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3. The important elements of typical Federal Register documents.

4. An introduction to the finding aids of the FR/CFR system.

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

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

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

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE253, Special Conditions No. 23–193–SC]

Special Conditions; Cessna Aircraft Company Model 510 Airplane; Turbofan Engines and Engine Location

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Cessna Aircraft Company, Model 510 airplane. This new airplane will have novel and unusual design features not typically associated with normal, utility, acrobatic, and commuter category airplanes. These design features include turbofan engines and engine location, for which the applicable regulations do not contain adequate or appropriate airworthiness standards. These special conditions contain the additional airworthiness standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* July 27, 2006.

FOR FURTHER INFORMATION CONTACT: Peter L. Rouse, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; 816–329–4135, fax 816–329–4090.

SUPPLEMENTARY INFORMATION:

Background

On August 30, 2003, Cessna Aircraft Company; One Cessna Boulevard; Post Office Box 7704; Wichita, KS 67277, made an application to the FAA for a new Type Certificate for the Cessna Model 510 Mustang. The Cessna Model 510 Mustang is an all new, high performance, low wing, aft fuselage mounted twin turbofan engine powered aircraft in the Normal Category including flight into known icing conditions and single pilot operations. The Model 510 is to use existing Cessna Citation construction materials and methods. The design criteria includes: 8,480 pounds maximum ramp weight, 8,395 pounds maximum takeoff weight, 250 KCAS/0.63 Mach V_{MO}/M_{MO}, and a 41,000 foot maximum altitude.

Type Certification Basis

Under the provisions of 14 CFR, part 21, § 21.17, Cessna Aircraft Company must show that the Cessna Model 510 Mustang meets the applicable provisions of 14 CFR, part 23, effective February 1, 1965, as amended by Amendments 23–1 through Amendment 23–54, effective September 14, 2000; exemptions, if any; and the special conditions adopted by this rulemaking action.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 23) do not contain adequate or appropriate safety standards for the Cessna Model 510 Mustang because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Cessna Model 510 Mustang must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy pursuant to § 611 of Public Law 92–574, the "Noise Control Act of 1972."

Discussion

Special conditions, as appropriate, as defined in 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The Cessna Model 510 Mustang will incorporate the following novel or unusual design features:

The Model 510 design includes engines mounted aft on the fuselage; therefore, early visual detection of engine fires is precluded. The applicable existing regulations do not require fire extinguishing systems for engines. Aft mounted engine installations were not envisaged in the development of part 23; therefore, special conditions for a fire extinguishing system with the applicable agents, containers, and materials for the engines of the Model 510 are appropriate.

Discussion of Comments

A notice of proposed special conditions No. 23–06–05–SC for the Cessna Model 510 Mustang was published in the **Federal Register** on June 23, 2006 (71 FR 36040). No comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Cessna Model 510 Mustang. Should Cessna apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on one model of airplane. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.17; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna Aircraft Model 510 airplane:

SC23.1195 Engine Fire Extinguishing System

(a) Fire extinguishing systems must be installed and compliance must be shown with the following:

(1) Except for combustor, turbine, and tailpipe sections of turbine-engine installations that contain lines or components carrying flammable fluids or gases for which a fire originating in these sections is shown to be controllable, a fire extinguisher system must serve each engine compartment.

(2) The fire extinguishing system, the quantity of the extinguishing agent, the rate of discharge, and the discharge distribution must be adequate to extinguish fires. An individual "one shot" system may be used.

(3) The fire extinguishing system for a nacelle must be able to simultaneously protect each compartment of the nacelle for which protection is provided.

(b) Fire extinguishing agents must meet the following requirements:

(1) Be capable of extinguishing flames emanating from any burning fluids or other combustible materials in the area protected by the fire extinguishing system; and

(2) Have thermal stability over the temperature range likely to be experienced in the compartment in which they are stored.

(3) If any toxic extinguishing agent is used, provisions must be made to prevent harmful concentrations of fluid or fluid vapors (from leakage during normal operation of the airplane or as a result of discharging the fire extinguisher on the ground or in flight) from entering any personnel compartment, even though a defect may exist in the extinguishing system. This must be shown by test except for built-in carbon dioxide fuselage compartment fire extinguishing systems for which:

(i) Five pounds or less of carbon dioxide will be discharged, under established fire control procedures, into any fuselage compartment; or

(ii) Protective breathing equipment is available for each flight crewmember on flight deck duty.

(c) Fire extinguishing agent containers must meet the following requirements:

(1) Each extinguishing agent container must have a pressure relief to prevent bursting of the container by excessive internal pressures.

(2) The discharge end of each discharge line from a pressure relief connection must be located so that discharge of the fire extinguishing agent would not damage the airplane. The line must also be located or protected to prevent clogging caused by ice or other foreign matter.

(3) A means must be provided for each fire extinguishing agent container to indicate that the container has discharged or that the charging pressure is below the established minimum necessary for proper functioning.

(4) The temperature of each container must be maintained, under intended operating conditions, to prevent the pressure in the container from falling below that necessary to provide an adequate rate of discharge, or rising high enough to cause premature discharge.

(5) If a pyrotechnic capsule is used to discharge the extinguishing agent, each container must be installed so that temperature conditions will not cause hazardous deterioration of the pyrotechnic capsule.

(d) Fire extinguisher system materials must meet the following requirements:

(1) No material in any fire extinguishing system may react chemically with any extinguishing agent so as to create a hazard.

(2) Each system component in an engine compartment must be fireproof.

Issued in Kansas City, Missouri on July 27, 2006.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–12660 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE245; Special Condition No. 23–185–SC]

Special Conditions: Aero Propulsion, Inc., Piper Model PA28–236; Diesel Cycle Engine Using Turbine (Jet) Fuel

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued to Aero Propulsion, Inc., for the Piper Model PA28–236 airplanes with a Societe de Motorisation Aeronautiques (SMA) Model SR305–230 Aircraft Diesel Engine (ADE). This airplane will have a novel or unusual design feature(s) associated with the installation of a diesel cycle engine utilizing turbine (jet) fuel. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for installation of this new technology engine. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: *Effective Date:* July 27, 2006.

FOR FURTHER INFORMATION CONTACT: Peter L. Rouse, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Kansas City, Missouri, 816–329–4135, fax 816–329–4090.

SUPPLEMENTARY INFORMATION:

Background

On August 20, 2003, Aero Propulsion, Inc., applied for a supplemental type certificate for the installation of an SMA Model SR305–230 ADE (type certificated in the United States, type certificate number E00067EN) in Piper Model PA28–236 airplanes. Piper Model PA28–236 airplanes, approved under Type Certificate No. 2A13, are four place, single engine airplanes.

In anticipation of the reintroduction of diesel engine technology into the small airplane fleet, the FAA issued Policy Statement PS–ACE100–2002–004 on May 15, 2004, which identified areas of technological concern involving introduction of new technology diesel engines into small airplanes. For a more detailed summary of the FAA's development of diesel engine requirements, refer to this policy.

The general areas of concern involved the power characteristics of the diesel engines, the use of turbine fuel in an airplane class that has typically been powered by gasoline fueled engines, and the vibration characteristics and failure modes of diesel engines. These concerns were identified after review of the historical record of diesel engine used in aircraft and a review of the 14 CFR part 23 regulations, which identified specific regulatory areas that needed to be evaluated for applicability to diesel engine installations. These concerns are not considered universally applicable to all types of possible diesel engines and diesel engine installations. However, after review of the Aero Propulsion installation, and after applying the provisions of the diesel policy, the FAA proposed these fuel system and engine related special conditions. Other special conditions issued in a separate notice include special conditions for HIRF and application of § 23.1309 provisions to

the Full Authority Digital Engine Control (FADEC).

Type Certification Basis

Under the provisions of § 21.101, Aero Propulsion, Inc., must show that the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE, continue to meet the applicable provisions of 14 CFR part 23 and CAR 3 thereto. In addition, the certification basis includes special conditions and equivalent levels of safety for the following:

Special Conditions:

- Engine torque (Provisions similar to § 23.361, paragraphs (b)(1) and (c)(3))
- Flutter (Compliance with § 23.629, paragraphs (e)(1) and (2))
- Powerplant—Installation (Provisions similar to § 23.901(d)(1) for turbine engines)
- Powerplant—Fuel System—Fuel system with water saturated fuel (Compliance with § 23.951 requirements)
- Powerplant—Fuel System—Fuel system hot weather operation (Compliance with § 23.961 requirements)
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- Operating Limitations and Information—Powerplant limitations—Fuel grade or designation (Compliance with § 23.1521(d) requirements)
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- Powerplant—Fuel system—Fuel Freezing
- Powerplant Installation—Vibration levels
- Powerplant Installation—One cylinder inoperative
- Powerplant Installation—High Energy Engine Fragments

Equivalent levels of safety for:

- Cockpit controls—23.777(d)
- Motion and effect of cockpit controls—23.779(b)
- Ignition switches—23.1145

The type certification basis includes exemptions, if any; equivalent level of safety findings, if any; and the special conditions adopted by this rulemaking action.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 23) do not contain adequate or appropriate safety standards for the Piper Model PA28–236 airplanes with the installation of an SMA Model SR305–230 ADE because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE, must comply with 14 CFR 21.115 noise certification requirements of 14 CFR part 36.

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

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE, will incorporate the following novel or unusual design features: The Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230, will incorporate an aircraft diesel engine utilizing turbine (jet) fuel.

Discussion of Comments

A notice of proposed special conditions No. 23–06–03-SC for Aero Propulsion, Inc., for the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE, was published on June 14, 2006 (71FR 34292). No comments were received, and the special conditions are adopted as proposed.

Applicability

As discussed above, these special conditions are applicable to the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE. Should Aero Propulsion, Inc., apply at a later date for a supplemental type certificate to modify any other model included on Type Certificate No.2A13 to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE. It is not a rule of general applicability, and it affects only the applicant who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued to Aero Propulsion, Inc., as part of the type certification basis for the Piper Model PA28–236 airplanes, with the installation of an SMA Model SR305–230 ADE.

1. *Engine torque (Provisions similar to § 23.361, paragraphs (b)(1) and (c)(3)):*

(a) For diesel engine installations, the engine mounts and supporting structure must be designed to withstand the following:

(1) A limit engine torque load imposed by sudden engine stoppage due to malfunction or structural failure.

The effects of sudden engine stoppage may alternately be mitigated to an acceptable level by utilization of isolators, dampers, clutches and similar provisions, so that unacceptable load levels are not imposed on the previously certificated structure.

(b) The limit engine torque obtained in CAR 3.195(a)(1) and (a)(2) or 14 CFR 23.361(a)(1) and (a)(2) must be obtained by multiplying the mean torque by a factor of four in lieu of the factor of two required by CAR 3.195(b) and 14 CFR 23.361(c)(3).

2. *Flutter—(Compliance with the requirements of § 23.629 (e)(1) and (e)(2) requirements):* The flutter evaluation of the airplane done in accordance with 14 CFR 23.629 must include—

(a) Whirl mode degree of freedom which takes into account the stability of the plane of rotation of the propeller and significant elastic, inertial, and aerodynamic forces, and

(b) Propeller, engine, engine mount and airplane structure stiffness and damping variations appropriate to the particular configuration, and

(c) The flutter investigation will include showing the airplane is free from flutter with one cylinder inoperative.

3. *Powerplant—Installation (Provisions similar to § 23.901(d)(1) for turbine engines):* Considering the vibration characteristics of diesel engines, the applicant must comply with the following:

(a) Each diesel engine installation must be constructed and arranged to result in vibration characteristics that—

(1) Do not exceed those established during the type certification of the engine; and

(2) Do not exceed vibration characteristics that a previously certificated airframe structure has been approved for—

(i) Unless such vibration characteristics are shown to have no effect on safety or continued airworthiness, or

(ii) Unless mitigated to an acceptable level by utilization of isolators, dampers, clutches and similar provisions, so that unacceptable vibration levels are not imposed on the previously certificated structure.

4. *Powerplant—Fuel System—Fuel system with water saturated fuel (Compliance with § 23.951 requirements):* Considering the fuel types used by diesel engines, the applicant must comply with the following:

Each fuel system for a diesel engine must be capable of sustained operation throughout its flow and pressure range with fuel initially saturated with water at 80 °F and having 0.75cc of free water per gallon added and cooled to the most critical condition for icing likely to be encountered in operation.

Methods of compliance that are acceptable for turbine engine fuel systems requirements of § 23.951(c) are also considered acceptable for this requirement.

5. *Powerplant—Fuel System—Fuel flow (Compliance with § 23.955(c) requirements):* In lieu of 14 CFR 23.955(c), engine fuel system must provide at least 100 percent of the fuel flow required by the engine, or the fuel flow required to prevent engine damage, if that flow is greater than 100 percent. The fuel flow rate must be available to the engine under each intended operating condition and maneuver. The conditions may be simulated in a suitable mockup. This flow must be shown in the most adverse fuel feed condition with respect to altitudes, attitudes, and any other condition that is expected in operation.

6. *Powerplant—Fuel System—Fuel system hot weather operation (Compliance with § 23.961 requirements):* In place of compliance with § 23.961, the applicant must comply with the following:

Each fuel system must be free from vapor lock when using fuel at its critical temperature, with respect to vapor formation, when operating the airplane in all critical operating and environmental conditions for which approval is requested. For turbine fuel, or for aircraft equipped with diesel cycle engines that use turbine or diesel type fuels, the initial temperature must be 110 °F, −0°, +5° or the maximum outside air temperature for which approval is requested, whichever is more critical.

The fuel system must be in an operational configuration that will yield the most adverse, that is, conservative results.

To comply with this requirement, the applicant must use the turbine fuel requirements and must substantiate these by flight-testing, as described in Advisory Circular AC 23–8B, Flight Test Guide for Certification of Part 23 Airplanes.

7. *Powerplant—Fuel system—Fuel tank filler connection (Compliance with § 23.973(f) requirements):* In place of compliance with § 23.973(e) and (f), the applicant must comply with the following:

For airplanes that operate on turbine or diesel type fuels, the inside diameter of the fuel filler opening must be no smaller than 2.95 inches.

8. *Powerplant—Fuel system—Fuel tank outlet (Compliance with § 23.977 requirements):* In place of compliance with § 23.977(a)(1) and (a)(2), the applicant will comply with the following:

There must be a fuel strainer for the fuel tank outlet or for the booster pump. This strainer must, for diesel engine powered airplanes, prevent the passage of any object that could restrict fuel flow or damage any fuel system component.

9. *Equipment—General—Powerplant Instruments (Compliance with § 23.1305):* In addition to compliance with § 23.1305, the applicant will comply with the following:

The following are required in addition to the powerplant instruments required in § 23.1305:

(a) A fuel temperature indicator.

(b) An outside air temperature (OAT) indicator.

(c) An indicating means for the fuel strainer or filter required by § 23.997 to indicate the occurrence of contamination of the strainer or filter before it reaches the capacity established in accordance with § 23.997(d).

Alternately, no indicator is required if certain requirements are met. First, the engine can operate normally for a specified period with the fuel strainer exposed to the maximum fuel contamination as specified in MIL–5007D. Second, provisions for replacing the fuel filter at this specified period (or a shorter period) are included in the maintenance schedule for the engine installation.

10. *Operating Limitations and Information—Powerplant limitations—Fuel grade or designation (Compliance with § 23.1521 requirements):* All engine parameters that have limits specified by the engine manufacturer for takeoff or continuous operation must be investigated to ensure they remain within those limits throughout the expected flight and ground envelopes (*e.g.*, maximum and minimum fuel temperatures, ambient temperatures, as applicable, etc.). This is in addition to the existing requirements specified by 14 CFR 23.1521 (b) and (c). If any of those limits can be exceeded, there must be continuous indication to the flight crew of the status of that parameter with appropriate limitation markings.

Instead of compliance with § 23.1521(d), the applicant must comply with the following:

The minimum fuel designation (for diesel engines) must be established so that it is not less than that required for the operation of the engines within the limitations in paragraphs (b) and (c) of § 23.1521.

11. *Markings and Placards—Miscellaneous markings and placards—Fuel, oil, and coolant filler openings (Compliance with § 23.1557(c)(1) requirements):* Instead of compliance with § 23.1557(c)(1), the applicant must comply with the following:

Fuel filler openings must be marked at or near the filler cover with—

For diesel engine-powered airplanes—

(a) The words "Jet Fuel"; and

(b) The permissible fuel designations, or references to the Airplane Flight Manual (AFM) for permissible fuel designations.

(c) A warning placard or note that states the following or similar:

"Warning—this airplane equipped with an aircraft diesel engine, service with approved fuels only."

The colors of this warning placard should be black and white.

12. *Powerplant—Fuel system—Fuel-Freezing:* If the fuel in the tanks cannot be shown to flow suitably under all possible temperature conditions, then fuel temperature limitations are required. These will be considered as part of the essential operating

parameters for the aircraft and must be limitations.

A minimum takeoff temperature limitation will be determined by testing to establish the minimum cold-soaked temperature at which the airplane can operate. The minimum operating temperature will be determined by testing to establish the minimum operating temperature acceptable after takeoff from the minimum takeoff temperature. If low temperature limits are not established by testing, then a minimum takeoff and operating fuel temperature limit of 5 °F above the gelling temperature of Jet A will be imposed along with a display in the cockpit of the fuel temperature. Fuel temperature sensors will be located in the coldest part of the tank if applicable.

13. *Powerplant Installation—Vibration levels:* Vibration levels throughout the engine operating range must be evaluated and:

(1) Vibration levels *imposed on the airframe* must be less than or equivalent to those of the gasoline engine; or

(2) Any vibration level that is higher than that imposed on the airframe by the replaced gasoline engine must be considered in the modification and the effects on the technical areas covered by the following paragraphs must be investigated:

14 CFR part 23, §§ 23.251; 23.613; 23.627; 23.629 (or CAR 3.159, as applicable to various models); 23.572; 23.573; 23.574 and 23.901.

Vibration levels imposed on the airframe can be mitigated to an acceptable level by utilization of isolators, dampers, clutches and similar provisions, so that unacceptable vibration levels are not imposed on the previously certificated structure.

14. *Powerplant Installation—One cylinder inoperative:* It must be shown by test or analysis, or by a combination of methods, that the airframe can withstand the shaking or vibratory forces imposed by the engine if a cylinder becomes inoperative. Diesel engines of conventional design typically have extremely high levels of vibration when a cylinder becomes inoperative.

No unsafe condition will exist in the case of an inoperative cylinder before the engine can be shut down. The resistance of the airframe structure, propeller, and engine mount to shaking moment and vibration damage must be investigated. It must be shown by test or analysis, or by a combination of methods, that shaking and vibration damage from the engine with an inoperative cylinder will not cause a catastrophic airframe, propeller, or engine mount failure.

15. *Powerplant Installation—High Energy Engine Fragments:* It may be possible for diesel engine cylinders (or portions thereof) to fail and physically separate from the engine at high velocity (due to the high internal pressures). This failure mode will be considered possible in engine designs with removable cylinders or other non-integral block designs. The following is required:

(1) It must be shown by the design of the engine, that engine cylinders, other engine components or portions thereof (fragments) cannot be shed or blown off of the engine in the event of a catastrophic engine failure; or

(2) It must be shown that all possible liberated engine parts or components do not have adequate energy to penetrate engine cowlings; or

(3) Assuming infinite fragment energy, and analyzing the trajectory of the probable fragments and components, any hazard due to liberated engine parts or components will be minimized and the possibility of crew injury is eliminated. Minimization must be considered during initial design and not presented as an analysis after design completion.

Issued in Kansas City, Missouri on July 27, 2006.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–12663 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–ANE–44–AD; Amendment 39–14705; AD 2006–16–05]

RIN 2120–AA64

Airworthiness Directives; Pratt & Whitney PW4164, PW4168, and PW4168A Series Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Pratt & Whitney PW4164, PW4168, and PW4168A series turbofan engines. That AD currently requires initial and repetitive torque checks for loose or broken front pylon mount bolts made from INCO 718 material and MP159 material, and initial and repetitive visual inspections of the primary mount thrust load path. This AD requires the same actions, but at reduced intervals for front pylon mount bolts made from MP159 material. This AD results from analysis by the manufacturer that the MP159 material pylon bolts do not meet the full life cycle torque check interval requirement, in a bolt-out condition. We are issuing this AD to prevent front pylon mount bolt and primary mount thrust load path failure, which could result in an engine separating from the airplane.

DATES: This AD becomes effective September 8, 2006. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of September 8, 2006. The Director of the Federal Register previously approved the incorporation by reference of certain publications listed in the regulations as of February 6, 2003 (68 FR 28, January 2, 2003).

ADDRESSES: Contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–7700, fax (860) 565–1605 for the service information identified in this AD.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA. You may examine the service information, at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7146, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 with a proposed AD. The proposed AD applies to Pratt & Whitney PW4164, PW4168, and PW4168A series turbofan engines. We published the proposed AD in the **Federal Register** on December 29, 2005 (70 FR 77075). That action proposed to require initial and repetitive torque checks for loose or broken front pylon mount bolts made from INCO 718 material and MP159 material. That action also proposed to require initial and repetitive visual inspections of the primary mount thrust load path, but at reduced intervals from AD 2000–16–02R1 for front pylon mount bolts made from MP159 material.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through

Friday, except Federal holidays. See **ADDRESSES** for the location.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the proposal or on the determination of the cost to the public.

Bolt Life Limit Clarification

For clarification, we removed three bolt life limit references from paragraphs (f)(1), (f)(2), and (f)(3) and added paragraph (f)(4). The added paragraph states to remove from service front pylon mount bolts P/N 54T670, at or before reaching the life limit of 11,000 CSN.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the changes described previously.

Costs of Compliance

About 60 engines installed on airplanes of U.S. registry are affected by this AD. We estimate that it will take about four work-hours per engine to perform the actions, and that the average labor rate is $65 per work-hour. Required parts will cost about $26,500 per engine. Based on these figures, we estimate the total cost of the AD to U.S. operators to be $1,605,600.

Special Flight Permits Paragraph Removed

Paragraph (g) of the AD we are superseding, AD 2000–16–02R1, contains a paragraph pertaining to special flight permits. Even though this final rule does not contain a similar paragraph, we have made no changes with regard to the use of special flight permits to operate the airplane to a repair facility to do the work required by this AD. In July 2002, we published a new Part 39 that contains a general authority regarding special flight permits and airworthiness directives. See Docket No. FAA–2004–8460, Amendment 39–9474 (69 FR 47998, July 22, 2002). Thus, when we now supersede ADs we will not include a specific paragraph on special flight permits unless we want to limit the use of that general authority granted in section 39.23.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include "AD Docket No. 97–ANE–44–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–12989 (68 FR 28, January 2, 2003) and by adding a new airworthiness directive, Amendment 39–14705, to read as follows:

2006–16–05 Pratt & Whitney: Amendment 39–14705. Docket No. 97–ANE–44–AD.

Effective Date

(a) This AD becomes effective September 8, 2006.

Affected ADs

(b) This AD supersedes AD 2000–16–02R1.

Applicability

(c) This AD applies to Pratt & Whitney (PW) PW4164, PW4168, and PW4168A series turbofan engines, with front pylon mount bolts, part number (P/N) 54T670 or 51U615, installed. These engines are installed on, but not limited to, Airbus A330 series airplanes.

Unsafe Condition

(d) This AD results from analysis by the manufacturer that MP159 material pylon bolts do not meet the full life cycle torque check interval requirement, in a bolt-out condition. We are issuing this AD to prevent front pylon mount bolt and primary mount thrust load path failure, which could result in an engine separating from the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

INCO 718 Material Bolts Torque Checks

(f) Perform initial and repetitive torque checks of INCO 718 material front pylon mount bolts, P/N 54T670, and replace, if necessary, with new bolts, using the Accomplishment Instructions of PW Alert Service Bulletin (ASB) PW4G–100–A71–9, Revision 1, dated November 24, 1997, as follows:

(1) For front pylon mount bolts, P/N 54T670, with fewer than 1,000 cycles-since-new (CSN) on the effective date of this AD, do the following using Part (A) of the Accomplishment Instructions of the ASB:

(i) Perform an initial torque check before accumulating 1,250 CSN or at the next engine removal for cause, whichever occurs sooner.

(ii) Thereafter, perform torque checks at intervals of no fewer than 750 or no more than 1,250 cycles-in-service (CIS) since last torque check.

(2) For front pylon mount bolts, P/N 54T670, with 1,000 CSN or more but fewer than 5,750 CSN on the effective date of this AD, do the following using Part (A) of the Accomplishment Instructions of the ASB:

(i) Perform an initial torque check within 250 CIS after the effective date of this AD, or at the next engine removal for any cause, whichever occurs sooner.

(ii) Thereafter, perform torque checks at intervals of no fewer than 750 or no more than 1,250 CIS since last torque check.

(3) For front pylon mount bolts, P/N 54T670, with 5,750 CSN or more on the effective date of this AD, do the following using Part (B) of the Accomplishment Instructions of the ASB:

(i) Perform an initial torque check within 250 CIS after the effective date of this AD, or before the next engine removal for any cause, whichever occurs sooner.

(ii) Thereafter, perform torque checks at intervals of no fewer than 750 or no more than 1,250 CIS since last torque check.

(4) Remove from service front pylon mount bolts P/N 54T670, at or before reaching the life limit of 11,000 CSN.

(5) Before further flight, replace all four bolts using Part (A), Paragraph 1(D) of the Accomplishment Instructions of the ASB, if any of the bolts are loose or broken.

MP159 Material Bolts Inspections

(g) Perform initial and repetitive torque checks of front pylon mount bolts, P/N 51U615, using the Accomplishment Instructions of PW ASB PW4G–100–A71–32, dated April 15, 2005, as follows:

(1) For front pylon mount bolts with fewer than 2,200 CSN on the effective date of this AD, perform the initial torque inspection before accumulating 2,700 CSN, or at the next engine removal for any cause, whichever occurs sooner.

(2) For front pylon mount bolts with 2,200 CSN or more on the effective date of this AD, perform the initial torque check within the next 500 CIS, or at the next engine removal for any cause, whichever occurs sooner.

(3) Thereafter, perform torque inspections at intervals not to exceed 2,700 CIS since last torque inspection.

(4) Before further flight, replace all four bolts using Paragraph 1.E. of the Accomplishment Instructions of the ASB, if any are loose or broken.

Primary Mount Thrust Load Path Inspections

(h) Perform initial and repetitive visual inspections of the primary mount thrust load path using the Accomplishment Instructions of PW ASB PW4G–100–A71–18, Revision 2, dated January 15, 2002, as follows:

(1) For forward engine mount assemblies with fewer than 1,000 CSN on the effective date of this AD, perform the initial visual inspection at the earlier of the following:

(i) Before accumulating 1,250 CSN; or

(ii) The next engine removal for any cause.

(2) For forward engine mount assemblies with 1,000 CSN or more on the effective date of this AD, perform the initial visual inspection within 250 CIS after the effective date of this AD, or the next engine removal for any cause, whichever occurs sooner.

(3) Thereafter, perform visual inspections at intervals of no fewer than 750 or no more than 1,250 CIS since-last-visual-inspection.

(4) Before further flight, replace all cracked parts with serviceable parts and inspect the primary thrust load path components using Paragraph 4 of the Accomplishment Instructions of the ASB.

Terminating Action

(i) Replacement of the forward engine mount bearing housing, P/N 59T794 or P/N 54T659 with P/N 52U420, using SB PW4G–100–71–22, dated January 15, 2002, constitutes terminating action to the inspection requirements of paragraph (h) of this AD.

Alternative Methods of Compliance

(j) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(k) None.

Material Incorporated by Reference

(l) You must use the Pratt & Whitney service information specified in Table 1 of this AD to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of Pratt & Whitney Alert Service Bulletin (ASB) PW4G–100–A71–32, dated April 15, 2005, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. The Director of the Federal Register previously approved the incorporation by reference of Pratt & Whitney ASB PW4G–100–A71–9, Revision 1, dated November 24, 1997, as of October 16, 2000, and, ASB PW4G–100–A71–18, Revision 2, dated January 15, 2002, and ASB PW4G–100–71–22, dated January 15, 2002, as of February 6, 2003. Contact Pratt & Whitney, 400 Main St., East Hartford, CT 06108; telephone (860) 565–7700, fax (860) 565–1605 for the service information identified in this AD. You may review copies at the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001, on the Internet at *http://dms.dot.gov*, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

TABLE 1.—INCORPORATION BY REFERENCE

Alert Service Bulletin (ASB) or Service Bulletin (SB) No.	Page	Revision	Date
ASB PW4G–100–A71–9	1	1	November 24, 1997.
	2	Original	July 31, 1997.
	3	1	November 24, 1997.
	4–7	Original	July 31, 1997.
	8–9	1	November 24, 1997.
Total Pages: 11	10–11	Original	July 31, 1997.
ASB PW4G–100–A71–18	1–2	2	January 15, 2002.
	3	1	December 9, 1999.
	4	2	January 15, 2002.
	5–6	Original	September 15, 1999.
	7	2	January 15, 2002.
Total Pages: 12	8–12	Original	September 15, 1999.
SB PW4G–100–71–22	ALL	Original	January 15, 2002.
Total Pages: 8			
ASB PW4G–100–A71–32	ALL	Original	April 15, 2005.
Total Pages: 9			

Issued in Burlington, Massachusetts, on July 27, 2006.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E6–12564 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 43

Removal of References to Part 123 From 14 CFR Part 43

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical amendment.

SUMMARY: In the final rule, Certification and Operation Rules for Certain Large Airplanes, which the FAA published in the **Federal Register** on October 9, 1980, the FAA revoked part 123, effective January 1, 1983. However, references to part 123 remain in part 43. The purpose of this action is to remove those

references. In addition, we are taking this opportunity to make some minor editorial corrections to part 43.

DATES: *Effective Dates:* Effective on August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Kim Barnette, Aircraft Maintenance Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: (202–493–4922); facsimile: (202–267–5115); e-mail: *kim.a.barnette@faa.gov.*

SUPPLEMENTARY INFORMATION: In a 1980 final rule,[1] the FAA revoked part 123, effective January 1, 1983, because of the diminishing number of operators under that part. As an alternative, we allowed those operators to seek certification either under part 121 or part 125. Since the effective date of the revocation was January 1, 1983, we should have removed all references to part 123 from part 43 as of that date. However, we recently learned that part 123 references remain in § 43.11(a), § 43.11(a)(7), § 43.15(a), § 43.15(a)(2), and § 43.16. This action removes those references. In addition, it corrects some editorial inconsistencies. For example, we lowercased the word "Part" in several of the previously referenced sections to make it consistent with other sections.

Technical Amendment

The technical amendment will remove references to part 123 from part 43 and will make minor editorial corrections to part 43.

List of Subjects in 14 CFR Part 43

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

■ Accordingly, Title 14 of the Code of Federal Regulations (CFR) part 43 is amended as follows:

PART 43—MAINTENANCE, PREVENTIVE MAINTENANCE, REBUILDING, AND ALTERATION

■ 1. The authority citation for part 43 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44703, 44705, 44707, 44711, 44713, 44717, 44725.

■ 2. Amend § 43.11 by revising paragraphs (a) introductory text and (a)(7) to read as follows:

§ 43.11 Content, form, and disposition of records for inspections conducted under parts 91 and 125 and §§ 135.411(a)(1) and 135.419 of this chapter.

(a) *Maintenance record entries.* The person approving or disapproving for return to service an aircraft, airframe, aircraft engine, propeller, appliance, or component part after any inspection performed in accordance with part 91, 125, § 135.411(a)(1), or § 135.419 shall make an entry in the maintenance record of that equipment containing the following information:

* * * * *

(7) If an inspection is conducted under an inspection program provided for in part 91, 125, or § 135.411(a)(1), the entry must identify the inspection program, that part of the inspection program accomplished, and contain a statement that the inspection was performed in accordance with the inspections and procedures for that particular program.

* * * * *

■ 3. Amend § 43.15 by revising paragraphs (a) introductory text and (a)(2) to read as follows:

§ 43.15 Additional performance rules for inspections.

(a) *General.* Each person performing an inspection required by part 91, 125, or 135 of this chapter, shall—

* * * * *

(2) If the inspection is one provided for in part 125, 135, or § 91.409(e) of this chapter, perform the inspection in accordance with the instructions and procedures set forth in the inspection program for the aircraft being inspected.

* * * * *

■ 4. Amend § 43.16 by revising it to read as follows:

§ 43.16 Airworthiness limitations.

Each person performing an inspection or other maintenance specified in an Airworthiness Limitations section of a manufacturer's maintenance manual or Instructions for Continued Airworthiness shall perform the inspection or other maintenance in accordance with that section, or in accordance with operations specifications approved by the Administrator under part 121 or 135, or an inspection program approved under § 91.409(e).

Issued in Washington, DC, on July 27, 2006.

Tony F. Fazio,

Director, Office of Rulemaking, Aviation Safety.

[FR Doc. E6–12655 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–P

[1] Certification and Operation Rules for Certain Large Airplanes (45 FR 67214; October 9, 1980).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2006–24869; Airspace Docket No. 06–ACE–4]

Modification of Class E Airspace; Wellington, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of the direct final rule which revises Class E airspace at Wellington, KS.

DATES: *Effective Date:* 0901 UTC, September 28, 2006.

FOR FURTHER INFORMATION CONTACT: Brenda Mumper, Air Traffic Division, Airspace Branch, ACE–520A, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2524.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on June 5, 2006 (71 FR 32271). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on September 28, 2006. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO, on July 26, 2006.

Donna R. McCord,

Acting Area Director, Western Flight Services Operations.

[FR Doc. 06–6699 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 764

[Docket No. 060721198–6198–01]

RIN 0694–AD74

Revision and Clarification of Civil Monetary Penalty Provisions of the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends the Export Administration Regulations (EAR) to clarify the civil monetary penalties that BIS may impose for violations of the EAR during periods when the EAR are continued under the Export Administration Act, of 1979, as amended, the International Emergency Economic Powers Act, as amended, or other statutory authority. BIS is revising the EAR to reflect amendments to the International Emergency Economic Powers Act made by the USA PATRIOT ACT Improvement and Reauthorization Act of 2005.

DATES: This rule is effective August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Melissa B. Mannino, Chief, Enforcement and Litigation Division, Office of Chief Counsel for Industry and Security, Telephone: (202) 482–5301 or E-mail: *MMANNINO@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Export Administration Act of 1979, as amended (EAA), which provided authority for promulgation of the EAR, included a date on which it would lapse. The EAA has lapsed and been renewed several times since its original enactment. At each lapse, the President has used his authority under the International Emergency Economic Powers Act (IEEPA) to continue in effect the EAR to the extent permissible by law. The most recent lapse of the EAA occurred on August 21, 2001. To address that lapse, the President, acting pursuant to IEEPA, issued Executive Order 13222 of August 17, 2001, which continued the EAR in effect. To keep the EAR in effect pursuant to IEEPA, the President has issued annual declarations stating that the emergency necessitating implementation of the EAR is continuing. Executive Order 13222 states, in part, that "* * * all orders, regulations, licenses, and other forms of administrative action issued, taken, or continued in effect pursuant [to the EAA], shall remain in full force and effect as if issued or taken pursuant to this order, except that the provisions of sections 203(b)(2) and 206 [penalties] of [IEEPA] (50 U.S.C. 1702(b)(2) and 1705) shall control over any inconsistent provisions in the [EAR]." Further, prior to the date of publication of this rule, the EAR provided that "[i]n the event that any part of the EAR is not under the authority of the EAA, sanctions shall be limited to those provided by such other authority, but the provisions of this part and of part 766 of the EAR shall apply insofar as not inconsistent with that other authority." (15 CFR 764.3(a) n.1).

Prior to publication of this rule, § 764.3(a)(1)(i) of the EAR provided for imposition of monetary penalties authorized by the EAA as amended, *i.e.* a maximum of $100,000 for violations involving national security controls imposed under section 5 of the Export Administration Act of 1979 as amended and a maximum of $10,000 for any other violation. However, since August 21, 2001, the date of the most recent lapse of the EAA, civil monetary penalties for violations of the EAR have been governed by the penalties set forth in the IEEPA, as adjusted by Department of Commerce regulations issued pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. The adjusted maximum amount was $11,000. On March 9, 2006, H.R. 3199, the USA PATRIOT ACT Improvement and Reauthorization Act of 2005, was enacted (Public Law 109–177) and amended Section 206 of the International Emergency Economic Powers Act to raise the maximum civil monetary penalty to $50,000 per violation. Due to this increase in penalties, BIS is amending the EAR to clearly set forth the maximum civil monetary penalties it may impose for violations of the EAR. Hence, effective March 9, 2006, the increased IEEPA maximum civil monetary penalty of $50,000 applies to any violation of the EAR or any license, order or authorization issued thereunder that occurs when the EAA is in lapse and IEEPA is the authorizing statute.

Changes Made by This Rule

This rule replaces the language in § 764.3(a)(1)(i) that referred to the specific civil monetary penalty amounts authorized by the EAA with more general language explaining that a civil monetary penalty authorized by the EAA may be imposed, and in situations in which any provision of the EAR is continued by IEEPA or other authority, the maximum monetary civil penalty is that which is authorized by the applicable authority. This rule also removes the footnote to § 764.3(a) because the clarification to § 764.3(a)(1)(i) obviates the need for the footnote.

Effects of These Changes

The changes made by this rule provide that BIS may impose civil monetary penalties in the amount authorized by Public Law 109–177 which amended section 206 of IEEPA, among other laws. These changes clarify the source of authority for civil monetary penalties for violations of the EAR when the EAA has lapsed and the maximum amount of such penalties. This rule results in an explicit statement in the EAR that when any provision of the EAR is continued by IEEPA or other authority, the maximum civil monetary penalty is that which is authorized by the applicable authority. Therefore, for any violations of the EAR or license, order or authorization thereunder that occur on or after March 9, 2006 when the EAA is in lapse and IEEPA is the authorizing statute, BIS may impose a civil monetary penalty of up to $50,000 per violation.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This rule does not contain any collection of information that is subject to the Paperwork Reduction Act.

3. This rule does not contain policies with federalism implications as this term is defined in Executive Order 13132.

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3) to waive the provisions of the Administrative Procedure Act requiring prior notice, the opportunity for public comment and 30-day delay in effectiveness. The changes made by this rule make clear that BIS may utilize any applicable statutory authority to impose civil penalties. Because the increase in IEEPA civil monetary penalties enacted in Public Law 109–177 became effective on March 9, 2006, BIS is revising the civil monetary penalty provision of the EAR

to conform with the statutory change and to avoid confusion as to what the actual maximum civil monetary penalty is, and therefore notice and public comment concerning this rule are unnecessary.

Because notice of proposed rulemaking and opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects in 15 CFR Part 764

Administrative practice and procedure, Exports, Law enforcement, Penalties.

■ Accordingly, part 764 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 764—[AMENDED]

■ 1. The authority citation for part 764 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 2, 2005, 70 FR 45273 (August 5, 2005).

■ 2. In § 764.3, revise paragraph (a)(1)(i), remove footnote number 1, and redesignate footnote 2 as footnote 1, to read as follows:

§ 764.3 Sanctions.

(a) *Administrative.*

(1) *Civil monetary penalty.*

(i) A civil monetary penalty not to exceed the amount set forth in the EAA may be imposed for each violation, and in the event that any provision of the EAR is continued by IEEPA or any other authority, the maximum monetary civil penalty for each violation shall be that provided by such other authority.

* * * * *

Dated: August 1, 2006.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. E6–12653 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–33–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Parts 2700, 2704, and 2705

Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Federal Mine Safety and Health Review Commission (the "Commission") is an independent adjudicatory agency that provides trials and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (2000) (the "Mine Act"). Trials are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. This rule makes final revisions to many of the Commission's procedural rules, regulations implementing the Equal Access to Justice Act, and regulations implementing the Privacy Act. The Commission makes these changes in a continued effort to ensure the just, speedy, and inexpensive determination of all proceedings before the Commission.

DATES: This rule will take effect on October 3, 2006.

ADDRESSES: Questions may be mailed to Thomas A. Stock, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202–434–9944.

FOR FURTHER INFORMATION CONTACT: Thomas A. Stock, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202–434–9935; fax 202–434–9944.

SUPPLEMENTARY INFORMATION: The final rules will apply to cases initiated after the rules take effect. The final rules also will apply to further proceedings in cases pending on the effective date, except to the extent that such application would be infeasible or unfair, in which event the former procedural rules would continue to apply.

I. Background

In October 2004, the Commission published an Advance Notice of Proposed Rulemaking ("ANPRM") in which it sought suggestions for improving its procedural rules (29 CFR part 2700), Government in the Sunshine Act regulations (29 CFR part 2701), regulations implementing the Freedom of Information Act ("FOIA") (29 CFR part 2702), and regulations implementing the Equal Access to Justice Act ("EAJA") (29 CFR part 2704). *See* 69 FR 62632, October 27, 2004. In the ANPRM, the Commission identified several procedural rules set forth in part 2700 that required further revision, clarification, or expansion. *See id.* at 62632 through 62635. The Commission also stated that it would examine its procedures for processing requests for relief from final judgments. *Id.* at 62632. The Commission did not include in the ANPRM any specific proposed revisions to the Commission's regulations implementing the Government in the Sunshine Act (part 2701), the FOIA (part 2702), the EAJA (part 2704), or the Privacy Act (part 2705).

The comment period on the ANPRM closed on January 25, 2005. The Commission received comments from the Secretary of Labor through the U.S. Department of Labor's Office of the Solicitor; the Pennsylvania Coal Association; the United Mine Workers of America (the "UMWA"); the National Mining Association; the National Stone, Sand & Gravel Association; and other individual members of the mining community or bar who practice before the Commission. Most commenters expressed some degree of agreement with various areas that the Commission had targeted to review for possible revision. The commenters also requested further changes not described by the Commission in the ANPRM.

In January 2006, the Commission published a Notice of Proposed Rulemaking ("NPRM"). 71 FR 553, January 5, 2006. In the notice, the Commission explained that it determined that changes to the Commission's Procedural Rules and its regulations implementing the Privacy Act and EAJA were necessary, but that no revisions were necessary to its regulations implementing the Government in the Sunshine Act or FOIA. *Id.* at 554. Some of the changes in the NPRM were proposed in response to the comments received, while other changes were proposed in response to further reflection by the Commission or in response to developments in Commission proceedings. For example, after examining its procedures for processing requests for relief from final judgment, the Commission determined that such procedures could be made more efficient through informal means rather than through the rulemaking process. Such informal means include making available a summary of the Commission's procedural rules described in simple terms and placing on the Commission's Web site a page of frequently asked questions and answers regarding Commission procedure.

Although the proposed rules in this notice were procedural in nature and did not require notice and comment publication under the Administrative Procedure Act ("APA"), 5 U.S.C. 551, 553(b)(3)(A), the Commission invited comment from the interested public until March 6, 2006. Besides generally requesting comments on any revisions

to its rules, the Commission also requested comments on three particular subjects to aid its further consideration of possible rule revisions. Specifically, the Commission invited comments on whether a time limit and presumption should be imposed upon the issuance of a proposed penalty assessment (29 CFR 2700.25), whether an exception should be created for a proposed pleading requirement applicable to petitions for assessment of penalty (29 CFR 2700.28(b)), and whether the Commission should repeal its EAJA rule providing for aggregation in the determination of eligibility for an EAJA award (29 CFR 2704.104(b)(2)). 71 FR 557, 558, 559, 564, January 5, 2006.

In addition, the Commission invited members of the interested public to request a public meeting on the proposed rules during the comment period. The Commission stated that if public meetings were scheduled, the Commission would issue a subsequent notice to be published in the **Federal Register**. The Commission received no requests for public meetings.

The Commission received written comments on the NPRM from the Department of Labor's Office of the Solicitor and the UMWA. Those comments supported many of the revisions proposed by the Commission, although there were a few objections and suggestions for further improvements of the proposed rules. Those comments also addressed, in part, the three subjects upon which the Commission had requested further comment. The Commission has carefully considered all comments received and deliberated on the rules.

The final rules retain much of the same text set forth in the proposed rules. As discussed in the section-by-section analysis, some changes have been made in response to the comments received. In addition, the Commission has resolved the three areas in which it requested specific comments. First, as discussed more fully below, the Commission has determined not to set time limits on the filing of proposed penalty assessments (29 CFR 2700.25). Further, the Commission has determined that it is appropriate to set forth a pleading requirement for petitions for assessment of penalty, although an exception to the requirement has been made for single penalty assessments (29 CFR 2700.28(b)). The Commission has also determined that it is appropriate to repeal a provision allowing for the aggregation of assets or employees of affiliates of a prevailing party in determining eligibility for an EAJA award (29 CFR 2704.104(b)(2)). In addition, although not included in the proposed rules, the Commission made a revision clarifying when a motion for participation as amicus curiae and an amicus curiae brief must be filed when a movant does not support the position of a party in a Commission proceeding (29 CFR 2700.74). The Commission also made revisions that require a statement of material facts to be submitted with a motion for summary decision and that clarify the procedure for opposing a motion for summary decision (29 CFR 2700.67). The Commission did not invite comments on these revisions to sections 2700.67 and 2700.74 because the proceedings that brought to light the need for such clarification arose after the proposed rules had been published in the **Federal Register**. Finally, certain rules have been changed to accord with related changes in other rules.

II. Section-by-Section Analysis

Set forth below is an analysis of the comments received on the Commission's proposed rules and the final actions taken. Minor editorial modifications to present or proposed rules are not discussed.

A. Part 2700—Procedural Rules

Subpart A—General Provisions

29 CFR 2700.1

Proceedings before the Commission have sometimes revealed confusion regarding the relationship between the Commission and the Department of Labor and its Mine Safety and Health Administration ("MSHA"). In order to minimize such confusion, the Commission proposed amending paragraph (a) of Commission Procedural Rule 1 to add an explanation regarding the Commission's role and relationship to the Department of Labor. 71 FR 554, January 5, 2006. In addition, the Commission proposed adding to paragraph (a), pertinent information necessary for contacting the Commission or gaining access to Commission records. *Id.* The Commission received no objections to the change and adopts the proposed rule.

The Commission has also revised Procedural Rule 1 to add a provision stating the effective date of amendments to the Commission's procedural rules. The provision states that, unless the Commission provides otherwise, amendments to the rules are effective 60 days following publication in the **Federal Register**, and apply in cases then pending to the extent that application of the amended rules would not be feasible or would work injustice, in which event the former rules of procedure would apply. The Commission has repealed Commission Procedural Rule 84, which sets forth the effective date of the Commission's procedural rules which were revised and republished in 1993.

29 CFR 2700.5

Privacy-Related Issues Raised by Pleadings and Other Documents in Mine Act Cases

With the advent of electronic filings and internet access to judicial files, there has been increased sensitivity regarding personal information in files that are easily accessed by the public. Identity theft and other misuses of personal information are problems that have been exacerbated by the widespread availability of information over the internet. The Commission proposed redesignating current Commission Procedural Rule 5(d) as 5(e) and adding a new provision to paragraph (d) that would prevent incorporation into the Commission's case files of certain kinds of information (social security numbers, bank account numbers, and drivers' license numbers) and information related to certain individuals (e.g., minor children). 71 FR 554, January 5, 2006. The Commission explained that the role of the Commission's Judges in enforcing the rule would be limited because implementation of this rule would fall heavily on the parties in Mine Act proceedings in light of their interests in redacting personal information. *Id.* The Commission received no objections to the proposal, which is without change and will take effect as the new Procedural Rule 5(d).

Filing Requirements

Present Rule 5(d) provides that a notice of contest of a citation or order; a petition for assessment of penalty; a complaint for compensation; a complaint of discharge, discrimination, or interference; an application for temporary reinstatement; and an application for temporary relief shall be filed by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.5(d). Commission Procedural Rule 7(c) also requires that such documents, in addition to a proposed penalty assessment, must be served by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.7(c); *see also* 29 CFR 2700.45(a) (providing, in part, for service by certified mail of pleadings in a temporary reinstatement proceeding). Although not explicitly required by the Commission's procedural rules in all

circumstances, the Commission, as a matter of practice, generally mails Judges' decisions after hearing, default orders, and orders that require timely action by a party by certified mail, return receipt requested. *Cf. 29 CFR 2700.66(a) (requiring show cause orders to be mailed by registered or certified mail, return receipt requested).*

In addition, present paragraph (d) of Procedural Rule 5 provides that certain documents can be filed by facsimile transmission ("fax"), while Procedural Rule 7(c) contains corresponding provisions governing service when filing is by fax. The documents which can be filed by fax are motions for extension of time (29 CFR 2700.9), petitions for Commission review of a Judge's temporary reinstatement decision (29 CFR 2700.45(f)), motions for expedition of proceedings (29 CFR 2700.52(a)), petitions for discretionary review ("PDRs") (29 CFR 2700.70(a)), motions to file a PDR in excess of the applicable page limit (29 CFR 2700.70(f)), and motions to file a brief in excess of the applicable page limit (29 CFR 2700.75(f)). Under that paragraph, a Judge or the Review Commission can also permit the filing of other documents via fax.

In the ANPRM, the Commission stated that it was reviewing whether present sections 2700.5(d) and 2700.7(c) should permit parties to use other methods, such as commercial mail services, to file and serve the documents for which personal delivery or registered or certified mail are presently required. 69 FR 62632, October 27, 2004. In addition, the Commission stated that it was considering whether notices designating a PDR as an opening brief should be added to the list of pleadings that may be filed by fax. *Id.*

The Secretary opposed changing the rules in the manner described in the ANPRM on the use of registered or certified mail because she does not consider the rules to be burdensome and considers the availability of the return receipt desirable for proving that a document has been filed or served. Another commenter also stated that the requirements for certified mail should not be changed, except that the Commission should codify its current practice of mailing documents by certified mail. Most commenters supported changing the rule to allow the use of commercial mail services but further suggested that the Commission allow filing by fax to a greater degree than allowed under current rules. Those commenters stated that the use of commercial mail services could provide reliable information about the date of filing or service and that most fax machines will also print a verification of transmission. One commenter explained that because some mines are located in remote locations, it may be difficult to satisfy the requirements for certified or registered mail in a timely manner.

The pleadings and other documents which require personal delivery or certified or registered mail as the method for filing and service are generally those that initiate Commission proceedings. The purpose for requiring such methods of filing and service is to provide the party initiating the proceeding with proof that filing and service had taken place in the event a question later arises. The documents that can be filed by fax are generally those requesting Commission action of a time-sensitive nature.

Whenever a party initiates a Commission proceeding, the party is assuming a certain degree of risk that it may not be successful in initiating the proceeding due to unexpected circumstances involving the document it is filing or serving once the document has left the party's control. It is in the filing party's best interest to ensure against that risk by using a method of delivery that provides adequate proof of proper filing and service. While a signed receipt is reliable proof that filing and service were actually accomplished, the Commission believes that a receipt provided by a private carrier that contains tracking information or a fax machine transmission report may also provide sufficiently reliable information that proper filing and service have been accomplished.

Accordingly, the Commission proposed revising the filing and service requirements in redesignated Procedural Rule 5(e) in an effort to require a method of filing and service that would be convenient to most parties yet would provide reliable verification of the time of filing and service. 71 FR 554 through 555, January 5, 2006. Proposed section 2700.5(e) provided that the filing party could choose the manner for filing a document, unless a certain method were otherwise required by the Mine Act or the Commission's procedural rules. Under the proposed rule, it would be incumbent upon parties to use a method of delivery that provides adequate proof of timely filing and service, particularly if a filing party is initiating a proceeding. It would be the responsibility of that filing or serving party to confirm receipt of the document filed or served.

The Commission did not include a specific description of documents which could be filed by fax in proposed section 2700.5(e). Rather, virtually any document could be filed by fax, subject to a 15-page length limit. Documents filed pursuant to 30 CFR 2700.70 (petitions for discretionary review), 30 CFR 2700.45 (temporary reinstatement proceedings) or 30 CFR subpart F (applications for temporary relief) could be filed by fax and would not be subject to the 15-page limit. Under the proposed rule, a notice designating a PDR as an opening brief would be filed by fax, as it certainly would be 15 pages or less. The Commission proposed that the effective date of filing would depend upon the method of delivery chosen. The Commission also proposed deleting references to permissible fax filing, presently found in other rules (*see* 29 CFR 2700.9(a), 2700.45(f), 2700.52(a), 2700.70(a), 2700.75(f)), to avoid the misperception that those are the only instances in which fax filing is permitted. The Commission further proposed in section 2700.7(c), revisions to the service requirements that conform with those set forth in proposed section 2700.5(e) related to filing requirements.

The Commission received one comment on the proposed rule which generally supported the proposed changes. The commenter expressed concern, however, that a litigant filing a document by fax may not be able to verify with certainty that the document had been filed if a question later arose. In addition, the commenter suggested that the Commission's rules should differentiate between business and calendar days, and that proposed Rule 5(e) should specify that when a document is filed by fax, the original document should be filed within three "business" days.

The Commission has determined to adopt Procedural Rule 5(e) as proposed. The Commission declines to confirm receipt of fax transmissions, as suggested, because such confirmation would unduly strain the Commission's limited resources. The Commission leaves such confirmation to parties who choose to file or serve documents by fax.

The Commission has further determined that it is unnecessary at this time to differentiate between business and calendar days in Procedural Rule 5(e) and throughout the Commission's rules. The Commission has concluded that it is appropriate to conform its rules more closely to federal rules of procedure, and federal rules generally do not differentiate between business and calendar days. The Commission believes that it is appropriate to continue the use of the terms only where necessary to avoid confusion, and that their use is not necessary in Procedural Rule 5(e).

Finally, the Commission has declined to codify its current practice of mailing

by certified mail, return receipt requested, Judges' decisions (after hearing), default orders, and orders that require timely action by a party. Such codification would not alter the Commission's practice or ultimately result in a benefit to parties.

Number of File Copies

In the NPRM, the Commission proposed redesignating current Commission Procedural Rule 5(e) as 5(f). Paragraph (e) of Rule 5 currently sets forth the number of copies to be submitted in cases before a Judge and the Review Commission, requiring represented parties to file two copies per docket in cases before Judges and seven copies in cases before the Review Commission. 29 CFR 2700.5(e). The rule further requires that when filing by fax a party must file the required number of copies with the Judge or Review Commission within 3 days of the facsimile transmission. *Id.*

In the ANPRM, the Commission stated that it was considering requiring fewer copies than were currently required by the rule. 69 FR 62632, October 27, 2004. All commenters supported reducing the number of copies that must be filed.

In newly redesignated Commission Procedural Rule 5(f), the Commission proposed requiring that only those parties represented by a lawyer needed to file, unless otherwise ordered, the original document and one copy for each docket in cases before a Judge, and the original document and six copies in cases before the Review Commission. 71 FR 555, January 5, 2006. The proposed rule further stated that filing the original document would be sufficient for "part[ies] * * * not represented by a lawyer." *Id.* at 566. Under the proposed rule, when filing was by fax, the original document would have to be filed with the Judge or Review Commission within 3 days of transmission, but no other copies needed to be filed. The Commission proposed making a conforming change to 29 CFR 2700.75(g), setting forth the number of copies of briefs to be filed.

Commenters generally agreed with the Commission's proposed changes. One commenter, however, suggested that new Procedural Rule 5(f) should state that only "pro se litigants" are permitted to file the original document without copies. Another commenter requested that the reference to three days be changed to specify 3 "business" days.

The Commission has determined to adopt Procedural Rule 5(f) as proposed. The Commission declines to refer in the rule to a party who is permitted to file an original document without copies as a "pro se litigant" rather than as a "party" who is "not represented by a lawyer." The term "pro se litigant" would overly restrict the scope of the exception to those representing themselves. The Commission intends that all parties with non-attorney representatives appearing in Commission proceedings, rather than only parties who are representing themselves, should be subject to the exception. In addition, as discussed above, the Commission has determined that it is unnecessary to differentiate between business and calendar days throughout the Commission's rules.

Form of Pleadings

In the NPRM, the Commission proposed redesignating current Commission Procedural Rule 5(f) as 5(g). Paragraph (f) of Rule 5 currently contains various format requirements for pleadings filed with the Commission, providing in part that "failure to comply with the requirements * * * will be grounds for rejection of a brief." 29 CFR 2700.5(f). The rule was intended to permit rejection of all pleadings not meeting the format requirements, rather than only briefs. The Commission proposed revising redesignated Procedural Rule 5(g) to provide that any "pleading" not meeting the format requirements would be subject to rejection. 71 FR 555 through 556, January 5, 2006. The Commission also proposed redesignating 29 CFR 2700.5(g) as 29 CFR 2700.5(i). *Id.* at 556.

One commenter suggested that the rule be revised from providing that the failure to meet the format requirements "will" be grounds for rejection of a pleading to language providing that the failure to meet the format requirements "may" be grounds for rejection of the pleading. The Commission agrees with the suggested change because it clarifies that rejection of a pleading that does not meet format requirements is within the discretion of the Review Commission and its Judges. In addition, the Commission adopts the proposed revision described in the NPRM, referring to the documents within the scope of the rule as pleadings rather than briefs. *Id.*

Citations to Judges' Decisions

Commission Procedural Rule 72 currently provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation in a pleading to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR 62634, October 27, 2004. The Commission explained that such a revision would provide the reader with information regarding whether the citation is binding precedent for the proposition for which it is cited. *Id.*

The majority of commenters on the ANPRM did not oppose the suggested change. However, a few commenters suggested that a system for designating cases should be published. One commenter suggested that a change is unnecessary because citation to a Judge's decision without subsequent Commission history is presumptively an unreviewed decision.

In an effort to maximize clarity and precision in citation format, the Commission proposed adding a requirement that citations to a Judge's decision include "(ALJ)" at the end of the citation. 71 FR 556, January 5, 2006. The Commission explained that there was no current requirement that citations to Commission cases in pleadings differentiate between Judge and Review Commission decisions, regardless of whether the former are reviewed or unreviewed. *Id.* The Commission proposed including the requirement in Commission Procedural Rule 5 because such a change would be general and apply to pleadings before the Judges and the Review Commission. The Commission also proposed redesignating current Commission Procedural Rule 5(g) as 5(i) and placing the requirement regarding citation to a Judge's decision as a new provision in paragraph (h) of Procedural Rule 5. *Id.* In addition, the Commission further clarified that Judges' decisions are not binding precedent upon the Review Commission and included that clarification in 29 CFR 2700.69, which addresses Judges' decisions. *Id.* The Commission proposed deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use. *Id.*

One commenter suggested that proposed Procedural Rule 5(h) should be revised to provide that citations to Judges' decisions "should," rather than "shall," include the "(ALJ)" designation so as to allow the Review Commission and Judges discretion to reject documents not in compliance with the citation requirement. The Commission agrees with the suggested change and has revised the rule accordingly.

29 CFR 2700.8

Commission Procedural Rule 8 provides in part that the last day of a period computed shall be included unless that day is a Saturday, Sunday,

or Federal holiday, in which event the period runs until the next business day. 29 CFR 2700.8. The rule further provides that when a period of time prescribed in the rules is less than 7 days, intermediate Saturdays, Sundays, and Federal holidays shall be excluded in the computation of time. *Id.* Procedural Rule 8 also states that when the service of a document is by mail, 5 days shall be added to the time allowed by the rules for the filing of a response or other documents. *Id.*

In the ANPRM, the Commission stated that it was considering whether to more closely conform its time computation with Federal procedural rules. 69 FR 62633, October 27, 2004. It specified that the Commission was considering whether it should increase the period for which intervening Saturdays, Sundays, and Federal holidays shall be excluded, and decrease the number of days added for filing a response if service is by mail. *Id.* The Commission further stated that it was considering clarifying changes to Procedural Rule 8 that would dispel confusion regarding the circumstances and the types of mail and delivery that qualify for the additional days for filing when service is by mail. *Id.* Finally, the Commission stated that it was considering making explicit that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday. *Id.*

Most commenters on the ANPRM supported expanding the period in which intervening weekends and holidays would not be counted, in conformance with Federal procedural rules. The Secretary also agreed that the period should be expanded, but further stated that no additional time should be added to the time periods set forth in 29 CFR 2700.45 pertaining to temporary reinstatement proceedings. In addition, the Secretary suggested that Procedural Rule 8 should be revised to provide that the last day of a filing period should not be counted if the Commission's office is closed due to inclement weather or other conditions. Most commenters also supported clarifying Procedural Rule 8 to explain the circumstances in which 5 days are added to time periods when service is by mail. Most commenters did not support reducing the 5-day period added for filing when service is by mail. Most commenters supported making explicit that the Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday.

After considering these comments, the Commission determined that it would be appropriate to harmonize Procedural Rule 8 with Federal procedural rules in order to decrease confusion and to better afford parties ample time in which to prepare their pleadings. 71 FR 556 through 557, January 5, 2006. Federal procedural rules provide that when a period of time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Fed. R. Civ. P. 6(a); Fed. R. App. P. 26(a)(2). The Commission proposed revising Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days. *Id.* at 556.

However, adopting the 11-day period set forth in Federal procedural rules, without other Commission procedural rule changes, would have had an unintended negative impact on the efficient adjudication of proceedings before the Review Commission and its Judges. Under Commission Procedural Rule 10(d), a party has 10 days to respond to a motion. 29 CFR 2700.10(d). Under proposed Commission Procedural Rule 8, weekends and holidays that occur within the 10-day response time of current Procedural Rule 10(d) would not be counted, which could result in the return response period being unreasonably extended to nearly 3 weeks where parties are served by mail. In order to avoid this result, the Commission also proposed changing the period of time for responding to a motion set forth in 29 CFR 2700.10(d) from 10 days to 8 days. This proposed change would guarantee parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules.

The Commission agreed with the Secretary's comment that any proposed change to Procedural Rule 8 providing for an expanded response time should not apply to the time periods set forth in 29 CFR 2700.45 pertaining to temporary reinstatement proceedings. 71 FR 556 through 557, January 5, 2006. Section 105(c)(2) of the Mine Act requires the Commission to consider applications for temporary reinstatement on an expedited basis. 30 U.S.C. 815(c)(2). Therefore, the Commission proposed that Commission Procedural Rule 45 be amended to specify time periods in "business" days when the time period prescribed for action is less than 7 days, and "calendar" days when the time period prescribed is 7 or more days under that rule. This proposed change would maintain the same time frames currently provided in Procedural Rule 45. 71 FR 557.

The Commission also agreed with the Secretary's comment that Commission Procedural Rule 8 should be revised to recognize that the last day of a filing period should not be counted if the Commission's offices are closed due to inclement weather or other similar conditions. *Id.* The Commission proposed revising Procedural Rule 8 to include more general language stating that the last day of a prescribed period for action shall be the due date unless the Commission's offices are not open or the Commission is otherwise unable to accept filings. *Id.* This proposed revision would apply to deadlines for both Commission and party action. *Id.*

In addition, the Commission agreed with commenters that the 5-day period that is added under Procedural Rule 8 when service is by mail should not be reduced. *Id.* Commenters explained that for many operators in isolated areas, it would be unreasonable to expect delivery within a shorter period of time. In addition, there have been mail delays caused by security concerns and increased screening procedures. Nonetheless, the Commission proposed specifying that the 5 days added when service is by mail would be 5 additional "calendar" days. The rule is presently silent as to whether the 5 days are calendar days or business days.

Furthermore, in order to better explain the circumstances in which the 5 additional days would be added, the Commission proposed inserting language to clarify that 5 calendar days would be added to the due date for a responding party's reply to a pleading which has been served by a method of delivery other than one providing for same-day service. *Id.* This proposed change clarified that the 5-day period would be added when documents responded to a party's pleading, rather than when documents responded to orders from the Commission. Service by courier or fax would result in same-day delivery so that the 5 days would not be added to the time for response to such pleadings. However, service by U.S. Postal Service first-class mail or any other mail service resulting in other than same-day delivery would result in the addition of 5 days to the response time.

The Commission determined that, given these proposed changes, it did not need to further clarify that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday. *Id.* Rather, the proposed changes to Procedural Rule 8

sufficiently clarified that the Review Commission may act on the PDR until the end of the next day that the Commission's offices are open. Such proposed language would apply to other deadlines for Commission action as well. *See, e.g.*, 30 U.S.C. 823(d)(2)(B) (providing the period within which the Review Commission may direct sua sponte review).

The various provisions of proposed Procedural Rule 8 could result in different determinations of due dates depending upon the order in which the provisions are applied. Therefore, the Commission proposed stating in the rule that its subsections apply in sequential order. 71 FR 557, January 5, 2006. That is, in computing time, a party must apply the subsections in order, beginning with subsection (a) and ending with subsection (c). The Commission proposed including as a part of the rule two examples demonstrating how the provisions would apply sequentially. *Id.*

The Commission received one comment on these proposed changes in which the commenter stated that while it generally supports the changes, it believes that the terms "business" and "calendar" days that are used in Procedural Rule 45 and a portion of Procedural Rule 8 should be used throughout the Commission's rules wherever time periods are set forth, including throughout Rule 8. The Commission has determined that it is unnecessary at this time to so differentiate between business and calendar days throughout the Commission's rules. In addition, the Commission has concluded that it is appropriate to conform its rules more closely to the Federal rules of procedure, and Federal rules do not generally use the business and calendar day terminology. The Commission believes that it is appropriate to continue the use of the terms, as set forth in the proposed rules, only where necessary in order to avoid confusion. For example, the use of the terms "calendar" or "business" days as proposed in Procedural Rules 8 and 45 is appropriate because such use forecloses the necessity of creating exceptions to the Commission's time computation rule. Accordingly, the Commission adopts Procedural Rule 8 as proposed.

29 CFR 2700.9

Commission Procedural Rule 9 currently provides in part that the time for filing or serving "any document" may be extended for good cause and that a motion for extension of time shall be received no later than 3 days prior to the expiration of time allowed for the filing or serving of the document. 29 CFR 2700.9(a). Experience has shown that a number of parties believe that they can seek an extension of time to file a petition for discretionary review. The Commission proposed revising the rule to clarify that the rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(i), and 29 CFR 2700.70(a). 71 FR 557, January 5, 2006.

The Commission received one comment on the proposed change, in which the commenter stated that it supported the change, but that the provision requiring that requests for extensions of time must be filed at least 3 days before the due date should be restated as 3 "business" days. The Commission has declined to make the suggested change because it believes that it is sufficiently clear from the proposed rule, read in conjunction with Commission Procedural Rule 8, that requests for extension must be made at least three "business" days prior to the due date of a pleading. In addition, as stated with respect to Procedural Rule 8, the Commission has concluded that it is appropriate to conform its rules more closely to the Federal rules of procedure, and such rules do not generally differentiate between business and calendar days. Accordingly, the Commission adopts Procedural Rule 9 as proposed.

29 CFR 2700.10(c)

Commission Procedural Rule 10(c) currently provides that prior to filing a "procedural motion," the moving party shall make reasonable efforts to confer with other parties and state in the motion whether the other parties oppose the motion. 29 CFR 2700.10(c). In the ANPRM, the Commission stated that it was considering whether the phrase "procedural motion" should be changed to clarify that it refers to any non-dispositive motion. 69 FR 62633, October 27, 2004.

Most commenters on the ANPRM supported clarifying that movants must confer with opposing parties on non-dispositive motions. The Secretary stated that she did not oppose the change, provided that it was intended to exclude summary decision motions from the rule.

In an effort to dispel confusion created by the overly broad phrase "procedural motion," the Commission proposed revising the rule to state that consultation with opposing parties is required for any motion other than a dispositive motion. 71 FR 557, January 5, 2006. The Commission believes that the phrase "dispositive motion" more accurately describes the type of motion about which parties need not confer. The Commission received no objections to the proposed change and adopts the rule as proposed.

29 CFR 2700.10(d)

As discussed in the section above regarding 29 CFR 2700.8, the Commission proposed decreasing the period of time for responding to a motion from 10 days to 8 days. Such a change was proposed in combination with the proposed changes to 29 CFR 2700.8. The Commission proposed revising Commission Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days. 71 FR 557, January 5, 2006. If the Commission were to leave unchanged the time period for responding to a motion in current 29 CFR 2700.10(d), the response period could be unreasonably extended. The proposed change to Procedural Rule 10(d) guarantees parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules.

The Commission received one comment on the proposed change in which the commenter suggested that the 8 days referred to in the proposed rule as the time for responding to a motion should be specified as 8 "business" days. The Commission declines to make the suggested change. As stated with respect to Procedural Rule 8, the Commission has concluded that it is appropriate to conform its rules more closely to Federal rules of procedure, which generally do not differentiate between business and calendar days.

Subpart B—Contests of Citations and Orders; Subpart C—Contests of Proposed Penalties

29 CFR 2700.25

Commission Procedural Rule 25 currently provides that the Secretary shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary of any contest of the proposed penalty assessment. 29 CFR 2700.25.

The Commission received two comments on the ANPRM suggesting that the Commission adopt a time limit after a citation or order is issued for the Secretary to issue a proposed penalty assessment for the violations involved. The commenters stated that a time limit of 6 or 12 months would be appropriate

and that such a time limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable.

The Commission invited comment from members of the interested public regarding the imposition of a time limit on the issuance of a proposed penalty assessment and whether failing to issue a proposed penalty within the limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable. 71 FR 558, January 5, 2006.

The Commission received two comments opposing the creation of any time limits or presumptions regarding the Secretary's filing of proposed penalty assessments. The Secretary argued that any such revised rule would not be a "procedural rule" because it would not merely alter the manner in which parties present their viewpoints to the Commission. Citing section 113(d)(2) of the Mine Act, 30 U.S.C. 823(d)(2), which gives the Commission authority to "prescribe rules of procedure," the Secretary contended that the Commission lacks statutory authority to prescribe a substantive rule. In addition, the Secretary asserted that such a rule would be inconsistent with her interpretation of section 105(a) of the Mine Act, 30 U.S.C. 815(a), and with the decision in *Secretary of Labor* v. *Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005).

As noted by the Secretary, the change suggested by commenters on the ANPRM raises an array of issues, including an issue of statutory interpretation. The Commission has determined that the resolution of such matters is beyond the scope of this rulemaking, and leaves resolution of the matter to proceedings before the Review Commission and its Judges. Accordingly, the Commission retains Procedural Rule 25 without revision.

29 CFR 2700.26 and 2700.21

The Commission has dual filing requirements under subparts B and C that reflect the filing procedures set forth in sections 105(a) and (d) of the Mine Act, 30 U.S.C. 815(a) and (d). Subpart B sets forth the manner in which a party may contest a citation or order before the Secretary has proposed a civil penalty for the alleged violation described in the citation or order. Subpart C sets forth the manner in which a party may contest a civil penalty after a proposed penalty assessment has been issued. If a party chooses not to file a contest of a citation or order under subpart B, it may nonetheless contest the proposed penalty assessment under subpart C. In such circumstances, in addition to contesting the proposed penalty assessment, the party may challenge the fact of violation and any special findings alleged in the citation or order. *See* 29 CFR 2700.21. However, if a party files a contest of a citation or order under subpart B, it must also file additional pleadings under subpart C in order to challenge the proposed penalty assessment related to the citation or order.

In the ANPRM, the Commission stated that it was considering whether the filing requirements relating to contesting citations, orders, and proposed penalties could be streamlined while remaining consistent with the procedures set forth in sections 105(a) and (d) of the Mine Act. 69 FR 62633, October 27, 2004. It explained that the dual filing requirements under subparts B and C are inconsistent and can sometimes lead to confusion. *Id.* For instance, parties have failed to contest a proposed penalty assessment or to answer the Secretary's petition for assessment of penalty under subpart C based on the mistaken belief that they have been relieved of those obligations by having filed a notice of contest of a citation or order under subpart B. In such circumstances, a final order requiring the payment of the proposed penalty may have been entered against the party by default.

After publishing the ANPRM, the Commission considered streamlining the filing procedures by adding a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed the timely filing of a notice of contest of a proposed penalty assessment. The Commission discussed the provision with MSHA because such a provision would impact the manner in which MSHA processes notices of contests and issues proposed penalty assessments and related documents. During those discussions, the Commission was informed that, due to administrative and technological problems, the provision would be extremely difficult for MSHA to implement and that the expense of implementing it might not be justified by the relatively low number of default cases that would be eliminated.

The Commission determined that it was inadvisable to add a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed to include the timely filing of a notice of contest of a proposed penalty assessment. 71 FR 558, January 5, 2006. Rather, the Commission proposed adding a provision to Procedural Rule 26 which clarified that a party who wishes to contest a proposed penalty assessment must provide such notification regardless of whether that party has previously contested the underlying citation or order pursuant to 29 CFR 2700.20. *Id.* The Commission also proposed explaining, in Commission Procedural Rule 28(b), 29 CFR 2700.28(b), that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment.

The Commission also stated its intent to employ a number of informal practices in an effort to reduce the number of cases resulting in default. *Id.* Toward that end, the Commission has been working with MSHA to clarify the instructions provided to parties for the filing of various documents. The Commission also intends to distribute and make available to the interested public a document that summarizes the Commission's procedural rules in simple terms, and to place on its Web site a page of frequently asked questions and answers regarding Commission procedures.

The Commission received one comment that supported adding the proposed changes. The Commission adopts Procedural Rule 26 as proposed.

After publication of the NPRM, the Commission determined that it would be appropriate to make changes in subpart B that conform to the revisions to subpart C, set forth in Commission Procedural Rules 26 and 28(b)(2). Accordingly, the Commission revised Commission Procedural Rule 21 to state that the filing of a notice of contest of a citation or order under subpart B does not constitute a challenge to a proposed penalty assessment that may be subsequently issued by the Secretary based on that citation or order. The Commission set forth these conforming changes in a new paragraph (a) of Commission Procedural Rule 21. The current provisions of Procedural Rule 21 are set forth without change in new paragraph (b) of Rule 21.

29 CFR 2700.28(b)

Commission Procedural Rule 44(a), which pertains to a petition for the assessment of a penalty in a discrimination proceeding arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), currently provides that "[t]he petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act." 29 CFR

2700.44(a), *citing* 30 U.S.C. 820(i). Procedural Rule 28, which sets forth the procedure for the Secretary to file a petition for assessment of penalty when an operator has contested a proposed penalty in non-discrimination cases, does not include the "short and plain statement" requirement of Procedural Rule 44(a). Rather, Procedural Rule 28(b) provides merely that the petition for assessment of penalty shall state whether the citation or order has been contested, the docket number of any contest, and that the party against whom a penalty petition is filed has 30 days to answer the petition. 29 CFR 2700.28(b).

In the ANPRM, the Commission stated that it was considering whether the provisions of Procedural Rules 44(a) and 28(b) should be made consistent by adding to Procedural Rule 28(b) the "short and plain statement" requirement of Procedural Rule 44(a) so as to provide notice to the party against whom the penalty is filed of the bases for the penalty. 69 FR 62633, October 27, 2004.

Most of the comments received by the Commission on the ANPRM supported requiring the Secretary to provide a short and plain statement of supporting reasons for a penalty based on the section 110(i) criteria. The reasons given in support of amending Procedural Rule 28 were that it would provide a better understanding of the bases for the Secretary's allegations, enable a more complete response to the petition, make Procedural Rule 28 consistent with Procedural Rule 44, and promote more expeditious disposition of the case. One commenter did not support making the change because it perceived that such a change would likely result in the consumption of additional resources and lead to delays in the issuance of paperwork. The Secretary stated that requiring a short and plain statement would be unnecessary because the supporting reasons for the penalty are set forth in the proposed penalty assessment (referred to by MSHA as "Exhibit A"), which is attached to the petition for assessment of penalty.

In response to the comments on the ANPRM and upon further consideration, the Commission proposed revising Procedural Rule 28(b) by adding two requirements. First, as described in the section above regarding 29 CFR 2700.26, the Commission proposed adding to Procedural Rule 28(b) an explanation that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment. 71 FR 559, January 5, 2006.

In addition, the Commission proposed that the petition include a short and plain statement of the supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Mine Act, 30 U.S.C. 820(i). *Id.* at 558–59, 567. The Commission explained that the Secretary's regulations in part 100 describe three methods for calculating civil penalties: The regular assessment, the special assessment, and the single penalty assessment. *Id.* at 559, *citing* 30 CFR 100.3, 100.4, 100.5. For regular assessments, Exhibit A generally identifies in non-narrative form, among other things, the citation or order by number; whether the alleged violation is significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1); the date of issuance; the standard allegedly violated; and the points assigned to each of 10 listed factors listed, which correspond to 5 of the section 110(i) penalty criteria. The Secretary adds a narrative describing the bases of the penalty to Exhibit A only when she assesses a special assessment. However, in a proceeding in which individual liability is sought under section 110(c) of the Mine Act, 30 U.S.C. 820(c), Exhibit A does not include a narrative or other document explaining the proposed assessment. *See, e.g., Wayne R. Steen*, 20 FMSHRC 381, 386 (April 1998) (applying the section 110(i) criteria in a section 110(c) agent case). The Commission stated its belief that inclusion of a narrative description for the bases of a penalty within a petition would better provide a party notice of the rationale behind the penalty amount. 71 FR 559. In addition, the Commission questioned whether Exhibit A provided an adequate explanation of the bases of a proposed assessment. *Id.*

When the Secretary issues a single penalty assessment, there is no enumeration of the points attributed for each criterion in Exhibit A. The Commission recognized that since single penalty assessments do not involve individualized application of section 110(i) criteria (*see Coal Employment Project* v. *Dole*, 889 F.2d 1127, 1134 (D.C. Cir. 1989)), a narrative description requirement may not apply to these penalties. 71 FR 559. Accordingly, the Commission invited comment from members of the interested public regarding whether, if a short and plain statement requirement were added to Procedural Rule 28(b), an exception to that requirement for single penalty assessments should be explicitly stated. *Id.*

The Commission further stated its belief that requiring the inclusion of a short and plain statement in a petition for assessment of penalty for regular and special assessments would not impose an onerous burden on the Secretary's resources. *Id.* It reasoned that while section 110(i) does not require the Secretary to make findings on the six criteria, the Secretary generally bears the burden of presenting the evidence concerning section 110(i) penalty criteria in support of her proposed assessment in a civil penalty proceeding. *Id., citing Hubb Corp.*, 22 FMSHRC 606, 613 (May 2000); *see also Sec'y of Labor on behalf of Hannah* v. *Consolidation Coal Co.*, 20 FMSHRC 1293, 1302 (December 1998) (noting that the Secretary "must initially produce preliminary information that will assist the Judge in making findings concerning the statutory penalty criteria"). 71 FR 559. The Commission anticipated that providing the operator with notice of the bases of the Secretary's proposed penalty assessment and allowing the operator the opportunity to identify issues with respect to the proposed penalty would ultimately lead to a more efficient resolution of penalty cases. *Id.*

Moreover, the Commission noted that the revision would make the requirements for petitions for assessment of penalties in both discrimination and non-discrimination cases consistent under the Commission's procedural rules. *Id.* It observed that the Secretary's own regulations in 30 CFR part 100 consistently require the consideration of the same six criteria when proposing penalties in discrimination and non-discrimination cases. *Id., citing* 30 CFR 100.1.

The commenters objected to the addition of a requirement for a short and plain statement and did not address whether an exception to the requirement should be made for single penalty assessments. Both commenters reiterated the concern that the requirement would require the consumption of additional resources which might result in delay. The Secretary also reiterated her objection that there is no discernible need for the requirement because the operator already has notice of all of the matters in dispute when litigation begins. The Secretary further objected to the requirement on the basis that section 110(i) of the Mine Act gives her discretion in proposing penalties and explicitly states that the Secretary "shall not" be required to make findings of fact concerning the section 110(i) criteria.

Upon consideration of the comments on the NPRM, the Commission has

concluded that it is appropriate to add the requirement for a short and plain statement with an explicit exception for single penalty assessments. As the Commission responded to the ANPRM comments, the Commission does not believe that the requirement will result in an onerous burden on the Secretary. The additional requirement does not affect all proposed assessments and only applies to regular or special proposed assessments that have been contested by an operator. In those circumstances, the short and plain statement would be inserted in the Petition for Assessment of Penalty by the attorney drafting the Petition, completing the pleading cycle and assisting in framing the issues for the operator and the Judge. The Commission anticipates that the short and plain statement will not necessarily provide different information than that provided in Exhibit A, which is currently attached to the Petition for Assessment of Penalty. However, the narrative form of the short and plain statement will make that information more accessible and easier to comprehend. Currently, in order to comprehend the bases for a proposed penalty, an operator must refer to numbers listed in Exhibit A which are derived from the application of formulas set forth in the Secretary's regulations. The requirement for a short and plain statement also provides useful information for those contested penalties which do not currently have information provided by the attachment of Exhibit A, such as penalties proposed in cases arising under section 110(c) of the Mine Act, 30 U.S.C. 820(c).

The Commission further concludes that the requirement for a short and plain statement in the Petition for Assessment of Penalty is not precluded by the language of section 110(i) of the Mine Act, which states that "[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to [her] and shall not be required to make findings of fact concerning the above factors." 30 U.S.C. 820(i). Section 110(i) provides that the Secretary need not make findings of fact relating to the six factors listed in section 110(i) in proposing a penalty. The short and plain statement requirement does not apply to the Secretary's proposal of a penalty. Rather, it is a pleading requirement that is confined to the Petition for Assessment of Penalty. The Petition for Assessment of Penalty is a pleading that is prepared by the Secretary's counsel after proposing a civil penalty and informing the operator of the proposed penalty, and the operator has opposed the proposed penalty. Thus, consistent with the language of section 110(i), the Secretary need not make findings of fact relating to the six factors listed in section 110(i) in proposing a penalty. However, if a proposed penalty is contested, the Secretary shall be required to provide a short and plain statement regarding the bases for the proposed penalty in the Petition for Assessment of Penalty.

Subpart E—Complaints of Discharge, Discrimination or Interference

29 CFR 2700.45

Judge's Jurisdiction

Commission Procedural Rule 45, 29 CFR 2700.45, sets forth procedures governing the temporary reinstatement of a miner alleging discrimination under section 105(c) of the Mine Act, 30 U.S.C. 815(c). Currently, as to a Judge's jurisdiction, Procedural Rule 45 states only that a Judge shall dissolve an order of temporary reinstatement if the Secretary's investigation reveals that the provisions of section 105(c)(1) of the Mine Act have not been violated. 29 CFR 2700.45(g). The rule further provides that an order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3). *Id.*

In the ANPRM, the Commission stated that it was considering whether to revise Rule 45 to codify the Review Commission's holding in *Secretary of Labor on behalf of York* v. *BR&D Enterprises, Inc.*, 23 FMSHRC 386, 388–89 (April 2001), that a Commission Judge retains jurisdiction over a temporary reinstatement proceeding pending issuance of a final Commission order on the underlying complaint of discrimination. 69 FR 62634, October 27, 2004. All commenters on the ANPRM agreed with the suggested change.

The Commission proposed revising Procedural Rule 45(e) by inserting a statement explaining that the Judge's order temporarily reinstating a miner is not a final decision within the meaning of 29 CFR 2700.69 and that the Judge shall retain jurisdiction over a temporary reinstatement proceeding except during Review Commission or court review of the Judge's order of temporary reinstatement. 71 FR 559 through 560, January 5, 2006. The Commission received comments supporting the proposed revisions to Procedural Rule 45(e). The Commission adopts the rule as proposed.

Effect of Section 105(c)(3) Action on Temporary Reinstatement Order

The Secretary submitted a comment on the ANPRM in which she suggested that Commission Procedural Rule 45(g) be amended to provide that once temporary reinstatement is ordered, absent agreement of the parties, the order of temporary reinstatement shall remain in effect until there is a final decision on the merits of the miner's complaint of discrimination even when the Secretary determines that there was no violation of section 105(c) of the Mine Act. The Secretary explained that the current language of 29 CFR 2700.45(g) suggests that if, after temporary reinstatement has been ordered, the Secretary determines not to proceed on the complaint of discrimination under section 105(c)(2) of the Act, but the miner files a complaint of discrimination under section 105(c)(3), the order of reinstatement should be dissolved. The Secretary contended that such a result is at odds with the meaning of section 105(c)(2). The Secretary reads section 105(c)(2) to require that the temporary reinstatement order remain in effect until the underlying discrimination complaint is resolved regardless of whether the complaint of discrimination is litigated by the Secretary under section 105(c)(2) of the Act or whether it is litigated by the miner under section 105(c)(3) of the Act.

The Commission declined proposing to revise Procedural Rule 45(g) in the manner suggested by the Secretary. 71 FR 560, January 5, 2006. The Commission explained that the Review Commission has not decided the issue of whether a temporary reinstatement order remains in effect during a miner's pursuit of his or her discrimination complaint before the Commission under section 105(c)(3). *Id.* The Commission stated its belief that the issue of statutory interpretation raised by the Secretary's comment is more appropriately addressed in the context of litigation rather than rulemaking. *Id.*

The Commission received comments requesting further revision to Procedural Rule 45(g). One commenter supported the initial revision suggested by the Secretary in her comments on the ANPRM that the rules should be revised to state that a Judge's reinstatement order should remain in effect pending a miner's discrimination complaint under section 105(c)(3). The Secretary, however, agreed with the Commission's conclusion in the NPRM that the issue of whether a temporary reinstatement order remains in effect during a miner's pursuit of his or her discrimination

complaint under section 105(c)(3) would best be resolved in the context of litigation. She observed, however, that current Procedural Rule 45(g) appears to address the issue and resolve it in the negative: That is, that a Judge's reinstatement order should not remain in effect pending a miner's discrimination complaint under section 105(c)(3). The Secretary requested that, because the matter should be resolved in litigation, the Commission should delete the current provision of Procedural Rule 45(g).

The Commission agrees with the Secretary that Procedural Rule 45(g) should be revised so that it does not appear to resolve the question of whether a temporary reinstatement order remains in effect pending a miner's discrimination complaint under section 105(c)(3). Accordingly, the Commission has deleted from Procedural Rule 45(g) the provision directing the Judge to enter an order dissolving an order of temporary reinstatement upon notification by the Secretary of her determination that the provisions of section 105(c)(1) have not been violated. The deletion of such language leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3) of the Mine Act.

Time Computation

The Commission proposed that Procedural Rule 45 be amended to reflect time periods in "business" days when the time period described for action is less than 7 days, and "calendar" days when the time period prescribed is 7 or more days. 71 FR 560, January 5, 2006. The Commission explained that, as discussed in the section above regarding 29 CFR 2700.8, it does not intend the proposed rule revisions regarding time computation to affect the filing and service requirements of temporary reinstatement proceedings currently set forth in 29 CFR 2700.45. *Id.* The proposed change maintained the time frames currently provided in 29 CFR 2700.45. There were no objections to the proposed changes. The Commission adopts the rule as proposed.

Subpart G—Hearings

Amendment of Pleadings

The Commission received two comments on the ANPRM suggesting that the Commission adopt a rule limiting the amendment of pleadings by the Secretary. The Commission declined to do so, concluding that the issue should be determined on a case-by-case basis. 71 FR 560, January 5, 2006. The Commission explained that the comments raised an issue which falls within the sound discretion of the Commission's Judges. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (setting forth guidance in the exercise of discretion regarding amendment of pleadings).

The Secretary submitted a comment on the NPRM, agreeing with the Commission and stating that, in any event, any rule limiting the amendment of pleadings should apply to all parties and not just to the Secretary. The Commission declines to take further action and leaves the matter to the discretion of its Judges.

29 CFR 2700.51 and 2700.54

Commission Procedural Rule 54 currently provides in part that written notice of the time, place, and nature of a hearing shall be given to all parties at least 20 days before the date set for hearing. 29 CFR 2700.54. In the ANPRM, the Commission stated that it was considering whether Rule 54 should be revised to require a Judge to consult with all parties before setting a date for hearing. 69 FR 62634, October 27, 2004.

The comments on the ANPRM favored imposing a requirement that a Judge confer with the parties before establishing a hearing date. The comments noted that when hearing dates are set ex parte, one or both parties must often move for a continuance to avoid schedule conflicts. The Secretary added that the requirement to confer should be extended to the choice of a hearing site, while another commenter suggested at least 45 days' notice of a hearing should be required. Another commenter suggested that Judges should be required to hold the hearing without undue delay, and that a time frame within which the hearing must be held should be established.

The Mine Act requires that hearings before the Commission's Judges be held pursuant to 5 U.S.C. 554 of the APA. 30 U.S.C. 815(c), (d). The APA requires that in "fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. 554(b). Commission Procedural Rule 51 currently provides in part that a Judge shall give due regard to the convenience and necessity of parties or their representatives and witnesses in setting a hearing site. 29 CFR 2700.51.

Rather than propose changes to Procedural Rule 54, the Commission proposed that Procedural Rule 51 should be revised to explicitly require a Judge to consider the convenience of parties or their representatives and witnesses in setting the hearing date in addition to setting the site. 71 FR 560, January 5, 2006. The Commission declined to require Commission Judges to consult with all parties before setting a date for hearing. *Id.* The Commission explained that experience has revealed that requiring Judges to confer with parties prior to setting a hearing date may result in undue delay in situations in which it is difficult to contact a party or a party's representative. *Id.* For instance, difficulties can sometimes arise in contacting pro se parties or operators of seasonal or intermittent mining operations during periods when those facilities are not in operation. *Id.* In any event, many of the Commission's Judges confer with parties before setting a hearing in all cases, and others confer in certain types of cases, e.g., where discovery has been initiated and/or the case appears complex.

The Commission further declined to establish a time within which hearings must be held. *Id.* It explained that in practice, a hearing date is typically set within 45–90 days after the case has been assigned. *Id.* Later dates may be established with the agreement of the parties. The Commission noted that under the current and proposed rules, any party would be free to request or move for an expedited hearing in appropriate cases, pursuant to 29 CFR 2700.52. *Id.*

The Commission received one comment on the proposed changes. The commenter supported the proposed revision but stated further that Judges should be encouraged to set hearings without undue delay. As the Commission stated in the NPRM, any party is free to request or move for an expedited hearing pursuant to Commission Procedural Rule 52. *Id.* The Commission adopts Procedural Rule 51 as proposed.

29 CFR 2700.56(d) and (e)

Commission Procedural Rule 56(d) sets forth a time for initiating discovery, providing in part that "[d]iscovery shall be initiated within 20 days after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section[s] 105(c) or 111 of the Act has been filed." 29 CFR 2700.56(d), *citing* 30 U.S.C. 815(c) and 821. Procedural Rule 56(e) sets forth a time for completing discovery, providing that "[d]iscovery shall be completed within 40 days after its initiation." 29 CFR 2700.56(e).

In the ANPRM, the Commission stated that it was considering whether there should be no specific time frame

for initiating discovery, and whether 40 days is too short a period of time for the completion of discovery. 69 FR 62634, October 27, 2004.

The comments on the ANPRM favored eliminating the present rules' specific time periods for commencing and completing discovery, and suggested substituting language providing that discovery not cause undue delay and that it be completed 30 days in advance of a hearing. Several commenters noted that the present time frames are outmoded and, if enforced, would require initiation of potentially costly and burdensome discovery before settlement options could be explored. Several also noted that a specific provision should be added allowing the Judge to permit discovery within the 30-day period prior to the hearing for good cause shown.

The Commission proposed amending Procedural Rule 56 to permit discovery to begin with the filing of a responsive pleading and requiring that it be completed 20 days in advance of a scheduled hearing. 71 FR 560 through 561, January 5, 2006. The Commission explained that the 20-day period, combined with a general provision that discovery not unduly delay or otherwise impede disposition of the case, would assure that discovery be completed in time to allow the filing of comprehensive prehearing statements and full presentation of the case. *Id.* at 561.

The Commission received one comment supporting the proposed change. The Commission adopts Procedural Rule 56 as proposed.

29 CFR 2700.61 and 2700.62

Commission Procedural Rule 61 currently provides that a "Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 CFR 2700.61. Commission Procedural Rule 62 currently states that a "Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness." 29 CFR 2700.62.

The Commission received two comments on the ANPRM suggesting that the Commission should modify Procedural Rule 62 to require disclosure of the names of miner witnesses, along with any documents containing statements by the miner witnesses, at the time of the filing of a prehearing statement or no later than 15 days before a scheduled hearing. The commenters suggested that the 2-day period precludes proper preparation for hearing. The commenters further stated that the Commission should also modify Procedural Rule 61 to provide that the Secretary cannot rely upon evidence from miner informants without providing the names of these informants and the substance of their testimony to the operator 15 days before the hearing.

In the NPRM, the Commission declined to propose any changes to Procedural Rules 61 and 62. *Id.* at 561. It explained that extending the time period for identifying anticipated miner witnesses from 2 days to 15 days before the start of a hearing, as suggested, would unacceptably weaken the protection afforded to miners under Procedural Rules 61 and 62. *Id.* It noted that in the majority of cases, an operator would be able to independently depose miners who might be witnesses well in advance of the trial and therefore would not be harmed by the 2-day limitation. *Id.* In most instances, the universe of potential witnesses, i.e., those with knowledge of the facts of a violative condition or an accident, is generally limited, and the operator would know who has knowledge of the facts of the alleged violation. Such information could also be available to the operator through discovery. If the potential miner informant/witness is an employee, the operator would be able to easily contact the employee for purposes of arranging a deposition. Moreover, the identification of miner witnesses, who may also be informants, 15 days in advance of a hearing would not be necessary to ensure the operator a fair trial in circumstances in which a hearing is continued to a later date or eliminated altogether for unrelated reasons.

The Commission further observed that its Judges have indicated that they generally have not experienced problems applying Procedural Rules 61 and 62 and have been able to balance the interests of all parties under the current rules. *Id.* The Commission also noted that because the 2-day period set forth in Procedural Rule 62 refers to 2 business days, under current Procedural Rule 8 and its revisions, the operator also could use weekend days contiguous to the 2-day period for depositions of miner witnesses. *Id.* In any event, should there be an occasion where the late identification of a miner witness or the late discovery of the scope of his testimony causes prejudice to the operator, the operator could request a continuance in order to have time to adequately prepare for the hearing.

The Commission received one comment on the NPRM supporting the Commission's determination not to revise Procedural Rules 61 and 62. The Commission retains Procedural Rules 61 and 62 without further revision.

29 CFR 2700.63(a)

Commission Procedural Rule 63(a) currently provides that "[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." 29 CFR 2700.63(a). The Commission received two comments on the ANPRM suggesting that the Commission modify its rule to require that hearsay evidence be supported by some evidence of reliability in order to be admissible.

In the NPRM, the Commission concluded that further rulemaking was not warranted because Commission precedent sufficiently addresses the commenters' concerns. 71 FR 561, January 5, 2006. Under Commission precedent, hearsay evidence is admissible in proceedings before the Commission's Judges as long as the evidence is "material and relevant." *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). Hearsay evidence can constitute substantial evidence supporting a Judge's decision only if that evidence "is surrounded by adequate indicia of probativeness and trustworthiness." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1135–36 (May 1984) (citations omitted). The Commission received no comments on the NPRM on this issue. The Commission retains Procedural Rule 63(a) without further revision.

29 CFR 2700.67(a)

Commission Procedural Rule 67(a) currently provides that "[a]t any time after commencement of a proceeding and no later than 10 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding." 29 CFR 2700.67(a).

In the ANPRM, the Commission stated that it was considering whether the filing deadline for a summary decision motion should be changed from 10 days to 20 or 30 days before the hearing, allowing the Judge a greater period of time to rule on the motion. 69 FR 62634, October 27, 2004.

Most of the comments received by the Commission on the ANPRM supported changing the time period for filing a motion for summary decision from 10 days to 20 days before the hearing date. The Secretary and another commenter favored increasing the time period to 30 days. That commenter further suggested adding a requirement that the Judge rule

on the motion at least 10 days before the hearing.

An appropriate deadline for filing a motion for summary decision prior to a hearing must be considered in light of other rule provisions governing filing and time computation. Under the present rules, which provide that filing is effective upon mailing (29 CFR 2700.5(d)), a party has 10 days to respond to a motion (29 CFR 2700.10(d)), and an additional 5 days is added to that time when the motion is served by mail (29 CFR 2700.8). Consequently, a party could file by mail a motion for summary decision 10 days prior to a hearing, and the opposition would not have to be filed by mail until 5 days after commencement of the hearing.

The Commission proposed revising Procedural Rule 67(a) to provide that a motion for summary decision may be filed no later than 25 days prior to a hearing, and that the filing of such motions and responses would be effective upon receipt. 71 FR 562, January 5, 2006. The Commission explained that the proposed revision should ensure adequate time for a Judge to review the motion and the opposition, and to make an informed decision as to whether a hearing will be necessary. *Id.* The Commission noted that, pursuant to 29 CFR 2700.9, a party may request an extension of time if it is unable to meet the deadline for filing a motion for summary decision. *Id.* The Commission further declined to revise the rule to require a Judge to decide a motion for summary decision by a time certain. *Id.* The Commission explained that under the proposed rule, the Judge may not have the opposition until approximately 10 days before the hearing. *Id.* Such a time period should be sufficient to allow the Judge to make an informed determination of whether to cancel, postpone, or go forward with the hearing, without inconveniencing the parties. Requiring a decision on the motion 10 days prior to hearing, as one commenter suggested, would not in all instances allow the Judge sufficient time to make a decision and prepare an opinion.

The Commission received one comment supporting the proposed change. The Commission adopts Procedural Rule 67(a) as proposed.

29 CFR 2700.67(c), (d), (e) and (f)

Commission Procedural Rule 67(c) currently sets forth the requirements for the form of a motion for summary decision and any supporting affidavits. 29 CFR 2700.67(c). After publication of the NPRM, proceedings before the Commission brought to light the need to include a provision setting forth a requirement that a statement of material facts as to which the moving party contends there is no genuine issue must be submitted with a motion for summary decision. The Commission also determined that it was necessary to clarify the procedure for opposing a motion for summary decision. The Commission is revising paragraph (c) of Procedural Rule 67 to add requirements for filing a statement of material facts with a motion for summary decision. In addition, the Commission is redesignating current paragraph (d) of Procedural Rule 67 as paragraph (f). Finally, the Commission is adding new paragraph (d), which sets forth requirements for opposing a motion for summary decision, and new paragraph (e), which sets forth the requirements for affidavits.

29 CFR 2700.69

Commission Procedural Rule 69(c) sets forth the procedure for correcting clerical errors in a Judge's decision. 29 CFR 2700.69(c). It provides that, at any time before the Review Commission has directed review of a Judge's decision, a Judge may correct clerical errors on his/her own motion, or on the motion of a party. *Id.* After the Review Commission has directed review of the Judge's decision or after the Judge's decision has become the final order of the Commission, the Judge may correct clerical errors with the leave of the Review Commission. *Id.*

In the ANPRM (69 FR 62634, Oct. 27, 2004), the Commission stated that it was considering inserting a provision which would make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR of the Judge's decision on the merits. *See Earl Begley,* 22 FMSHRC 943, 944 (August 2000).

Most of the comments received by the Commission on the ANPRM favored making the change. The Secretary, however, stated that a Judge's authority to correct decisions should be "expanded" in the rule to include errors that result from oversight or omission, and that such a corrected decision be appealable in its own right.

The Commission proposed amending Procedural Rule 69(c) to make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR. 71 FR 562, January 5, 2006. The Commission further declined to make the change suggested by the Secretary because broadening a Judge's authority to alter or amend a decision to cover more substantive changes, like those addressed under Fed. R. Civ. P. 59(e) and 60(a), could create questions involving finality and appealability that could result in a delay in Commission proceedings. *Id.*

In addition, as described in the section-by-section analysis of 29 CFR 2700.5 and 2700.72, the Commission proposed adding Procedural Rule 69(d) to clarify that Judges' decisions are not binding precedent upon the Commission. *Id.*

The Commission received no objections to the proposed revisions. The Commission adopts Procedural Rule 69 as proposed.

Subpart H—Review by the Commission

29 CFR 2700.70(h)

Commission Procedural Rule 70(h) currently provides that a PDR that is not granted within 40 days after the issuance of a Judge's decision is deemed denied. 29 CFR 2700.70(h).

In the ANPRM, the Commission stated that it was considering making explicit its present practice under the rule that the Review Commission may act on a PDR on the 1st business day following the 40th day after a Judge's decision, where the 40th day would otherwise fall on a weekend or federal holiday. 69 FR 62634, October 27, 2004.

In the NPRM, the Commission declined to propose any changes to Procedural Rule 70. 71 FR 562, January 5, 2006. The Commission explained that it need not clarify in Procedural Rule 70 that the Review Commission may act on a PDR on the next day that the Commission's offices are open if the Commission's offices are closed on the 40th day. *Id.* It noted that the changes that the Commission had proposed with respect to Procedural Rule 8 would sufficiently clarify the Review Commission's authority in this respect. *Id.* The Commission received no objections to its determination that it need not revise Rule 70. The Commission retains Procedural Rule 70 without revision.

29 CFR 2700.72

As noted above in the section-by-section analysis of 29 CFR 2700.5, the Commission proposed deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use. Presently, Procedural Rule 72 provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR 62634, October 27, 2004.

The Commission proposed including in Procedural Rule 5 a requirement that citations to a Judge's decision shall include "(ALJ)" at the end of the citation. 71 FR 562, January 5, 2006. In addition, the Commission proposed adding to Procedural Rule 69 a provision stating that all Judge's decisions are not binding precedent upon the Commission. The Commission adopts those proposed changes and removes and reserves present Procedural Rule 72.

29 CFR 2700.74

Commission Procedural Rule 74 currently sets forth the provisions applicable to amicus curiae participation in Commission proceedings. 29 CFR 2700.74. After publication of the NPRM, proceedings before the Commission brought to light the need to clarify that, under Procedural Rule 74, a movant may seek to enter an appearance as an amicus curiae in a Commission proceeding, even if the movant does not specifically support any of the positions of the parties in that proceeding. The Commission is revising paragraph (a) of Procedural Rule 74 and adding a new paragraph (d). These revisions clarify the procedures for seeking participation as an amicus when the movant does not support a party in a Commission proceeding.

29 CFR 2700.75

As noted above in the section-by-section analysis regarding 29 CFR 2700.5, the Commission proposed to revise Commission Procedural Rule 5 to require that fewer copies be filed. The Commission proposed making conforming changes to 29 CFR 2700.75(g) which require that each party shall file the original and six copies of its brief with the Review Commission, or if the party is not represented by a lawyer, it need file only the original document. 71 FR 562, January 5, 2006.

In addition, the Commission proposed adding a new paragraph (h) to Commission Procedural Rule 75 requiring a table of contents for opening and response briefs filed with the Review Commission. *Id.* The Commission suggested that a table of contents in opening and response briefs would be helpful to the Review Commission and parties, particularly in lengthy briefs involving multiple issues. *Id.* As provided in current Procedural Rule 75(c), the table of contents would be excluded from the page limit allowed for such briefs. 29 CFR 2700.75(c).

The Commission received no objections on the proposed revisions. The Commission adopts Procedural Rule 75 as proposed.

29 CFR 2700.76

Commission Procedural Rule 76 currently sets forth the procedure for interlocutory review by the Commission. 29 CFR 2700.76. The rule provides for the simultaneous filing of briefs within 20 days of the order granting interlocutory review. 29 CFR 2700.76(c). While the rule specifies that the Review Commission's consideration is confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review (29 CFR 2700.76(d)), there is no description of what constitutes the record on interlocutory review. In the ANPRM, the Commission stated that it was considering whether Procedural Rule 76 should be revised to state what constitutes the record on interlocutory review. 69 FR 62634, October 27, 2004.

A few commenters on the ANPRM supported amending the rule to clarify what constitutes the record on interlocutory review, while others stated that such a change is unnecessary. The Secretary further suggested that Procedural Rule 76 should be revised to provide for the filing of briefs seriatim, and that the party seeking review should be permitted to file a reply brief.

After publication of the ANPRM, the Commission improved its internal processes to better provide the Review Commission with the record on interlocutory review in the event the parties do not supply the Commission with all the relevant record excerpts. Because the changes in the Commission's internal processes do not impose any additional or different requirements upon parties, the Commission determined that it need not revise Procedural Rule 76 to describe what constitutes the record on interlocutory review.

The Commission proposed, however, that Procedural Rule 76 should be amended to substitute for the rule's current briefing requirement, language stating that when the Commission grants interlocutory review, it will also issue an order addressing the sequence and timing of briefs, including any reply briefs. 71 FR 563, January 5, 2006. The Commission explained that, while it agrees with the Secretary that there may be occasions when it is useful for parties to file briefs seriatim or for the filing party to have the opportunity to file a reply brief, the briefing schedule for interlocutory appeals is best determined on a case-by-case basis. *Id.*

One commenter on the NPRM supported the proposed changes to Procedural Rule 76, while the other commenter stated a preference for a briefing schedule that requires briefs to be filed seriatim and provides an opportunity for the filing of a reply brief. For the reasons stated in the NPRM, the Commission has determined that it shall revise Procedural Rule 76 as proposed. In its petition for interlocutory review, a party may request a briefing schedule that requires briefs to be filed seriatim and provides an opportunity for the filing of a reply brief.

29 CFR 2700.78

Commission Procedural Rule 78(b) currently provides in part that, unless the Review Commission orders otherwise, the filing of a petition for reconsideration does not stay the effect of a Review Commission decision and does not affect the finality of a decision for purposes of review in the courts. 29 CFR 2700.78(b). In the ANPRM, the Commission stated that it was considering whether it should revise Rule 78 to state that the filing of a petition for reconsideration tolls the time period for filing an appeal for judicial review until the Review Commission has issued an order disposing of the petition for reconsideration. 69 FR 62634, October 27, 2004.

Some commenters on the ANPRM did not support revising the rule, stating that judicial review would simply be delayed, given the unlikelihood that the Review Commission would grant a petition for reconsideration, or that the revision could encourage parties to file petitions for reconsideration in order to delay court review, with the result being an increase in the duration of Commission proceedings. Another commenter supported the revision on the ground that it could help avoid unnecessary court review and expedite final resolution. The Secretary supported the revision on the ground that it would make the Commission's rules consistent with the decisions of Federal courts of appeal on the question.

In the NPRM, the Commission proposed deleting the present language that the filing of a petition for reconsideration with the Review Commission shall not affect the finality of a decision or order for purposes of judicial review. 71 FR 563, January 5, 2006. The Commission explained that such a revision is consistent with precedent recognizing that court review is precluded while a petition for reconsideration before an agency is pending. *Id., citing United Transportation Union* v. *ICC,* 871 F.2d 1114, 1116–18 (D.C. Cir. 1989) (*"UTU"*);

West Penn Power Co. v. *EPA*, 860 F.2d 581, 585 (3d Cir. 1988). Courts have reasoned that court review should be so precluded in order to prevent the waste of judicial resources and consideration of questions that may be disposed of by the agency when acting upon a reconsideration request. *See UTU*, 871 F.2d at 1116–18 (discussing rationale of the different courts addressing the issue). The Commission stated that it would otherwise leave to the courts the determination of the extent to which court review will proceed while a petition for reconsideration is before the Review Commission. 71 FR 563.

The Commission declined to insert a statement that filing a petition for reconsideration tolls the time period for filing an appeal for judicial review, however. *Id.* It reasoned that such an insertion may lead to the misperception that a Review Commission decision that is the subject of a petition for reconsideration is non-final with respect to even those parties who did not petition for reconsideration. *Id.* Courts generally have determined that a pending reconsideration request at the administrative level does not make the underlying decision non-final for parties who do not seek administrative reconsideration. *ICG Concerned Workers Ass'n* v. *United States*, 888 F.2d 1455 (D.C. Cir. 1989).

One commenter supported the proposed revision. Another commenter suggested that the Commission should revise the rule to incorporate an explanation of how courts have precluded judicial review during the pendency of a reconsideration request sought by those parties that filed for reconsideration, but not for those parties that did not seek reconsideration. The Commission has determined that it is not appropriate at this time to codify court precedent on the issue, particularly given the paucity of precedent directly applying relevant provisions of the Mine Act. In the absence of such codification, parties may seek guidance on the issue from court precedent. Accordingly, the Commission adopts Procedural Rule 78 as proposed.

Subpart I—Miscellaneous

29 CFR 2700.80

Commission Procedural Rule 80(a) presently provides that "[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 CFR 2700.80(a).

The Commission proposed revising Procedural Rule 80(a) to clarify that certain ethical conduct is required of individuals practicing before the Review Commission or practicing before Commission Judges. 71 FR 563, January 5, 2006. It noted that, by its literal terms, the standard could be misinterpreted to require certain ethical conduct of: (a) Individuals practicing before the Review Commission; and (b) Commission Judges. *Id.* The Commission explained that the rule was intended to require certain ethical conduct of individuals practicing in Commission proceedings, and that other Commission rules explicitly impose standards of conduct upon Judges. *Id., citing* 29 CFR 2700.81 (recusal and disqualification); 29 CFR 2700.82 (ex parte communications).

One commenter did not object to the proposed change. Another commenter suggested that Procedural Rule 80 should be revised to specifically cite the American Bar Association Model Rules of Professional Conduct as the applicable ethical standard for individuals practicing in Commission proceedings. That commenter further suggested that Procedural Rule 80 should also be revised to cite the American Bar Association Model Code of Judicial Conduct as the applicable standard of conduct for Commission Judges. The Commission declines to specify the standards of ethical conduct required in Commission proceedings as beyond the scope of this procedural rulemaking. The Commission adopts Procedural Rule 80 as proposed.

29 CFR 2700.84

As discussed in the section above regarding 29 CFR 2700.1, the Commission has revised Commission Procedural Rule 1 to add a provision stating the effective date of amendments to the Commission's procedural rules. The Commission has repealed Commission Procedural Rule 84, which states the effective date of the Commission's procedural rules which were revised and republished in 1993.

B. Part 2704—Implementation of the Equal Access to Justice Act in Commission Proceedings

Interplay of parts 2700 and 2704

Experience under the agency's EAJA rules of procedure has highlighted procedural matters in Commission EAJA proceedings that are governed by the Commission's rules of procedure in 29 CFR part 2700. Issues including scope of review by the Review Commission once review has been granted (29 CFR 2700.70(g)); motion practice (29 CFR 2700.10); and standards of conduct (29 CFR 2700.80), for example, are not separately covered in the Commission's EAJA rules. These rules stand in contrast to other rules in part 2700 that clearly are applicable only to Mine Act proceedings, such as 29 CFR 2700.25 (proposed penalty assessments). Therefore, the Commission proposed revising its EAJA rule at 29 CFR 2704.100 to clarify that its rules of procedure at part 2700 apply to EAJA proceedings where appropriate. 71 FR 564, January 5, 2006. The Commission received no comments on the proposed revision. The Commission adopts EAJA Rule 100 as proposed.

Eligibility for Fees

In *Colorado Lava, Inc.*, 27 FMSHRC 186, 188–95 (March 2005), the Review Commission ruled unanimously that prevailing parties are not eligible for fees under the "excessive and unreasonable demand" prong of EAJA and the Commission's regulations implementing it. As currently written, the Commission's regulations are silent as to whether prevailing parties may obtain fees under this provision. The Commission proposed clarifying these rules and revising 29 CFR 2704.100, 2704.104, 2704.105, and 2704.206 to make it clear, consistent with its decision in *Colorado Lava*, that only non-prevailing parties may be awarded fees under EAJA's "excessive and unreasonable demand" provision. 71 FR 564, January 5, 2006. The Commission received no comments on the proposed changes and adopts the rules as proposed.

Aggregation of Assets and Employees of Prevailing Parties

Commission EAJA Rule 104(b)(2) presently provides for the aggregation of assets or employees of affiliates of a prevailing party to determine eligibility for an EAJA award. 29 CFR 2704.104(b)(2). In response to the ANPRM, one commenter requested that the Commission revise its present rules by deleting the requirement for aggregation of assets or employees of affiliates. In the NPRM, the Commission asked for further comments on the rule and requested commenters to focus their attention on judicial and administrative developments since the Commission last revised its EAJA rules in 1998. 71 FR 564, Jan. 5, 2006, *citing Tri-State Steel Constr. Co.* v. *Herman*, 164 F.3d 973 (6th Cir. 1999), and 70 FR 22785, 22787, May 3, 2005. In response to the NPRM, the Commission received one comment in support of the present rule. After considering the comments on the ANPRM and NPRM and recent judicial and administrative developments, the Commission has determined to repeal EAJA Rule 104(b)(2).

SBA Rule Changes

Commission EAJA Rule 104(c) cross references the regulations of the Small Business Administration ("SBA") that establish the standards for the eligibility of an applicant who has been the subject of an excessive and unreasonable demand from MSHA. Since the last publication of the Commission's EAJA rules (63 FR 63172 through 63178, November 12, 1998), there have been minor changes in the SBA rules governing when applicants qualify as "small entities," as defined in 5 U.S.C. 601. Therefore, for the convenience of the public, the Commission has reproduced the annual-receipts and number-of-employees standards, for various mining entities, identified by the North American Classification System ("NAICS") code, which is established by the SBA at 13 CFR 121.201.

NAICS codes	NAICS U.S. industry title	Size standard in millions of dollars	Size standard in number of employees
Subsector 212—Mining (Except Oil and Gas)			
212111	Bituminous Coal and Lignite Surface		500
212112	Bituminous Coal Underground Mining		500
212113	Anthracite Mining		500
212210	Iron Ore Mining		500
212221	Gold Ore Mining		500
212222	Silver Ore Mining		500
212231	Lead Ore and Zinc Ore Mining		500
212234	Copper Ore and Nickel Ore Mining		500
212291	Uranium-Radium-Vanadium Ore Mining		500
212299	All Other Metal Ore Mining		500
212311	Dimension Stone Mining and Quarrying		500
212312	Crushed and Broken Limestone Mining and Quarrying		500
212313	Crushed and Broken Granite Mining and Quarrying		500
212319	Other Crushed and Broken Stone Mining and Quarrying		500
212321	Construction Sand and Gravel Mining		500
212322	Industrial Sand Mining		500
212324	Kaolin and Ball Clay Mining		500
212325	Clay and Ceramic and Refractory Minerals Mining		500
212391	Potash, Soda, and Borate Mineral Mining		500
212392	Phosphate Rock Mining		500
212393	Other Chemical and Fertilizer Mineral Mining		500
212399	All Other Nonmetallic Mineral Mining		500
Subsector 213—Support Activities for Mining			
213111	Drilling Oil and Gas Wells		500
213112	Support Activities for Oil and Gas Operations	$6.5	
213113	Support Activities for Coal Mining	$6.5	
213114	Support Activities for Metal Mining	$6.5	
213115	Support Activities for Nonmetalic Minerals (except Fuels)	$6.5	

Standards for Awards

Commission EAJA Rule 105(b) presently provides that a non-prevailing party may establish that the Secretary's demand is excessive when compared to the Commission's decision and that the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to the decision. 29 CFR 2704.105(b). The Commission received a comment on the ANPRM that EAJA Rule 105(b) improperly places the burden of proof on EAJA applicants to show that the Secretary's demand is both excessive and unreasonable. In the NPRM, the Commission declined to make any revisions to the rule. 71 FR 564, January 5, 2006. The Commission explained that Commission EAJA Rules 105(b) and 203(a) require that the EAJA applicant "show" that the Secretary's demand is excessive, while the Secretary can only avoid an award by establishing that the demand is not unreasonable when compared to the Commission's decision. *Id., citing* 29 CFR 2704.203(a). The Commission reasoned that contrary to the commenter's suggestion, the rule does not require the applicant to prove that the penalty is unreasonable. 71 FR at 564. The Commission further noted that experience under the rules has not indicated any change to the pleading requirements is necessary. *Id., citing L&T Fabrication & Constr., Inc.*, 22 FMSHRC 509, 514 (April 2000). The Commission received one comment on the NPRM supporting its determination not to revise EAJA Rule 105(b). The Commission retains EAJA Rule 105(b) without revision.

Hourly Rate

Commission EAJA Rule 106(b) currently provides that the award for the fee of an attorney or agent to those parties who are successful on EAJA claims may not exceed $125 per hour, except as provided in 29 CFR 2704.107. 29 CFR 2704.106(b). The Commission received one comment on the ANPRM recommending that the Commission amend the rule to provide for an automatic increase in the $125 hourly rate. The Commission considered the recommendation but stated in the NPRM that no change was necessary because no party had sought an increase in the present rate for attorney's fees since the rule was revised in 1998. 71 FR 564, January 5, 2006. Further, the Commission noted that 29 CFR 2704.107(a) allows parties to petition the Review Commission or its Judges for a higher rate. *Id.* The Commission received one comment on the NPRM supporting its determination not to revise EAJA Rule 106(b). The Commission retains EAJA Rule 106(b) without revision.

EAJA Application Deadline

Commission EAJA Rule 206(a) requires that an application be filed no later than 30 days after the Commission's final disposition of the underlying proceeding (or 30 days after a final and nonappealable court judgment in a Commission case). 29 CFR 2704.206(a). Commission EAJA Rule 206(c) currently defines "final disposition" as the date on which a case on the merits becomes final pursuant to sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. 815(d) and 823(d). 29 CFR 2704.206(c). As currently written, it is not clear whether this term means "final and not appealable."

In the NPRM, the Commission proposed amending the definition of "final disposition" in EAJA Rule 206(c) to clarify that it means the date on which a decision or order on the merits becomes final and unappealable. 71 FR 564, January 5, 2006. The Commission explained that the proposed revision is consistent with court precedent holding that an EAJA application is due 30 days following the expiration of the time for an appeal on the merits—that is, the time for appeal must lapse or the appeal be completed before the 30-day deadline begins to run. *Id.*, *citing Scafar Contracting, Inc.* v. *Sec'y of Labor*, 325 F.3d 422 (3d Cir. 2003); *Adams* v. *SEC*, 287 F.3d 183 (D.C. Cir. 2002).

The Commission received no objections to the proposed change and adopts EAJA Rule 206(c) as proposed.

Automatic Stay of Proceedings

Commission EAJA Rule 206(b) currently provides that if review or reconsideration is sought or taken of a decision on the merits, EAJA proceedings shall be stayed pending final disposition of the underlying case. 29 CFR 2704.206(b). The Secretary submitted a comment on the ANPRM stating that generally she files a motion for stay in these circumstances, and that the stay is routinely granted. The Secretary suggested that the Commission revise EAJA Rule 206(b) to provide that the stay of EAJA proceedings is automatic, which will make the filing of such motions unnecessary.

In the NPRM, the Commission declined to revise EAJA Rule 206(b) in the manner suggested by the Secretary. 71 FR 564, January 5, 2006. The Commission explained that the issuance of an order in response to a motion creates certainty as to the procedural posture of a case. *Id.* It noted that the absence of a stay order could lead to uncertainty among the parties, particularly those unfamiliar with the Commission's procedures, and that the advantage of certainty among the parties is not outweighed by the minimal hardship imposed on the Secretary when she is required to file a stay motion. *Id.*

The Secretary submitted a comment on the NPRM reiterating the suggestion that the rule should be revised to state that the stay of an EAJA proceeding is automatic pending final disposition of the underlying case. The Secretary stated that an automatic stay would clarify that a party who appeals a Judge's decision need not file an EAJA application until the Commission has finished its review of the merits proceeding. The Commission declines to revise EAJA Rule 206(b) in the manner suggested. An explicit stay order from a Judge is preferable because it makes clear the procedural posture of the case. In addition, revisions to EAJA Rule 206(c) regarding EAJA application deadlines sufficiently clarify when an EAJA application must be filed.

Effect of Stay on Filing Answer

Commission EAJA Rule 302(a), as currently worded, sets forth time frames for the filing of an answer in an EAJA proceeding without taking into account the possible existence of a stay. 29 CFR 2704.302(a). The Commission received a comment on the ANPRM from the Secretary stating that the Commission should consider revising this rule to address the interplay of Commission EAJA Rule 206(b), 29 CFR 2704.206(b) (providing for a stay of EAJA proceedings under certain circumstances) and the 30-day requirement for answering the EAJA application. The Secretary suggested that the Commission should revise its rules to require that the Secretary file an answer within 30 days after service of an application unless the matter has been stayed under Rule 206(b), in which case the Secretary must file an answer within 30 days after the expiration of the stay.

In the NPRM, the Commission agreed with the Secretary's suggestion and proposed amending EAJA Rule 302(a), which provides guidance regarding the filing of an answer, to clarify that an answer must be filed within 30 days after service of an application unless the matter has been stayed under EAJA Rule 206(b). 71 FR 565, January 5, 2006. The Commission received no objections to the proposed change and adopts the rule as proposed.

C. Part 2705—Privacy Act Implementation

29 CFR 2705.1

Privacy Act Rules and the Commission's Case Files Under the Mine Act

After publication of the ANPRM, the Commission examined its practices under the Privacy Act of 1974, 5 U.S.C. 552a (2000), to determine whether any revisions to its rules implementing the Privacy Act were necessary. In the NPRM, the Commission proposed revising 29 CFR 2705.1 to clarify that the Commission's Privacy Act rules do not apply to its files generated under the Mine Act. 71 FR 565, January 5, 2006. The Commission recognized that its files that pertain to its personnel are covered by the Privacy Act. *Id.* Certain Commission files are retrievable by a "personal identifier," one of the criteria for coverage under the Privacy Act. Those files involve circumstances arising under the Mine Act when a case adjudicatory file may bear the name of an individual, such as miner discrimination complaints under 30 U.S.C. 815(c); violations involving operators that do business as sole proprietorships; violations involving individual directors, owners, or officers under 30 U.S.C. 820(c); violations involving miners for carrying smoking materials under 30 U.S.C. 820(g); and persons charged with giving advance notice of mine inspections under 30 U.S.C. 820(e). The Commission explained, however, that while these files are retrievable by a personal identifier, it is not apparent that files generated in Mine Act enforcement proceedings are "records" within the meaning of the Privacy Act. *Id.*

The Commission received no comments on the issue. The Commission adopts the rule as proposed.

Miscellaneous

Electronic Filing

The Commission is considering the feasibility of electronic filing and may consider initiating a program that would permit the electronic filing of limited categories of documents in proceedings on a voluntary basis. If the Commission determines that electronic filing is feasible, the Commission will amend its rules as necessary.

III. Matters of Regulatory Procedure

The Commission has determined that these rules are not subject to the Office of Management and Budget ("OMB") review under Executive Order 12866, 58 FR 51735, September 30, 1993.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that these rules will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

List of Subjects

29 CFR Part 2700

Administrative practice and procedure, Mine safety and health, Penalties, Whistleblowing.

29 CFR Part 2704

Claims, Equal access to justice, Lawyers.

29 CFR Part 2705

Privacy.

■ For the reasons stated in the preamble, the Commission amends 29 CFR parts 2700, 2704, and 2705 as follows:

PART 2700—PROCEDURAL RULES

■ 1. The authority citation for part 2700 continues to read as follows:

Authority: 30 U.S.C. 815, 820, and 823.

■ 2. Section 2700.1 is amended by revising paragraphs (a) and (b) to read as follows:

§ 2700.1 Scope; applicability of other rules; construction.

(a) *Scope.* (1) This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission ("the Commission") and its Administrative Law Judges. The Commission is an adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act"). The Commission is an independent agency, not a part of nor affiliated in any way with the U.S. Department of Labor or its Mine Safety and Health Administration ("MSHA"). The location of the Commission's headquarters is at 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; its primary phone number is 202–434–9900; and the fax number of its Docket Office is 202–434–9954. The Commission maintains a Web site at *http://www.fmshrc.gov* where these rules, recent and many past decisions of the Commission and its Judges, and other information regarding the Commission, can be accessed.

(2) Unless the Commission provides otherwise, amendments to these rules are effective 60 days following publication in the **Federal Register**, and apply to cases initiated after they take effect. They also apply to further proceedings in cases pending on the effective date, except to the extent that application of the amended rules would not be feasible, or would work injustice, in which event the former rules of procedure would continue to apply.

(b) *Applicability of other rules.* On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

* * * * *

■ 3. Section 2700.5 is amended by redesignating paragraphs (d), (e), (f), and (g) as (e), (f), (g), and (i), revising newly redesignated paragraphs (e), (f), and (g), and adding new paragraphs (d) and (h) to read as follows:

§ 2700.5 General requirements for pleadings and other documents; status or informational requests.

* * * * *

(d) *Privacy considerations.* Persons submitting information to the Commission shall protect information that tends to identify certain individuals or tends to constitute an unwarranted intrusion of personal privacy in the following manner:

(1) All but the last four digits of social security numbers, financial account numbers, driver's license numbers, or other personal identifying numbers, shall be redacted or excluded;

(2) Minor children shall be identified only by initials;

(3) If dates of birth must be included, only the year shall be used;

(4) Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.

(e) *Manner and effective date of filing.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be filed with a Judge or the Commission by any means of delivery a party chooses, including facsimile transmission. With the exception of documents filed pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings), or subpart F (Applications for temporary relief), documents filed by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. Parties filing by facsimile are also required to file the original document with the Judge or Commission within 3 days of the facsimile transmission.

(2) When filing is by personal delivery or facsimile, filing is effective upon successful receipt by the Commission. When filing is by mail, filing is effective upon mailing, except that the filing of a petition for discretionary review, a petition for review of a temporary reinstatement order, a motion for extension of time, a motion for summary decision, or a motion to exceed page limit is effective upon receipt. *See* §§ 2700.9(a), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f).

(f) *Number of copies.* In cases before a Judge, unless otherwise ordered, the original document, along with one copy for each docket, shall be filed; in cases before the Commission, the original and six copies shall be filed; but if the filing party is not represented by a lawyer, the original shall be sufficient. When filing is by facsimile transmission, the original must be filed with the Judge or Commission within 3 days of the facsimile transmission, but no additional copies should be filed.

(g) *Form of pleadings.* All printed material shall appear in at least 12-point type on paper 8½ by 11 inches in size, with margins of at least 1 inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph or the use of compacted or otherwise compressed printing features may be grounds for rejection of a pleading.

(h) *Citation to a decision of a Judge.* Each citation to a decision of a Judge should include "(ALJ)" at the end of the citation.

* * * * *

■ 4. Section 2700.7 is amended by revising paragraph (c) to read as follows:

§ 2700.7 Service.

* * * * *

(c) *Methods of service.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be served by any means of delivery a party chooses, including facsimile transmission. With the exception of documents served pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings),

or subpart F (Applications for temporary relief), documents served by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. When filing by facsimile transmission (*see* § 2700.5(e)), the filing party must also serve by facsimile transmission or, if service by facsimile transmission is impossible, the filing party must serve by a third-party commercial overnight delivery service or by personal delivery.

(2) When service is by personal delivery or facsimile, service is effective upon successful receipt by the party intended to be served. When service is by mail, service is effective upon mailing.

* * * * *

■ 5. Section 2700.8 is revised to read as follows:

§ 2700.8 Computation of time.

Except to the extent otherwise provided herein (see, *e.g.*, § 2700.45), the due date for a pleading or other deadline for party or Commission action (hereinafter "due date") is determined sequentially as follows:

(a) When the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and Federal holidays shall be excluded in determining the due date.

(b) When a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days beyond the date otherwise prescribed, after consideration of paragraph (a) of this section where applicable.

(c) The day from which the designated period begins to run shall not be included in determining the due date. The last day of the prescribed period for action, after consideration of paragraphs (a) and (b) of this section where applicable, shall be included and be the due date, unless it is a Saturday, Sunday, Federal holiday, or other day on which the Commission's offices are not open or the Commission is open but unable to accept filings, in which event the due date shall be the next day which is not one of the aforementioned days.

Example 1: A motion is filed with the Commission on Friday, July 1, 2005. Under § 2700.10(d), other parties in the proceeding have 8 days in which to respond to the motion. Because the response period is less than 11 days, intervening weekends and holidays, such as Monday, July 4, 2005, are excluded in determining the due date. A response is thus due by Thursday, July 14, 2005. In addition, those parties not served with the motion on the day it was filed, such as by facsimile or messenger, have 5 additional calendar days in which to respond, or until Tuesday, July 19, 2005.

Example 2: A Commission Judge issues his final decision in a case on Friday, July 1, 2005. Under § 2700.70(a), parties have until July 31, 2005, to file with the Commission a petition for discretionary review of the Judge's decision. Even though the decision was mailed, 5 additional calendar days are not added, because paragraph (b) of this section only applies to actions in response to parties" pleadings. However, because July 31, 2005, is a Sunday, the actual due date for the petition is Monday, August 1, 2005.

■ 6. Section 2700.9 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§ 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

(c) This rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Act, 30 U.S.C. 823(d)(2)(A)(i), and § 2700.70(a).

■ 7. Section 2700.10 is amended by revising paragraph (c) and the first sentence of paragraph (d) to read as follows:

§ 2700.10 Motions.

* * * * *

(c) Prior to filing any motion other than a dispositive motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.

(d) A statement in opposition to a written motion may be filed by any party within 8 days after service upon the party. * * *

■ 8. Section 2700.21 is amended by:

■ A. Revising the heading;

■ B. Designating the existing text as paragraph (b); and

■ C. Adding new paragraph (a).

The revision and addition read as follows:

§ 2700.21 Effect of filing notice of contest of citation or order

(a) The filing of a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act, 30 U.S.C. 815(a), which is based on that citation or order. A challenge to such a proposed penalty assessment must be filed as a separate notice of contest of the proposed penalty assessment. *See* § 2700.26.

* * * * *

■ 9. Section 2700.26 is revised to read as follows:

§ 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

■ 10. Section 2700.28 is amended by revising paragraph (b) to read as follows:

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

* * * * *

(b) *Contents.* The petition for assessment of penalty shall:

(1) List the alleged violations and the proposed penalties. Each violation shall be identified by the number and date of the citation or order and the section of the Act or regulations alleged to be violated.

(2) Include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i), unless a single penalty assessment has been proposed under 30 CFR 100.4.

(3) State whether the citation or order has been contested pursuant to § 2700.20 and the docket number of any contest proceeding.

(4) Advise the party against whom the petition is filed that an answer to the petition must be filed within 30 days pursuant to § 2700.29 and that the answer must be filed regardless of whether the party has already filed a notice of contest of the citation, order,

or proposed penalty assessment involved.

* * * * *

■ 11. Section 2700.45 is amended by revising paragraph (a), the first and last sentences of paragraph (c), and paragraphs (e), (f), and (g) to read as follows:

§ 2700.45 Temporary reinstatement proceedings.

(a) *Service of pleadings.* A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be expeditiously served on all parties, such as by personal delivery, including courier service, by express mail, or by facsimile transmission.

* * * * *

(c) *Request for hearing.* Within 10 calendar days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested.

* * * If a hearing on the application is requested, the hearing shall be held within 10 calendar days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

* * * * *

(e) *Order on application.* (1) Within 7 calendar days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge.

(2) The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought.

(3) The parties shall be notified of the Judge's determination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(4) A Judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

(f) *Review of order.* Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned "Petition for Review of Temporary Reinstatement Order," with supporting arguments, within 5 business days following receipt of the Judge's written order. The filing of any such petition is effective upon receipt. The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be filed within 5 business days following service of a petition. Pleadings under this rule shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery. The Commission's ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 calendar days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

(g) *Dissolution of order.* If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

■ 12. Section 2700.51 is revised to read as follows:

§ 2700.51 Hearing dates and sites.

All cases will be assigned a hearing date and site by order of the Judge. In fixing the time and place of the hearing, the Judge shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

■ 13. Section 2700.52 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 2700.52 Expedition of proceedings.

(a) *Motions.* In addition to making a written motion pursuant to § 2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties. * * *

* * * * *

■ 14. Section 2700.56 is amended by revising paragraphs (d) and (e) to read as follows:

§ 2700.56 Discovery; general.

* * * * *

(d) *Initiation of discovery.* Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821.

(e) *Completion of discovery.* Discovery shall not unduly delay or otherwise impede disposition of the case, and must be completed at least 20 days prior to the scheduled hearing date. For good cause shown, the Judge may extend or shorten the time for discovery.

■ 15. Section 2700.67 is amended by:

■ A. Revising paragraph (a);

■ B. Revising paragraph (c);

■ C. Redesignating paragraph (d) as (f); and

■ D. Adding new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 2700.67 Summary decision of the Judge.

(a) *Filing of motion for summary decision.* At any time after commencement of a proceeding and no later than 25 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

* * * * *

(c) *Form of motion.* A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.

(d) *Form of opposition.* An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference

to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.

(e) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

■ 16. Section 2700.69 is amended by adding a new last sentence to paragraph (c) and a new paragraph (d) to read as follows:

§ 2700.69 Decision of the Judge.

* * * * *

(c) *Correction of clerical errors.* * * * Neither the filing of a motion to correct a clerical error, nor the issuance of an order or amended decision correcting a clerical error, shall toll the time for filing a petition for discretionary review of the Judge's decision on the merits.

(d) *Effect of decision of Judge.* A decision of a Judge is not a precedent binding upon the Commission.

■ 17. Section 2700.70 is amended by revising the second sentence of paragraph (a) and paragraph (f) to read as follows:

§ 2700.70 Petitions for discretionary review.

(a) *Procedure.* * * * Filing of a petition for discretionary review is effective upon receipt. * * *

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

§ 2700.72 [Removed]

■ 18. Section 2700.72 is removed and reserved.

■ 19. Section 2700.74 is amended by revising the third sentence of paragraph (a) and adding a new paragraph (d) to read as follows:

§ 2700.74 Procedure for participation as amicus curiae.

(a) * * * A motion for participation as amicus curiae shall set forth the interest of the movant; indicate which party's position, if any, the movant supports; the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case; and show that the granting of the motion will not unduly delay the proceeding or prejudice any party; * * *

* * * * *

(d) Any person who does not support a party in the proceeding must file its motion for participation as amicus curiae and brief no later than 20 days after initial briefs are filed (*see* § 2700.75(a)(1)). A motion for participation as amicus curiae must comply with the requirements set forth in paragraph (a) of this section. A brief of amicus curiae must comply with § 2700.75(c).

■ 20. Section 2700.75 is amended by revising paragraphs (f) and (g) and adding new paragraph (h) to read as follows:

§ 2700.75 Briefs.

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(g) *Number of copies.* As provided in § 2700.5(f), each party shall file the original and six copies of its brief. If the filing party is not represented by a lawyer, the original shall be sufficient. When filing is by facsimile transmission, the original must be filed with the Commission within 3 days of the facsimile transmission, but no additional copies should be filed.

(h) *Table of contents.* Each opening and response brief filed with the Commission shall contain a table of contents. Unless otherwise ordered by the Commission, a party is not required to submit a table of contents for a previously filed petition for discretionary review that has been designated as the party's opening brief pursuant to paragraph (a) of this section.

■ 21. Section 2700.76 is amended by revising paragraph (c) to read as follows:

§ 2700.76 Interlocutory review.

* * * * *

(c) *Briefs.* When the Commission grants interlocutory review, it shall also issue an order which addresses page limits on briefs and the sequence and schedule for filing of initial briefs, and, if permitted by the order, reply briefs.

* * * * *

■ 22. Section 2700.78 is amended by revising paragraph (b) to read as follows:

§ 2700.78 Reconsideration.

* * * * *

(b) Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not stay the effect of a decision or order of the Commission.

■ 23. Section 2700.80 is amended by revising paragraph (a) to read as follows:

§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

* * * * *

§ 2700.84 [Removed]

■ 24. Section 2700.84 is removed.

PART 2704—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN COMMISSION PROCEEDINGS

■ 25. The authority citation for part 2704 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1); Public Law 99–80, 99 Stat. 183; Public Law 104–121, 110 Stat. 862.

■ 26. Section 2704.100 is revised to read as follows:

§ 2704.100 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of

attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission's general rules of procedure, part 2700 of this chapter, apply where appropriate.

■ 27. Section 2704.104 is amended by removing paragraph (b)(2), redesignating paragraphs (b)(3) and (b)(4) as paragraphs (b)(2) and (b)(3), and revising paragraph (c) to read as follows:

§ 2704.104 Eligibility of applicants.

* * * * *

(c) For the purposes of awards for non-prevailing parties under § 2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 13 CFR part 121.

* * * * *

■ 28. Section 2704.105 is amended by revising paragraph (b) introductory text to read as follows:

§ 2704.105 Standards for awards.

* * * * *

(b) If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant who does not prevail the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary's demand is substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to that decision. As used in this section, "demand" means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty—

* * * * *

■ 29. Section 2704.206 is amended by revising the second sentence of paragraph (a) and paragraph (c) to read as follows:

§ 2704.206 When an application may be filed.

(a) * * * An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. * * *

* * * * *

(c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. 815(d) and 823(d)) and unappealable, both within the Commission and to the courts (pursuant to section 106(a) of the Mine Act (30 U.S.C. 816(a)).

■ 30. Section 2704.302 is amended by revising the second sentence of paragraph (a) to read as follows:

§ 2704.302 Answer to application.

(a) * * * Unless counsel requests an extension of time for filing, files a statement of intent to negotiate under paragraph (b), or a proceeding is stayed pursuant to § 206(b), failure to file an answer within the 30-day period may be treated as a consent to the award requested.

* * * * *

PART 2705—PRIVACY ACT IMPLEMENTATION

■ 31. The authority citation for part 2705 continues to read as follows:

Authority: 5 U.S.C. 552a; Public Law 93–579, 88 Stat. 1896.

■ 32. Section 2705.1 is amended by republishing the introductory text and revising paragraph (a) to read as follows:

§ 2705.1 Purpose and scope.

The purposes of these regulations are to:

(a) Establish a procedure by which an individual can determine if the Federal Mine Safety and Health Review Commission, hereafter the "Commission," maintains a system of records which includes a record pertaining to the individual. This does not include Commission files generated in adversary proceedings under the Federal Mine Safety and Health Act; and

* * * * *

Dated: July 28, 2006.

Michael F. Duffy,

Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. 06–6642 Filed 8–3–06; 8:45 am]

BILLING CODE 6735–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD13–06–038]

RIN 1625–AA08

Special Local Regulations, Seattle Seafair, Lake Washington, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations (SLR) for the Seattle Seafair, Lake Washington, Washington. These special local regulations limit the movement of non-participating vessels in the regulated race area and provide for a viewing area for spectator craft. This rule is needed to provide for the safety of life on navigable waters during Seafair. The rule adds four hours to the effective time period of the existing SLR to accommodate the addition of a fireworks display in this year's Seafair.

DATES: This rule is effective from 8 p.m. (PDT) until 11:59 p.m. (PDT) on August 5, 2006 unless sooner cancelled by the Captain of the Port.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket [CGD13–06–038] and are available for inspection or copying at the Waterways Management Division, Coast Guard Sector Seattle, 1519 Alaskan Way South, Seattle, WA 98134, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Jessica Hagen, c/o Captain of the Port Puget Sound, 1519 Alaskan Way South, Seattle, Washington 98134, (206) 217–6200.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. The Coast Guard was not notified about the fireworks show until July 19, 2006. Under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for not publishing a NPRM and for making this rule effective less than 30 days after publication in the **Federal Register.** Publishing a NPRM would be contrary to public interest since immediate action is necessary to ensure the safety of commercial and recreational vessels in the vicinity of the fireworks on the date and times this rule will be in effect. If normal notice and comment procedures were followed, this rule would not become effective until after the date of the event.

On July 2, 2001, the Coast Guard published a final rule (66 FR 34822) modifying the regulations in 33 CFR 100.1301 for the safe execution of the Seattle Seafair Unlimited Hydroplane races on the waters of Lake Washington. This SLR provides for a regulated area to protect spectators while providing unobstructed vessel traffic lanes to ensure timely arrival of emergency response craft. Movements are regulated for all vessels in the area as described under 33 CFR 100.1301 or unless otherwise regulated by the COTP or his designee. This temporary final rule is required to increase the length of time affected by the regulation.

Background and Purpose

For more than 50 years Seafair on Lake Washington has been a Pacific Northwest tradition, entertaining millions of people over that period. However, this entertaining event involves risks to both spectators and participants. During Seafair, the marine congestion associated with the number of boats, swimmers, and spectators on shore challenges even the most experienced seaman. These conditions necessitate the maintenance of a regulated area to protect spectators while providing unobstructed vessel traffic lanes to ensure timely arrival of emergency response craft.

The Coast Guard is establishing special local regulations to provide for the safety of boaters during a fireworks display. The Coast Guard is establishing these regulations to protect vessels and persons from the hazards associated with the fallout of burning embers that will be generated by the fireworks. The regulated area is also intended to protect boaters from the hazards associated with excessive vessel congestion associated with Seafair's activities.

Discussion of Rule

This rule will control the movement of all vessels in a regulated area on Lake Washington as indicated in section 2 of this Temporary Final Rule. This rule adds four hours to the effective time period of the existing SLR to accommodate the addition of a fireworks display for this year's Seafair.

The Coast Guard, through this action, intends to promote the safety of personnel and vessels in the area. The regulated areas will be enforced by the U.S. Coast Guard. The Captain of the Port may be assisted in the enforcement of the regulations by other federal, state, or local agencies.

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).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This change slightly modifies existing safety regulations, and should not effect the economic activities of any Seafair participant or spectator. The regulation is established for the benefit and safety of the recreational boating public, and any negative recreational boating impact is offset by the benefits of allowing the fireworks event to occur. This rule is effective from 8 p.m. until 11:59 p.m. on August 5, 2006. For the above reasons, the Coast Guard does not anticipate any significant economic impact.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), the Coast Guard 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 temporary rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit this portion of Lake Washington during the time this regulation is in effect. The regulations will not have a significant economic impact due to its short duration and the limited area of enforcement.

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 rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This 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 rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs

the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those costs. This rule would not impose an unfunded mandate.

Taking of Private Property

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

Protection of Children

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

Indian Tribal Governments

The Coast Guard recognizes the rights of Native American Tribes under the Stevens Treaties. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies to mitigate tribal concerns. We have determined that safety zones and fishing rights protection need not be incompatible. We have also determined that this Temporary Final 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. Nevertheless, Indian Tribes that have questions concerning the provisions of this Temporary Final Rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT.**

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.1D and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule.

List of Subjects in 33 CFR Part 100

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

■ For the reasons discussed in the preamble, the Coast Guard amends part 100 of Title 33, Code of Federal Regulations, as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; Department of Homeland Security Delegation No. 0170.1.

■ 2. From 8 p.m. until 11:59 p.m. on August 5, 2006, a temporary § 100.T13–023 is added to read as follows:

§ 100.T13–023 Special Local Regulations, Seattle Seafair, Lake Washington, WA.

(a) This section is in effect from 8 p.m. until 11:59 p.m. on August 5, 2006 unless sooner cancelled by the Captain of the Port.

(b) The area where the Coast Guard will restrict general navigation by this regulation during the hours it is in effect is: The waters of Lake Washington bounded by the Interstate 90 (Mercer Island/Lacey V. Murrow) Bridge, the western shore of Lake Washington, and the east/west line drawn tangent to Bailey Peninsula and along the shoreline of Mercer Island.

(c) The area described in paragraph (b) of this section has been divided into two zones. The zones are separated by a line perpendicular from the I–90 Bridge to the northwest corner of the East log boom and a line extending from the southeast corner of the East log boom to the southeast corner of the hydroplane race course and then to the northerly tip of Ohlers Island in Andrews Bay. The western zone is designated Zone I, the eastern zone, Zone II. (Refer to NOAA Chart 18447).

(d) The Coast Guard will maintain a patrol consisting of Coast Guard vessels, assisted by Auxiliary Coast Guard vessels, in Zone II. The Coast Guard patrol of this area is under the direction of the Coast Guard Patrol Commander (the "Patrol Commander"). The Patrol Commander is empowered to control the movement of vessels on the racecourse and in the adjoining waters during the period this regulation is in effect. The Patrol Commander may be assisted by other federal, state and local law enforcement agencies.

(e) Only authorized vessels may be allowed to enter Zone I during the hours this regulation is in effect. Vessels in the vicinity of Zone I shall maneuver and anchor as directed by Coast Guard Officers or Petty Officers.

(f) During the times in which the regulation is in effect, swimming, wading, or otherwise entering the water in Zone I by any person is prohibited.

(g) During the times in which the regulation is in effect, any person swimming or otherwise entering the water in Zone II shall remain within ten (10) feet of a vessel.

(h) During the times this regulation is in effect, rafting to a log boom will be limited to groups of three vessels.

(i) During the times this regulation is in effect, up to six (6) vessels may raft together in Zone II if none of the vessels are secured to a log boom.

(j) During the times this regulation is in effect, only vessels authorized by the Patrol Commander, other law enforcement agencies or event sponsors shall be permitted to tow other watercraft or inflatable devices.

(k) Vessels permitted to proceed through either Zone I or Zone II during the hours this regulation is in effect shall do so only at speeds which will create minimum wake, seven (07) miles per hour or less. This maximum speed may be reduced at the discretion of the Patrol Commander.

(l) Upon completion of the daily racing activities, all vessels leaving either Zone I or Zone II shall proceed at speeds of seven (07) miles per hour or less. The maximum speed may be reduced at the discretion of the Patrol Commander.

(m) A succession of sharp, short signals by whistle or horn from vessels patrolling the areas under the direction of the Patrol Commander shall serve as signal to stop. Vessels signaled shall stop and shall comply with the orders of the patrol vessel; failure to do so may result in expulsion from the area, citation for failure to comply, or both. The Coast Guard may be assisted by other Federal, state and local law enforcement agencies, as well as official Seafair event craft.

Dated: July 26, 2006.

R. Houck,

Rear Admiral, U.S. Coast Guard, Commander, Thirteenth Coast Guard District.

[FR Doc. E6–12582 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD05–06–042]

RIN 1625–AA08

Special Local Regulations for Marine Events; Susquehanna River, Port Deposit, MD

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing permanent special local regulations for "Ragin' on the River", a power boat race held annually each Labor Day weekend on the waters of the Susquehanna River adjacent to Port Deposit, Maryland. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in portions of the Susquehanna River adjacent to Port Deposit, Maryland during the power boat race.

DATES: This rule is effective August 21, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket (CGD05–06–042) and are available for inspection or copying at Commander (dpi), Fifth Coast Guard District, 431 Crawford Street, Portsmouth, Virginia 23704–5004, between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Dennis Sens, Project Manager, Inspections and Investigations Branch, at (757) 398–6204.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On May 4, 2006, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations for Marine Events; Susquehanna River, Port Deposit, MD in the **Federal Register** (71 FR 26287). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Any delay encountered in this regulation's effective date would be contrary to the public interest since the safety zone is needed to prevent traffic from transiting a portion of the Susquehanna River during the marine event thus ensuring that the maritime public is protected from any potential harm associated with such an event.

Background and Purpose

Annually, during Labor Day weekend, the Port Deposit, Maryland Chamber of Commerce sponsors the "Ragin' on the River" power boat race, on the waters of the Susquehanna River. The event consists of approximately 60 inboard hydroplanes and runabouts racing in heats counter-clockwise around an oval racecourse. A fleet of spectator vessels gather nearby to view the competition. Due to the need for vessel control during the event, vessel traffic will be temporarily restricted to provide for the safety of participants, spectators and transiting vessels.

Discussion of Comments and Changes

The Coast Guard did not receive comments in response to the notice of proposed rulemaking (NPRM) published in the **Federal Register.** Accordingly, the Coast Guard is establishing temporary special local regulations on specified waters of the Susquehanna River, Port Deposit, Maryland.

The event enforcement time was adjusted to start 1 hour earlier than what was indicated in the NPRM. Enforcement of this section was changed from 11:30 a.m. to 10:30 a.m to allow the Coast Guard Patrol Commander ample time to clear the regulated area prior to the event.

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).

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

Although this regulation prevents traffic from transiting a portion of the Susquehanna River adjacent to Port Deposit, Maryland during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, area newspapers and radio stations so mariners can adjust their plans accordingly.

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 would not have a significant economic impact on

a substantial number of small entities. This rule will effect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in this portion of the Susquehanna River during the event.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for only a short period, annually from 10:30 a.m. to 6:30 p.m. on Saturday and Sunday of Labor Day weekend. Although the regulated area will apply to the entire width of the river, traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander. In the case where the Patrol Commander authorizes passage through the regulated area during the event, vessels shall proceed at the minimum speed necessary to maintain a safe course that reduces wake near the race course. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

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 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 Dennis Sens, Project Manager, Inspections and Investigations Branch, at (757) 398–6204. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule 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 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 would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination 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, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction, from further environmental documentation.

Under figure 2–1, paragraph (34)(h), of the Instruction, an "Environmental Analysis Check List" is not required for this rule.

List of Subjects in 33 CFR Part 100

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

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233, Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 100.535 to read as follows:

§ 100.535 Susquehanna River, Port Deposit, Maryland.

(a) *Regulated area.* A regulated area is established for the waters of the Susquehanna River, adjacent to Port Deposit, Maryland, from shoreline to shoreline, bounded on the south by the U.S. I–95 fixed highway bridge, and bounded on the north by a line running southwesterly from a point along the shoreline at latitude 39°36′22″ N, longitude 076°07′08″ W, thence to latitude 39°36′00″ N, longitude 076°07′46″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions.* (1) Coast Guard Patrol Commander means a commissioned, warrant, or petty officer of the Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* means all vessels participating in the "Ragin' on the River" power boat race under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector Baltimore.

(c) *Special local regulations.* (1) Except for event participants and persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must: (i) Stop the vessel immediately when directed to do so by any official patrol.

(ii) Proceed as directed by any official patrol.

(iii) All persons and vessels must comply with the instructions of the Official Patrol. The operator of a vessel in the regulated area shall stop the vessel immediately when instructed to do so by the Official Patrol and then proceed as directed. When authorized to transit the regulated area, all vessels shall proceed at a minimum safe speed necessary to maintain a safe course that minimizes wake near the race course.

(d) This section will be enforced annually from 10:30 a.m. to 6:30 p.m. on Saturday and Sunday of Labor Day weekend. If the races are postponed due to weather, then the special local regulations will be enforced during the same time period on Monday, Labor Day. A notice of enforcement of this section will be published annually in the **Federal Register** and disseminated through the Fifth District Local Notice to Mariners and marine safety radio broadcasts.

Dated: July 17, 2006.

S.H. Ratti,

Captain, U.S. Coast Guard, Commander, Fifth Coast Guard District, Acting.

[FR Doc. E6–12657 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–06–017]

RIN 1625–AA00

Safety Zone; Beverly Homecoming Fireworks, Beverly, MA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Beverly Homecoming Fireworks Display on August 6, 2006 in Beverly, Massachusetts, temporarily closing all waters of Beverly Harbor within a four hundred (400) yard radius of the fireworks barge located at approximate position 42°33.35″ N, 070°52.00″ W. This zone is necessary to protect the maritime public from the potential hazards posed by a fireworks display. The safety zone temporarily prohibits entry into or movement within this portion of Beverly Harbor during its closure period. Entry into this zone is prohibited unless authorized by the Captain of the Port, Boston, Massachusetts.

DATES: This rule is effective from 8:30 p.m. until 10 p.m. on August 6, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket CGD01–06–017 and are available for inspection or copying at Sector Boston, 427 Commercial Street, Boston, MA, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Petty Officer Paul English, Sector Boston, Waterways Management Division, at (617) 223–5456.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM because the logistics with respect to the fireworks presentation were not presented to the Coast Guard with sufficient time to draft and publish an NPRM. Any delay encountered in this regulation's effective date would be contrary to the public interest since the safety zone is needed to prevent traffic from transiting a portion of Beverly Harbor during the fireworks display and to provide for the safety of life on navigable waters.

For the same reasons, the Coast Guard finds, under 5 U.S.C. 553(d)(3), that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The zone should have a minimal negative impact on vessel transits in Beverly Harbor because vessels will be excluded from the area for only one and one half hours, and vessels can still operate in other areas of the harbor during the event.

Background and Purpose

The City of Beverly, Massachusetts is holding a fireworks display in honor of the Beverly Homecoming. This rule establishes a temporary safety zone on the waters of Beverly Harbor within a four hundred (400) yard radius of the fireworks barge located at approximate position 42°33.35″ N, 070°52.00″ W. This safety zone is necessary to protect the life and property of the maritime public from the potential dangers posed by this event. It will protect the public by prohibiting entry into or movement within the proscribed portion of Beverly Harbor during the fireworks display.

Marine traffic may transit safely outside of the zone during the effective period. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this event. Public notifications will be made prior to and during the effective period via safety marine information broadcasts and Local Notice to Mariners.

Discussion of Rule

This rule is effective from 8:30 p.m. until 10 p.m. on August 6, 2006. Marine traffic may transit safely outside of the safety zone in the majority of Beverly Harbor during the event. Given the limited time-frame of the effective period of the zone, the size of the harbor and the size of the zone itself, the Captain of the Port anticipates minimal negative impact on vessel traffic due to this event. Public notifications will be made prior to and during the effective period via Local Notice to Mariners and marine information broadcasts.

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.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. Although this rule will prevent traffic from transiting a portion of Beverly Harbor during this event, the effect of this rule will not be significant for several reasons: vessels will be excluded from the area of the safety zone for only one and one half hours, although vessels will not be able to transit the harbor in the vicinity of the zone, they will be able to operate in other areas of the harbor during the effective period; and advance notifications will be made to the local maritime community by marine information broadcasts and Local Notice to Mariners.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in a portion of Beverly Harbor from 8:30 p.m. until 10 p.m. on August 6, 2006. This safety zone will not have a significant economic impact on a substantial number of small entities for the reason described under the Regulatory Evaluation section.

Assistance for Small Entities

Under subsection 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 rule so that they can better evaluate its effects on them and participate in the rulemaking process. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Chief Petty Officer Paul English, Sector Boston, Waterways Management Division, at (617) 223–5456.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

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 does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy

Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded 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. This rule fits the category selected from paragraph (34)(g), as it would establish a safety zone. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 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. Add temporary § 165.T06–017 to read as follows:

§ 165.T–01–017 Safety Zone: Beverly Homecoming Fireworks, Beverly, MA.

(a) *Location.* The following area is a safety zone: All waters of Beverly Harbor, from surface to bottom, within a four hundred (400) yard radius of the fireworks barge located at approximate position 42°33.35″ N, 070°52.00″ W.

(b) *Effective Date.* This rule is effective from 8:30 p.m. until 10 p.m. on August 6, 2006.

(c) *Definitions.* As used in this section *Designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port (COTP).

(d) *Regulations.* (1) In accordance with the general regulations in 165.23 of this part, entry into or movement within this zone by any person or vessel is prohibited unless authorized by the Captain of the Port (COTP), Boston or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the COTP's designated representative.

Dated: July 24, 2006.

James L. McDonald,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. E6–12585 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–06–135]

RIN 1625–AA00

Safety Zone; Pentwater Homecoming Fireworks, Pentwater, MI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the Pentwater Homecoming Fireworks, Pentwater, Michigan. This safety zone is necessary to safeguard vessels and spectators from hazards associated with fireworks displays. This rule is intended to restrict vessel traffic from a portion of Lake Michigan.

DATES: This safety zone is effective from 9 p.m. to 11 p.m. on August 12, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD09–06–135 and are available for inspection or copying at U.S. Coast Guard Sector Lake Michigan between 7 a.m. (local) and 3:30 p.m. (local), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Chief Warrant Officer Brad Hinken, U.S. Coast Guard Sector Lake Michigan, at (414) 747–7154.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. The permit application was not received in time to publish an NPRM followed by a final rule before the effective date. Under 5 U.S.C. 553(d)(3), good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying this rule would be contrary to the public interest of ensuring the safety of spectators and vessels during this event and immediate action is necessary to prevent possible loss of life or property. The Coast Guard has not received any complaints or negative comments previously with regard to this event.

Background and Purpose

This temporary safety zone is necessary to ensure the safety of vessels and spectators from hazards associated with a fireworks display. Based on accidents that have occurred in other Captain of the Port zones, and the explosive hazards of fireworks, the Captain of the Port Lake Michigan has determined fireworks launches in close proximity to watercraft pose significant risk to public safety and property. The likely combination of large numbers of recreation vessels, congested waterways, darkness punctuated by bright flashes of light, alcohol use, and debris falling into the water could easily result in serious injuries or fatalities. Establishing a safety zone to control vessel movement around the location of the launch platform will help ensure the safety of persons and property at these events and help minimize the associated risks.

Discussion of Rule

A temporary safety zone is necessary to ensure the safety of spectators and vessels during the setup, loading and launching of a fireworks display in conjunction with the Pentwater Homecoming fireworks display. The fireworks display will occur between 9 p.m. and 11 p.m. on August 12, 2006.

The safety zone will encompass all waters of Lake Michigan within a 1000-foot radius of the fireworks launching site located on the north break wall in position 43°46.56″ N/086°26.38″ W (DATUM: NAD 83).

All persons and vessels must comply with the instructions of the Captain of the Port Lake Michigan or his designated on-scene representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Lake Michigan or his designated on-scene representative. The Captain of the Port Lake Michigan may be contacted via VHF Channel 16.

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).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. This determination is based upon the size and location of the safety zone within the waterway. Recreational vessels may transit through the safety zone with permission from the Captain of the Port Lake Michigan or his designated on-scene representative.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners and operators of vessels intending to transit or anchor in a portion of the Lake Michigan off Pentwater, Michigan, between 9 p.m. and 11 p.m. on August 12, 2006.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will be in effect for only two hours for one event and vessels can safely pass outside the safety zone during the event. In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of the Port Lake Michigan to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast to Mariners that the regulation is in effect.

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. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

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

Technical Standards

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

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would

limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, 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. A new temporary § 165.T09–135 is added to read as follows:

§ 165.T09–135 Safety Zone; Pentwater Homecoming Fireworks, Pentwater, Michigan.

(a) *Location.* The following area is a Safety Zone: All waters of Lake Michigan within a 1000-foot radius of the fireworks launching site located on the north break wall in position 43°46.56″ N/086°26.38″ W (DATUM: NAD 83).

(b) *Effective Period.* This safety zone is effective from 9 p.m. until 11 p.m. on August 12, 2006.

(c) *Regulations.* In accordance with the general regulations in Section 165.23 of this part, entry into this zone is subject to the following requirements:

(1) This safety zone is closed to all marine traffic, except as may be permitted by the Captain of the Port or his designated on-scene representative.

(2) The "designated on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Lake Michigan, to act on his behalf. The designated on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(3) Vessel operators desiring to enter or operate within the Safety Zone shall contact the Captain of the Port or his designated on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the Safety Zone must comply with all directions given to them by the Captain of the Port or his designed on-scene representative.

(4) The Captain of the Port may be contacted by telephone via the Sector Lake Michigan Operations Center at (414) 747–7182 during working hours. Vessels assisting in the enforcement of the Safety Zone may be contacted on VHF–FM channels 16.

Dated: July 26, 2006.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port Sector Lake Michigan.

[FR Doc. E6–12658 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No.: PTO–P–2006–0007]

RIN 0651–AC02

Clarification of Filing Date Requirements for *Ex Parte* and *Inter Partes* Reexamination Proceedings

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is, in this final rule making, revising the rules of practice relating to the filing date requirements for *ex parte* and *inter partes* reexamination proceedings for consistency with the provisions of the patent statute governing *ex parte* and *inter partes* reexamination proceedings, and to permit the Office to have the full statutory three months to address a request for reexamination that is complete. The Office is specifically revising the rules to require that a request for *ex parte* reexamination or for *inter partes* reexamination must meet all the applicable statutory and regulatory requirements before a filing date is accorded to the request for *ex parte* reexamination or for *inter partes* reexamination.

DATES: *Effective Date:* August 4, 2006.

Applicability Date: The changes in this final rule apply to any request for reexamination (*ex parte* or *inter partes*) filed on or after March 27, 2006.

FOR FURTHER INFORMATION CONTACT: By telephone—Kenneth M. Schor, at (571) 272–7710; by mail addressed to U.S. Patent and Trademark Office, Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, marked to the attention of Kenneth M. Schor; by facsimile transmission to (571) 273–7710 marked to the attention of Kenneth M. Schor; or by electronic mail message over the Internet addressed to *kenneth.schor@uspto.gov*.

SUPPLEMENTARY INFORMATION: The United States Patent and Trademark Office (Office) is revising the rules of practice in title 37 of the Code of Federal Regulations (CFR) to require that a request for *ex parte* reexamination or for *inter partes* reexamination must meet all the applicable statutory requirements in 35 U.S.C. 302 or 311 (respectively) and the regulatory requirements in § 1.510 or § 1.915 (respectively) before a filing date is accorded to the request for *ex parte* reexamination or for *inter partes* reexamination. Thus, the Office is amending the rules to clearly require compliance with all the requirements of filing an *ex parte* reexamination request set forth in § 1.510 before a filing date will be assigned to an *ex parte* reexamination request, and to clearly require compliance with all the requirements of filing an *inter partes* reexamination request set forth in § 1.915 before a filing date will be assigned to an *inter partes* reexamination request. The Office published an interim rule revising the rules of practice to implement this revision of the rules. *See Clarification of Filing Date Requirements for Ex Parte and Inter Partes Reexamination Proceedings*, 71 FR 9260 (February 23, 2006), 1304 *Off. Gaz. Pat. Office* 95 (March 21, 2006) (interim rule). This notice adopts the interim revision as a final revision of the rules of practice, while making stylistic and non-substantive changes to the relevant rules, which changes are discussed below.

Section 1.510 sets forth the requirements for the content of a request for *ex parte* reexamination. Section 1.915 sets forth the requirements for the content of a request for *inter partes* reexamination. Former § 1.510(d) stated that the filing date of a request for *ex parte* reexamination is "(1) The date on which the request including the entire fee for requesting reexamination is received in the Patent and Trademark Office; or (2) The date on which the last portion of the fee for requesting reexamination is received." In like manner, former § 1.919(a) stated that "[t]he filing date of a request for *inter partes* reexamination is the date on

which the request satisfies the fee requirement of § 1.915(a)." Given the former rule language, it may have appeared that compliance with the provisions of § 1.510(b) or § 1.915(b) was not required for obtaining a filing date in reexamination. However, 35 U.S.C. 302 (for *ex parte* reexamination) explicitly requires that "[t]he request must set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested." Likewise, 35 U.S.C. 311(b) (for *inter partes* reexamination) explicitly requires that the request must "include the identity of the real party in interest" and "set forth the pertinency and manner of applying cited prior art to every claim for which reexamination is requested." Reexamination requesters did not always comply with these statutory requirements when submitting requests for reexamination. Furthermore, the information missing due to a lack of compliance with § 1.510(b) or with § 1.915(b) was often relevant to the decision on whether to grant the request for reexamination. This presented a difficulty for the Office in view of the statutory requirements of 35 U.S.C. 303 (for *ex parte* reexamination) and 35 U.S.C. 312 (for *inter partes* reexamination) that the decision on the request must be issued within three months of the filing date of the request for reexamination, because the process of notifying the requester of the non-compliance and obtaining the missing information may very well extend beyond the three-month statutory deadline, or the information may be provided so close to the deadline that there is not sufficient time to properly evaluate it.

To address this problem, §§ 1.510(c) and (d) were revised via interim rule to clearly require compliance with all the requirements of §§ 1.510(a) and (b) in order to obtain an *ex parte* reexamination filing date (and a decision on the request for reexamination). Likewise, § 1.919(a) was revised to clearly require compliance with all the requirements of § 1.915 in order to obtain an *inter partes* reexamination filing date. This notice adopts the substance of the interim rule as final. It is to be noted that these changes should not have a significant impact on reexamination requesters, because the filing date in a reexamination proceeding does not have the same legal significance as the filing date in other Office patent proceedings (*cf.* 35 U.S.C. 102(b)). The rules now simply clearly recite that the statutory and regulatory requirements for a request for reexamination must be fulfilled before a filing date will be assigned.

Unless otherwise stated, the present final rule simply adopts, or essentially adopts, the regulatory language of the interim rule. Sections 1.510(c) and 1.915(d) have been revised for parallelism purposes from the text that appears in the interim rule. Anything that is more than sentence structure, grammar, or style is identified in the discussion below.

Section-by-Section Discussion

Section 1.11: Section 1.11(c) is revised to provide that any request for reexamination "for which all the requirements of § 1.510 or § 1.915 have been satisfied" will be announced in the *Official Gazette*. Previously, § 1.11(c) provided that all requests for reexamination "for which the fee under § 1.20(c) has been paid" would be announced in the *Official Gazette*. This change was inadvertently omitted in the interim rule, but is not one of substance. As per the interim rule and this final rule, where all the requirements of § 1.510 or § 1.915 have not been satisfied, a request filing date is not assigned. Obviously, the Office cannot announce the "date of the request * * * and the examining group to which the reexamination is assigned," since these do not exist until the requirements of § 1.510 or § 1.915 have been satisfied.

Section 1.510: Section 1.510(c) is revised to provide that if a request for *ex parte* reexamination does not: (1) Include the fee for requesting *ex parte* reexamination, and (2) comply with all the requirements of § 1.510(b); then the person identified as requesting reexamination will be notified and will generally be given an opportunity to complete the request within a specified time. If the request is not completed within the time specified, the request will not be granted a filing date and no decision on the request will be made. The request may be placed in the patent file as a citation if it complies with the requirements of § 1.501. Deleted from former § 1.510(c) (as it existed prior to the interim rule) is the sentence: "If the fee for requesting reexamination has been paid but the defect in the request is not corrected within the specified time, the determination whether or not to institute reexamination will be made on the request as it then exists."

Section 1.510(c) states that the requester will "generally" be given an opportunity to complete the request, because, in some instances, it may not be practical, or even possible, to provide an opportunity for completion of the request. For example, the request might be submitted anonymously (although such is not proper), or without an address, or with an inoperative address. In such instances, the requester would be notified of the incomplete request by publication in the *Official Gazette*, but an opportunity to complete the request would not be provided.

Section 1.510(d) is revised to provide that the filing date of the request for an *ex parte* reexamination request is the date on which the request satisfies all the requirements of § 1.510. Until that point, the request for reexamination is not complete. In the interim rule, the language employed was "the date on which the request satisfies all the requirements of paragraphs (a) and (b) of this section." The language now provided is "the date on which the request satisfies all the requirements of this section." This language is used for consistency with § 1.919 which states, as a result of the interim rule, "[t]he filing date of a request for *inter partes* reexamination is the date on which the request satisfies all the requirements for the request set forth in § 1.915."

Section 1.915: Section 1.915(d) is revised to provide that if a request for *inter partes* reexamination does not (1) include the fee for requesting *inter partes* reexamination, and (2) comply with all the requirements of § 1.915(b), then the person identified as requesting reexamination will be notified and will generally be given an opportunity to complete the request within a specified time. The interim rule inadvertently did not include, in the text of § 1.915(d), that the requester will be notified where the complete fee for requesting *inter partes* reexamination required by paragraph (a) was not provided, though it was included in the interim rule preamble. That omission has been rectified.

If the request is not completed within the time specified, the request will not be granted a filing date and no decision on the request will be made. Section 1.915(d) stated, prior to the change made via the interim rule, that the reexamination proceeding may be vacated under this circumstance. Based on the revision to § 1.919(a) set forth below, however, the *inter partes* request will not be granted a filing date under this circumstance in the first place; thus, there will be no reexamination proceeding to vacate.

Section 1.915(d) is revised to provide that, where the request was not given a filing date, the request will be placed in the patent file as a citation, if it complies with the requirements of § 1.501. This was not present in the interim rule, and conforms § 1.915(d) with § 1.510(c).

Section 1.915(d) states that the requester will "generally" be given an opportunity to complete the request, because, in some instances, it may not be practical, or even possible, to provide an opportunity for completion of the request (see the discussion of § 1.510(c)).

Section 1.919: Section 1.919(a) is revised to require that the request for *inter partes* reexamination must satisfy all the requirements for the request set forth in § 1.915, prior to assignment of a filing date. Until that point, the request for *inter partes* reexamination is not complete.

Response to comments: The Office received one set of written comments from a patent practitioner in response to the interim rule. The comments, and the Office's response to the comments, now follow:

The commenter stated, in support of the change made to the rules, that "[t]he Interim Rule is well-merited for the reasons stated in on pages 9260–61 of the notice. The Office deserves a full three months in which to decide whether there is a substantial new question of patentability, and no examiner should be rushed into a decision because the requester failed to comply with the statute or rules."

The commenter then pointed out one implementation concern, as follows:

"The rule should be easy to apply, with one potential exception—the statement of the pertinency and manner of applied cited prior art for every claim that is requested. See 35 U.S.C. 302, 311(b)(2); 37 CFR 1.510(b)(1)–(2), 1.915(b)(3). A request may initially appear (on intake) to contain this statement, but closer review (by the examiner) may reveal that the statement is not actually there. Under the Interim Rule, the filing date "is the date on which the request satisfies all the requirements for the request set forth in [the rule]". Thus, one might read the rule as saying that if a filing date is assigned, the Office has decided that the required statement is present, and an examiner may not revisit the issue. * * * In these situations, the examiner should be able to independently decide that the request fails to comply with the statute and rules. I therefore suggest that the rule be interpreted to allow the examiner to do this."

This comment is adopted to the extent that the examiner is permitted, by Office procedure, to independently assert to a deciding official of the Office that the request fails to comply with the statute and/or rules, even after a reexamination filing date is assigned to a request. The deciding Official will then evaluate the examiner's assertion, and will decide whether the filing date that was assigned should be vacated. This point has been addressed in the internal procedure established by the Office to implement the revision of the rules made via this rule. Such procedure will be described below in this final rule, and will be incorporated into the *Manual of Patent Examining Procedure* in its next revision.

The commenter further pointed out that the interim rule "describes the Interim Rule as mandating compliance with 'the statutory requirements' before the Office will assign a filing date. But the specific language of the interim rule [preamble] mandates compliance with rules—37 CFR 1.510(b) and 1.915(b)—and does not mention the statute. Those rules include non-statutory requirements, e.g., an *inter partes* requester's certificate of service on the patent owner, and an *inter partes* requester's certificate of non-estoppel. *See* 37 CFR 1.915(b)(6)–(7). While these rules are sensible and easy to meet, it would be more accurate to describe the Interim Rule as mandating compliance with 'statutory and regulatory requirements' before the Office will assign a filing date."

This comment is adopted, and the language is revised as set out in the preamble of this final rule.

Office Procedure to Implement the Revision of the Rules Made via this Final Rule: A request for reexamination is no longer assigned a filing date, upon receipt of the request in the Central Reexamination Unit (CRU). Rather, the CRU Legal Instrument Examiners (LIE) and Paralegals will check each request for compliance with the reexamination filing date requirements, prior to the assigning of a filing date. In order to obtain a reexamination filing date, the request papers must include all of the following:

(1) The complete reexamination fee. For *ex parte* reexamination, this is currently set at $2,520.00 in § 1.20(c)(1). For *inter partes* reexamination, this is currently set at $8,800.00 in § 1.20(c)(2).

(2) A statement pointing out *each* substantial new question of patentability based on the cited patents and publications (i.e., the cited prior art or double patenting art).

(3) An identification of *every* claim for which reexamination is requested.

(4) A detailed explanation of how *all* of the cited documents are applied to the claims for which reexamination is requested. For each identified substantial new question of patentability (SNQ), the request must explain how *all* of the cited documents identified for that SNQ are applied to meet/teach the claim limitations to thus establish the identified SNQ.

(5) A legible copy of *every* patent or printed publication relied upon or referred to in the request. (To conform to current practice, this provision is not being enforced to require copies of U.S. patents and U.S. patent publications; the provision is deemed waived to that extent.) It is to be noted that the required "copy of every patent or printed publication" is construed by the Office to be a legible copy, since a non-legible copy cannot be used. Any copy of a patent or printed publication received by the Office that is illegible will not be accepted, and will be deemed to have not been received by the Office.

(6) Some translation (at least of the relevant portion(s)) of any non-English language patent or printed publication.

(7) A legible copy of the entire patent to be reexamined. The copy must include the front face, drawings, and specification/claims (in double column format) of the printed patent, and each page must be plainly written on only one side of a sheet of paper.

(8) A legible copy of any disclaimer, certificate of correction, or reexamination certificate issued for the patent, each page plainly written on only one side of a sheet of paper.

(9) If the request is not filed by the patent owner—A certificate of service on the patent owner at the address as provided for in § 1.33(c). The name and address of the party served must be given in the certificate of service. If service was not possible, a duplicate copy of the request papers must be supplied to the Office together with a factual explanation of what efforts were made to effect service, and why they were not successful.

(10) If the request is filed by an attorney/agent and identifies another party on whose behalf the request is being filed, then a power of attorney must be attached, or the attorney/agent must be acting in a representative capacity pursuant to § 1.34.

For *inter partes* reexamination, the request papers must also include—

(11) A certification by the requester that the estoppel provisions of § 1.907 do not prohibit the *inter partes* reexamination being requested.

(12) A statement identifying the real party in interest for whom (on whose behalf) the request is being filed.

If it is determined that the request fails to meet one or more of the filing date requirements, the person identified as requesting reexamination will be so notified and will be given an opportunity to complete the requirements of the request within a specified time (generally thirty days). The new Office form used to provide the notification is a "Notice of Failure to Comply with * * * Reexamination Request Filing Requirements."

If after receiving a "Notice of Failure to Comply with * * * Reexamination Request Filing Requirements," the requester does not remedy the defects in the request papers that are pointed out, then the request papers will not be given a filing date, and a control number will not be assigned. The simplest case of a failure to remedy the defect(s) in the Notice is where the requester does not timely respond to the Notice. The other case is where requester does timely respond, but the response does not cure the defect(s) identified to requester and/or the response introduces a new filing date defect or deficiency. If the requester timely responds to the Notice, then the CRU LIE and Paralegal will check the request, as supplemented by the response, for correction of all non-compliant items identified in the Notice. If any identified non-compliant item has not been corrected, then a filing date (and a control number) will not be assigned to the request papers. It is to be noted that a single failure to comply with the "Notice of Failure to Comply with * * * Reexamination Request Filing Requirements" will ordinarily result in the reexamination request not being granted a filing date. Absent extraordinary circumstances (or some minor non-compliant item that can be rectified by a phone call which can be made at the Office's sole discretion), requester will be given only one opportunity to correct the non-compliance, i.e., only one opportunity for compliance with the Notice. Similarly, if the response introduces a new filing date defect or deficiency into the request papers, then the reexamination request will not be granted a filing date absent extraordinary circumstances. If the request papers are not timely made filing-date-compliant in response to the Office's Notice of Failure to Comply with * * * Reexamination Request Filing Requirements, then the LIE will prepare a "Notice of Disposition of * * * Reexamination Request." This notice will point out the disposition of the request papers (whether they are treated as a § 1.501 submission or discarded) and why.

After a filing date is assigned to the reexamination control number, the patent examiner reviews the request to decide whether to order the granting or denial of reexamination. If, in the process of reviewing the request, the examiner notes a non-compliant item not earlier recognized, then the examiner will then inform an appropriate deciding official of the Office. Upon confirmation of the existence of any such non-compliant item(s), a decision vacating the assigned reexamination filing date will be issued. In the decision, the requester will be notified of the non-compliant item(s) and given time to correct the non-compliance. Only *one* opportunity will be given to comply with the notice to the requester included in the decision vacating the filing date, unless: (1) Extraordinary circumstances exist, or (2) there are only a few minor non-compliant items that can be rectified by a phone call, in which case such a phone call may be made; however, that is at the Office's sole discretion.

The requester must completely respond to the notice provided in the Office's decision vacating the filing date by rectifying all identified defects in the request papers without adding any new defect. If the third party requester does not timely and completely respond to the Office's decision vacating the filing date, the Office will issue a decision pointing out the disposition of the request papers (whether treated as a § 1.501 submission or discarded) and why. If the third party requester does timely and completely respond to the Office's decision vacating the filing date, a new filing date will be assigned to the proceeding, as of the date the requester's response was received.

Rule Making Considerations

Administrative Procedure Act

The changes in this final rule merely revise the rules of practice (§§ 1.510 and 1.915) to require that a request for *ex parte* reexamination or for *inter partes* reexamination meets the requirements in 35 U.S.C. 302 and 311 and regulations for a request for *ex parte* reexamination or for *inter partes* reexamination, before a filing date is accorded to the request for *ex parte* reexamination or for *inter partes* reexamination. Therefore, these rule changes involve interpretive rules, or rules of agency practice and procedure under 5 U.S.C. 553(b)(A), and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). *See Bachow Communications Inc.* v. *FCC*, 237 F.3d 683, 690 (DC Cir. 2001) (rules governing an application process are "rules of agency organization, procedure, or practice" and are exempt from the Administrative Procedure Act's notice and comment requirement); *see also Merck & Co., Inc.* v. *Kessler*, 80 F.3d 1543, 1549–50, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules (to which the notice and comment requirements of the Administrative Procedure Act apply), and *Fressola* v. *Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995) ("it is extremely doubtful whether any of the rules formulated to govern patent and trade-mark practice are other than 'interpretive rules, general statements of policy, * * * procedure, or practice.'") (quoting Casper W. Ooms, *The United States Patent Office and the Administrative Procedure Act*, 38 Trademark Rep. 149, 153 (1948)). Accordingly, prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law).

Regulatory Flexibility Act

As discussed previously, the changes in this final rule involve rules of agency practice and procedure under 5 U.S.C. 553(b)(A), and prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). As prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553 (or any other law) for the changes in this final rule, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not required for the changes in this final rule. See 5 U.S.C. 603.

Executive Order 13132

This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

Executive Order 12866

This rule making has been determined to be not significant for purposes of Executive Order 12866 (September 30, 1993).

Paperwork Reduction Act

This final rule involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The collection of information involved in this final rule has been reviewed and previously approved by OMB under OMB control number 0651–0033. The United States Patent and Trademark Office is not resubmitting any information collection to OMB for its review and approval because the changes in this final rule do not affect the information collection requirements associated with the information collection under OMB control number 0651–0033. The principal impacts of the changes in this final rule are to clarify the requirement for compliance with all the

requirements of filing a reexamination before a filing date will be assigned to a reexamination. Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden to: (1) The Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313–1450.

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

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses, and Biologics.

■ For the reasons set forth in the preamble, the interim rule amending 37 CFR part 1 which was published at 71 FR 9260–62 on February 23, 2006, is adopted as final with the following changes:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. Section 1.11 is amended by revising paragraph (c) to read as follows:

§ 1.11 Files open to the public.

* * * * *

(c) All requests for reexamination for which all the requirements of § 1.510 or § 1.915 have been satisfied will be announced in the *Official Gazette*. Any reexaminations at the initiative of the Director pursuant to § 1.520 will also be announced in the *Official Gazette*. The announcement shall include at least the date of the request, if any, the reexamination request control number or the Director initiated order control number, patent number, title, class and subclass, name of the inventor, name of the patent owner of record, and the examining group to which the reexamination is assigned.

* * * * *

■ 3. Section 1.510 is amended by revising paragraphs (c) and (d) to read as follows:

§ 1.510 Request for ex parte reexamination.

* * * * *

(c) If the request does not include the fee for requesting *ex parte* reexamination required by paragraph (a) of this section and meet all the requirements by paragraph (b) of this section, then the person identified as requesting reexamination will be so notified and will generally be given an opportunity to complete the request within a specified time. Failure to comply with the notice will result in the *ex parte* reexamination request not being granted a filing date, and will result in placement of the request in the patent file as a citation if it complies with the requirements of § 1.501.

(d) The filing date of the request for *ex parte* reexamination is the date on which the request satisfies all the requirements of this section.

* * * * *

■ 4. Section 1.915 is amended by revising paragraph (d) to read as follows:

§ 1.915 Content of request for inter partes reexamination.

* * * * *

(d) If the *inter partes* request does not include the fee for requesting *inter partes* reexamination required by paragraph (a) of this section and meet all the requirements of paragraph (b) of this section, then the person identified as requesting *inter partes* reexamination will be so notified and will generally be given an opportunity to complete the request within a specified time. Failure to comply with the notice will result in the *inter partes* reexamination request not being granted a filing date, and will result in placement of the request in the patent file as a citation if it complies with the requirements of § 1.501.

Dated: July 31, 2006.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E6–12600 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1507

[Docket No. TSA–2004–19845; Amendment No. 1507–2]

RIN 1652–AA34

Privacy Act of 1974: Implementation of Exemptions; Intelligence, Enforcement, Internal Investigation, and Background Investigation Records

AGENCY: Transportation Security Administration, DHS.

ACTION: Final rule.

SUMMARY: The Transportation Security Administration is amending its regulations to exempt four systems of records from certain provisions of the Privacy Act. The systems intended for exemption are the Transportation Security Intelligence Service Operations Files, the Personnel Background Investigation File System, the Transportation Security Enforcement Record System, and the Internal Investigation Record.

DATES: Effective September 5, 2006.

FOR FURTHER INFORMATION CONTACT: Lisa S. Dean, Privacy Officer, Office of Transportation Security Policy, TSA–9, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–3947; facsimile (571) 227–2555.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*);

(2) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html*; or

(3) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for "Research Center" at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the Transportation Security Administration (TSA) to comply with small entity requests for information and advice about

compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT**. Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/laws/law_lib.html.*

I. Analysis of the Final Rule

A. Background

The Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, governs the means by which the U.S. Government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a "system of records." A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. See 5 U.S.C. 552a(a)(5).

An individual may request access to records containing information about him or herself. 5 U.S.C. 552a(b), (d). However, the Privacy Act authorizes Government agencies to exempt systems of records from access by individuals under certain circumstances, such as where the access or disclosure of such information would impede national security or law enforcement efforts. For example, allowing the subject of an ongoing law enforcement investigation to access his or her investigative file could impede the investigation or allow the subject to avoid detection or apprehension.

Exemptions from Privacy Act provisions must be established by regulation. 5 U.S.C. 552a(j), (k). TSA's Privacy Act exemptions are found at 49 CFR part 1507.

B. Amendments to TSA's Privacy Act Exemptions

On December 10, 2004, TSA published a notice of proposed rulemaking in the **Federal Register** (69 FR 71767) seeking to exempt four systems of records from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j) and (k). The four systems of records are:

(1) The Transportation Security Intelligence Service (TSIS) Operations Files (DHS/TSA 011), under which TSA maintains records on intelligence, counterintelligence, transportation security, and information systems security matters as they relate to TSA's mission of protecting the nation's transportation systems;

(2) The Personnel Background Investigation File System (PBIFS) (DHS/TSA 004), under which TSA maintains investigative and background records used to make suitability and eligibility determinations for employment;

(3) The Transportation Security Enforcement Record System (TSERS) (DHS/TSA 001), which serves as an enforcement docket system; and

(4) The Internal Investigation Record System (IIRS) (DHS/TSA 005), under which TSA maintains records that facilitate the management of investigations into allegations or appearances of misconduct by current and former TSA employees or contractors and investigations of security-related incidents and reviews of TSA programs and operations.

In the December 10, 2004 notice of proposed rulemaking, TSA proposed to add 5 U.S.C. 552a(k)(1)[1] as an authority to exempt the Personnel Background Investigation File System (DHS/TSA 004) from the exemptions previously established for this system. See 49 CFR 1507.3. TSA also proposed to add 5 U.S.C. 552a(j)(2) (a general law enforcement exemption) as an authority to exempt the Transportation Security Enforcement Record System (DHS/TSA 001) and the Internal Investigation Record System (DHS/TSA 005) from the provisions previously claimed for those two systems, and to now include an exemption for those two systems of records from subsection (e)(3) of the Privacy Act.[2]

This final rule adopts the proposed rule with only two technical changes from the proposed rule. First, TSA changed references to "security sensitive information" to read "sensitive security information." Second, TSA revised § 1507.3(j)(1) (Accounting for Disclosures) to add text inadvertently omitted from the proposed rule related to the possibility that release of the accounting of disclosures could "reveal investigative interest on the part of the Transportation Security Administration, as well as the recipient." The proposed rule stated that release of the accounting of disclosures could "alert the subject of intelligence gathering operations on the part of the Transportation Security Administration as well as the recipient." This implied that TSA engages in intelligence gathering operations, which is not the case. TSA is a recipient of intelligence information and engages in analysis and dissemination of that information. The addition of the language described above corrects this incorrect implication and is consistent with the language used in the justification for exemption in § 1507.3(j)(2) (Access to Records).

C. Response to Public Comments

TSA received two letters commenting on the proposed rule and one comment encouraging TSA to establish redress procedures whereby air carrier customers can report and correct any inaccurate information they believe TSA possesses. TSA received consolidated comments on the proposed rule from the Electronic Frontier Foundation, PrivacyActivism, Privacy Rights Clearinghouse, the Fairfax County Privacy Council, and the World Privacy Forum (collectively, Privacy Groups). TSA also received comments from the Owner-Operator Independent Drivers Association, Inc. (OOIDA). A number of the comments from the Privacy Groups relate to the scope and routine uses for the Transportation Security Enforcement Record System (TSERS) (DHS/TSA 001) and the Transportation Security Intelligence Service (TSIS) Operations Files (DHS/TSA 011). The remaining comments relate to the exemptions claimed for these systems, which TSA has addressed below.

As a preliminary matter and an overall response to the comments, TSA recognizes that although there is a need for the exemptions provided for in this document, there may be instances where such exemptions can be waived. There may be times when application of the Privacy Act exemptions claimed here are not necessary to further a governmental interest. In appropriate circumstances, where compliance would not appear to interfere with, or adversely affect, the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived.

1. Applicability of TSERS and TSIS

OOIDA requests clarification as to whether TSERS (DHS/TSA 001) and TSIS (DHS/TSA 011) apply to records TSA maintains in conjunction with conducting threat assessments of commercial truck drivers applying for hazardous materials (hazmat) endorsements. OOIDA expresses concern that the exemptions and routine

[1] Section 552a(k)(1) authorizes the application of exemption (b)(1) under the Freedom of Information Act (5 U.S.C. 552) protecting from disclosure "matters that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy" and that are properly classified under such Executive Order.

[2] Section 552a(e)(3) requires the agency collecting information from an individual to inform the individual of the authority for the agency to collect the information, the purpose and intended routine uses of such information, and the potential effects on the individual if the information requested is not provided to the Government.

uses applicable to these two records systems are inconsistent with certain protections for hazmat drivers envisioned by the regulation governing threat assessments for those drivers.

TSA notes that records relating to threat assessments for hazmat drivers are contained within the Transportation Security Threat Assessment System (T–STAS) DHS/TSA 002, and are not automatically included in TSERS or TSIS. A driver's records may become a part of TSERS, only if the driver is involved in a violation or potential violation of law.

2. Exemption From Requirement To Give an Accounting for Disclosures

The Privacy Groups object to TSA's proposal to exempt TSERS (DHS/TSA 001) and TSIS (DHS/TSA 011) from the requirement in 5 U.S.C. 552a(c)(3) to furnish individuals with an accounting for disclosures of records. They state that this exemption is not necessary because disclosures for civil and criminal law enforcement activity already are exempt from the disclosure requirements in 5 U.S.C. 552a(c)(3). See 5 U.S.C. 552a(c)(3) and (b)(7).

TSA notes that disclosures pursuant to subsection (b)(7) of the Privacy Act are not the only disclosures TSA may need to make from these systems. TSA may need to make a disclosure, for instance, when the agency merely suspects a violation of law. Accounting of such a disclosure would not be exempted under 5 U.S.C. 552a(c)(3) and (b)(7), because that limited exemption applies only where the disclosure results from a written request from any agency head specifying the particular portion of the record desired. The current routine uses applicable to the TSERS and TSIS systems of records permit disclosure of information in those systems to Federal, State, local, tribal, territorial, foreign or international agencies responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation. Any requirement to disclose the accounting of disclosures compiled under the requirements of 5 U.S.C. 552(a)(c)(3) may interfere with a law enforcement investigation, particularly if the subject of the investigation is unaware of the investigation. Consequently, TSA must assert an exemption from the accounting requirements of 5 U.S.C. 552a(c)(3) generally.

TSA notes that the ability to use a routine use for certain disclosures was intended as an addition to the type of disclosures for civil or criminal law enforcement activity under 5 U.S.C. 552a(b)(7). See Office of Management and Budget Guidance, 40 FR 28955 (July 9, 1975). Dependence on the disclosure authority in subsection (b)(7) for all investigations, therefore, is not appropriate, and must be supplemented by routine uses. For this reason, TSA also is claiming an exemption from 5 U.S.C. 552a(c)(3), generally, to cover access to the accounting of the disclosures made pursuant to these routine uses.

As explained in this document, TSA is exempting the two systems of records, TSERS (DHS/TSA 001) and TSIS (DHS/TSA 011), from the accounting for disclosures in order to protect the integrity of investigations. Notifying individuals of an investigation alerts those individuals who are subject to the investigation, and could help them evade investigation and compromise security. Both of the systems of records at issue are essential to TSA's transportation security mission.

TSA notes that with respect to TSERS (DHS/TSA 001), this rulemaking only adds 5 U.S.C. 552a(j)(2) as an authority for exemptions, and that TSA previously published a final rule on June 25, 2004 (69 FR 35536), exempting the TSERS (DHS/TSA 001) system from the accounting, access, and relevance/necessity requirements. TSERS is a system intended to cover civil and criminal enforcement and inspection records, and records related to investigations or prosecution of violations or potential violations of law. TSERS records are also used to record details of security-related activity, such as passenger or baggage screening, and include suspicious activity reports. TSIS is a system intended to cover records on intelligence, counterintelligence, transportation security, and information security matters as they relate to TSA's mission of protecting the nation's transportation systems. TSIS records also are used to identify potential threats to transportation security, uphold and enforce the law, and ensure public safety. Both TSERS and TSIS contain records that are investigatory in nature. If TSA is investigating a security incident, or the security activities of a regulated entity, it is imperative that the individuals involved not be given the opportunity to evade detection and resulting enforcement action. Providing this knowledge to such individuals defeats the investigation.

Commenters suggest that an exemption from the requirement to provide individuals access to the accounting of disclosures would prevent an individual wrongly denied a job, contract, or license from learning to whom incorrect information had been disclosed, and from attempting to correct any error.

However, because the focus of the TSERS and TSIS systems is to support transportation security and the use of appropriate investigatory authority, TSA must be able to notify transportation employers about their employees that violate TSA regulations or are determined to pose a threat to transportation, particularly if the investigation requires the cooperation of the employer. Where an employer takes action against an individual, it is expected that the employer will likely notify the individual of the basis of the action, including the fact of a disclosure from TSA. So, for example, if an air carrier employee is caught with a firearm at a screening checkpoint, TSA will report that incident to the air carrier for its consideration in connection with revoking the employee's security credentials. The air carrier will likely notify the individual of the basis of the revocation. The individual can contest the Notice of Violation from TSA, or can seek redress under the procedures outlined in the applicable Privacy Impact Assessment. If, on the other hand, TSA is investigating an air carrier employee for on-going access door violations, TSA might notify the employer of the investigation, but ask that the employer not notify the employee of the disclosure in order to preserve the investigation. In developing these systems, TSA has attempted to strike a balance between the agency's mission to protect the nation against threats to transportation, and the privacy and civil liberties of the public.

3. Exemption From Requirement To Collect Only Relevant and Necessary Information

The Privacy Groups also object to TSA's assertion of exemption authority under 5 U.S.C. 552a(e)(1), which permits the maintenance of information beyond that which is "relevant and necessary" to accomplish the agency's purpose. The Privacy Groups state that the assertion of this exemption would lead to the wide dissemination of irrelevant and inaccurate information.

While the commenters focus on the relevance requirement, they fail to address the necessity component of the statute. The necessity of maintaining a particular piece of information often is difficult to determine in the context of an investigation, particularly in its nascent stages. TSA will, of course, collect information that it deems relevant to the investigation as

collection of irrelevant information wastes scarce resources, is inefficient, and uses database space inappropriately. It is, however, not always possible to determine the relevance *and* necessity (emphasis added) of specific information early in the investigative process. TSA should not be required to discard relevant information as unnecessary when such information may very well turn out to be necessary later in an investigation.

To ensure that no key pieces of information are lost, and in the interest of protecting the integrity of investigations, TSA is claiming an exemption from the relevancy and necessity requirements. TSERS and TSIS are both systems crucial to the TSA's transportation security mission. Without this exemption, TSA's ability to conduct thorough investigations, and ultimately its ability to protect transportation security, is jeopardized. As to the allegation that inaccurate and irrelevant information will be "widely" disseminated, TSA disseminates information only as appropriate and authorized under the Privacy Act.

4. Exemption From Notice Requirements

Finally, the Privacy Groups object to TSA's proposed exemption of TSERS (DHS/TSA 001) from the requirement of 5 U.S.C. 552a(e)(3), which requires that, prior to requiring an individual to submit information to an agency, the agency provide notice of the authority under which information is collected, the purpose for which it is intended to be used, routine uses which may be made; and the consequences to the individual for refusing to provide the information. TSA claims this exemption in order to safeguard the integrity of investigations. Early notice to all individuals of the authority, voluntary nature, purpose, and routine uses of the information collected would impair investigations into transportation security. It would reveal TSA's investigative interest in the individual, as well as the nature of the investigation, thereby providing the individual an opportunity to interfere with the investigation or evade detection or suspicion.

Also, the Privacy Groups state that this exemption should not apply to information that individuals provide to TSA for purposes of passenger screening. With respect to the Privacy Groups' concerns regarding passenger reservations data, such information will be part of a separate system of records to be published in connection with the Secure Flight Program. The TSERS (DHS/TSA 001) system does not cover the records TSA will maintain for the operation of the Secure Flight Program.

The Air Transport Association of America, Inc, has no comments on the proposed rule, but encourages TSA to establish redress procedures whereby air carrier customers can report and correct any inaccurate information they believe TSA possesses. TSA has established an Office of Transportation Security Redress that will be the public's point of contact for this purpose. TSA also will publish a system of records notice for the Secure Flight program that will be the primary system affecting passengers.

II. Regulatory Requirements

A. Regulatory Impact Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

In conducting these analyses, TSA has determined:

1. Executive Order 12866 Assessment

This rule is a significant regulatory action under section 3(f) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993) (as amended). Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB). Distilled to its essence, this rulemaking exempts TSA from providing a privacy act notice in the context of criminal investigations, permits TSA to withhold classified documents from employees seeking their background investigation, and exempts TSA intelligence records from access, accounting, and relevance/necessity requirements as outlined elsewhere in this rulemaking. TSA's ability to perform law enforcement and intelligence functions connected to transportation security are significantly degraded without these exemptions.

2. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). Section 605 of the RFA allows an agency, in lieu of preparing an analysis, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. Accordingly, TSA certifies that this final rule will not have a significant impact on a substantial number of small entities. The final rule imposes no duties or obligations on small entities. This rule provides exemptions to existing procedures and adds no new regulated parties. Further, the exemptions to the Privacy Act apply to individuals, and individuals are not covered entities under the RFA.

3. International Trade Impact Assessment

This rulemaking will not constitute a barrier to international trade. The exemptions relate to criminal investigations and agency documentation and, therefore, do not create any new costs or barriers to trade.

4. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), (Pub. L. 104–4, 109 Stat. 48), requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A "Federal mandate" is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, $100 million or more in any one year the UMRA analysis is required. This rulemaking will not impose an unfunded mandate on state, local, or tribal governments, or on the private sector. This rule will provide exemptions rather than new requirements. The exemptions relate to

criminal investigations of individuals and agency documentation and, therefore, do not create any new requirements for state, local, or tribal governments, or on the private sector.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. TSA has determined that there are no current or new information collection requirements associated with this rule.

C. Executive Order 13132, Federalism

TSA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. This action will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore will not have federalism implications.

D. Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment.

E. Energy Impact

The energy impact of this action has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). This rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1507

Privacy.

The Amendment

■ In consideration of the foregoing, the Transportation Security Administration amends part 1507 of Chapter XII, Title 49 of the Code of Federal Regulations, as follows:

PART 1507—PRIVACY ACT—EXEMPTIONS

■ 1. The authority citation for part 1507 continues to read as follows:

Authority: 49 U.S.C. 114(l)(1), 40113, 5 U.S.C. 552a(j) and (k).

■ 2. Amend § 1507.3 by revising paragraphs (a), (c), and (d), and by adding a new paragraph (j) to read as follows:

§ 1507.3 Exemptions.

* * * * *

(a) *Transportation Security Enforcement Record System (DHS/TSA 001).* The Transportation Security Enforcement Record System (TSERS) (DHS/TSA 001) enables TSA to maintain a system of records related to the screening of passengers and property and they may be used to identify, review, analyze, investigate, and prosecute violations or potential violations of criminal statutes and transportation security laws. Pursuant to exemptions (j)(2), (k)(1), and (k)(2) of the Privacy Act, DHS/TSA 001 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(3), (e)(4)(G), (H), and (I), and (f). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and reveal investigative interest on the part of TSA, as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to transportation security, law enforcement efforts, and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation and avoid detection or apprehension, which undermines the entire system.

(2) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of the investigation and reveal investigative interest on the part of TSA, as well as the recipient agency. Access to the records would permit the individual who is the subject of a record to impede the investigation and avoid detection or apprehension. Amendment of the records would interfere with ongoing investigations and law enforcement activities, and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. The information contained in the system may also include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such information also could disclose sensitive security information, which could be detrimental to transportation security.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of transportation security laws, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective enforcement of transportation security laws, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(4) From subsection (e)(3) (Privacy Act Statement) because disclosing the authority, purpose, routine uses, and potential consequences of not providing information could reveal the investigative interests of TSA, as well as the nature and scope of an investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes.

(5) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access provisions of subsection (d).

* * * * *

(c) *Personnel Background Investigation File System (DHS/TSA 004).* The Personnel Background Investigation File System (PBIFS) (DHS/TSA 004) enables TSA to maintain investigative and background material used to make suitability and eligibility determinations regarding current and former TSA employees, applicants for TSA employment, and TSA contract employees. Pursuant to exemptions (k)(1) and (k)(5) of the Privacy Act, the Personnel Background Investigation File System is exempt from 5 U.S.C. 552a(c)(3) (Accounting of Disclosures) and (d) (Access to Records). Exemptions from the particular subsections are justified because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment. To the extent that the disclosure of material would reveal any classified material or the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of

confidentiality should the data subject request access to or amendment of the record, or access to the accounting of disclosures of the record. Exemption (k)(1) will be required to protect any classified information that may be in this system.

(d) *Internal Investigation Record System (DHS/TSA 005).* The Internal Investigation Record System (IIRS) (DHS/TSA 005) contains records of internal investigations for all modes of transportation for which TSA has security-related duties. This system covers information regarding investigations of allegations or appearances of misconduct of current or former TSA employees or contractors and provides support for any adverse action that may occur as a result of the findings of the investigation. It is being modified to cover investigations of security-related incidents and reviews of TSA programs and operations. Pursuant to exemptions (j)(2), (k)(1), and (k)(2) of the Privacy Act, DHS/TSA 005 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(3), (e)(4)(G), (H), and (I), and (f). Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could reveal investigative interest on the part of the recipient agency that obtained the record pursuant to a routine use. Disclosure of the accounting could, therefore, present a serious impediment to law enforcement efforts on the part of the recipient agency, as the individual who is the subject of a record would learn of third-agency investigative interests and thereby avoid detection or apprehension, as well as to TSA investigative efforts.

(2) From subsection (d) (Access to Records) because access to the records contained in this system could reveal investigative techniques and procedures of the investigators, as well as the nature and scope of the investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes. The information contained in the system might include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such records could reveal sensitive security information protected pursuant to 49 U.S.C. 114(s), the disclosure of which could be detrimental to the security of transportation.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because third agency records obtained or made available to TSA during the course of an investigation may occasionally contain information that is not strictly relevant or necessary to a specific investigation. In the interests of administering an effective and comprehensive investigation program, it is appropriate and necessary for TSA to retain all such information that may aid in that process.

(4) From subsection (e)(3) (Privacy Act Statement) because disclosing the authority, purpose, routine uses, and potential consequences of not providing information could reveal the targets of interests of the investigating office, as well as the nature and scope of an investigation, the disclosure of which could enable individuals to circumvent agency regulations or statutes.

(5) From subsections (e)(4)(G), (H) and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access provisions of subsection (d).

* * * * *

(j) *Transportation Security Intelligence Service (TSIS) Operations Files.* Transportation Security Intelligence Service Operations Files (TSIS) (DHS/TSA 011) enables TSA to maintain a system of records related to intelligence gathering activities used to identify, review, analyze, investigate, and prevent violations or potential violations of transportation security laws. This system also contains records relating to determinations about individuals' qualifications, eligibility, or suitability for access to classified information. Pursuant to exemptions (j)(2), (k)(1), (k)(2), and (k)(5) of the Privacy Act, DHS/TSA 011 is exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f). Exemptions from particular subsections are justified for the following reasons:

(1) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of intelligence gather operations and reveal investigative interest on the part of the Transportation Security Administration, as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to transportation security law enforcement efforts and efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede operations and avoid detection and apprehension, which undermined the entire system. Disclosure of the accounting may also reveal the existence of information that is classified or sensitive security information, the release of which would be detrimental to the security of transportation.

(2) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of intelligence gathering operations and reveal investigative interest on the part of the Transportation Security Administration. Access to the records would permit the individual who is the subject of a record to impede operations and possibly avoid detection or apprehension. Amendment of the records would interfere with ongoing intelligence and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continually reinvestigated. The information contained in the system may also include properly classified information, the release of which would pose a threat to national defense and/or foreign policy. In addition, permitting access and amendment to such information also could disclose sensitive security information, which could be detrimental to transportation security if released. This system may also include information necessary to make a determination as to an individual's qualifications, eligibility, or suitability for access to classified information, the release of which would reveal the identity of a source who received an express or implied assurance that their identity would not be revealed to the subject of the record.

(3) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of gathering and analyzing information about potential threats to transportation security, the accuracy of information obtained or introduced occasionally may be unclear or the information may not be strictly relevant or necessary to a specific operation. In the interests of transportation security, it is appropriate to retain all information that may aid in identifying threats to transportation security and establishing other patterns of unlawful activity.

(4) From subsections (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules), because this system is exempt from the access and amendment provisions of subsection (d).

Issued in Arlington, Virginia, on July 28, 2006.

Kip Hawley,

Assistant Secretary.

[FR Doc. 06–6670 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 010319075–1217–02; I.D. 073106E]

Fisheries of the Northeastern United States; Tilefish Fishery; Quota Harvested for Full-time Tier 2 Category

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that the percentage of the tilefish annual total allowable landings (TAL) available to the Full-time Tier 2 permit category for the 2006 fishing year has been harvested, In response, commercial vessels fishing under the Full-time Tier 2 tilefish category may not harvest tilefish from within the Golden Tilefish Management Unit for the remainder of the 2006 fishing year (through October 31, 2006). Regulations governing the tilefish fishery require publication of this notification to advise the public of this closure.

DATES: Effective 0001 hrs local time, August 2, 2006, through 2400 hrs local time, October 31, 2006.

FOR FURTHER INFORMATION CONTACT: Brian R. Hooker, Fishery Policy Analyst, at (978) 281–9220.

SUPPLEMENTARY INFORMATION: Regulations governing the tilefish fishery are found at 50 CFR part 648. The regulations require annual specification of a TAL for federally permitted tilefish vessels harvesting tilefish from within the Golden Tilefish Management Unit. The Golden Tilefish Management Unit is defined as an area of the Atlantic Ocean from the latitude of the VA/NC border (36°33.36′ N. lat.), extending eastward from the shore to the outer boundary of the exclusive economic zone, and northward to the U.S./Canada border. After 5 percent of the TAL is deducted to reflect landings by vessels issued an open-access Incidental permit category, and after up to 3 percent of the TAL is set aside for research purposes, should research TAL be set aside, the remaining TAL is distributed among the following three tilefish limited access permit categories: Full-time Tier 1 category (66 percent), Full-time Tier 2 category (15 percent), and the Part-time category (19 percent).

The TAL for tilefish for the 2006 fishing year was set at 1.995 million lb (905,172 kg) and then adjusted downward by 5 percent to 1,895,250 lb (859,671 kg) to account for incidental catch. There was no research set-aside for the 2006 fishing year. Thus, the Full-time Tier 2 permit category quota for the 2006 fishing year, which is equal to 15 percent of the TAL, is 284,288 lb (128,951 kg).

The Administrator, Northeast Region, NMFS (Regional Administrator) monitors the commercial tilefish quota for each fishing year using dealer reports, vessel catch reports, and other available information to determine when the quota for each limited access permit category is projected to have been harvested. NMFS is required to publish notification in the **Federal Register** notifying commercial vessels and dealer permit holders that, effective upon a specific date, the tilefish TAL for the specific limited access category has been harvested and no commercial quota is available for harvesting tilefish by that category for the remainder of the fishing year, from within the Golden Tilefish Management Unit.

The Regional Administrator has determined, based upon dealer reports and other available information, that the 2006 tilefish TAL for the Full-time Tier 2 category has been harvested. Therefore, effective 0001 hrs local time, August 2, 2006, further landings of tilefish harvested from within the Golden Tilefish Management Unit by tilefish vessels holding Full-time Tier 2 category Federal fisheries permits are prohibited through October 31, 2006. The 2007 fishing year for commercial tilefish harvest will open on November 1, 2006. Federally permitted dealers are also advised that, effective August 2, 2006, they may not purchase tilefish from Full-time Tier 2 category federally permitted tilefish vessels who land tilefish harvested from within the Golden Tilefish Management Unit for the remainder of the 2006 fishing year (through October 31, 2006).

Classification

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

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

Dated: July 31, 2006.

Alan D. Risenhoover,

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

[FR Doc. 06–6691 Filed 8–1–06; 1:44 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 060216045–6045–01; I.D. 073106B]

Fisheries of the Economic Exclusive Zone Off Alaska; Pacific Cod by Catcher Vessels Less Than 60 Feet (18.3 Meters) Length Overall Using Hook-and-Line or Pot Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 meters (m)) length overall (LOA) using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to allow the catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI to harvest their Pacific cod allocation.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 15, 2006, through 2400 hrs, A.l.t., December 31, 2006.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

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

NMFS closed directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI under § 679.21(d)(1)(iii) on May 23, 2006 (71 FR 30300, May 26, 2006).

NMFS has determined that as of July 25, 2006, approximately 60 metric tons of Pacific cod remain in the 2006 Pacific cod TAC specified for catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI. Therefore, in accordance with §§ 679.25(a)(2)(i)(C) and (a)(2)(iii)(D),

and to allow the catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI to harvest their Pacific cod allocation, NMFS is terminating the previous closure and is reopening directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI. The reopening is effective 1200 hrs, Alaska local time (A.l.t.), August 15, 2006, through 2400 hrs, A.l.t., December 31, 2006.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified for jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 25, 2006.

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

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: July 31, 2006.

Alan D. Risenhoover,

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

[FR Doc. E6–12648 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 060216045–6045–01; I.D.073106A]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using jig gear to catcher vessels less than 60 feet (18.3 meters (m)) length overall (LOA) using pot or hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). These actions are necessary to allow the 2006 A and B season total allowable catch (TAC) of Pacific cod to be harvested.

DATES: Effective August 3, 2006, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2006.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

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

The 2006 A and B season allowance of the Pacific cod TAC specified for vessels using jig gear in the BSAI totals 389 metric tons (mt) for the period 1200 hrs, A.l.t., April 30, 2006, through 1200 hrs, A.l.t., August 31, 2006. This amount is established by the 2006 and 2007 final harvest specifications for groundfish in the BSAI (71 FR 10894, March 3, 2006); the adjustment of the Pacific cod TACs in the BSAI on March 14, 2006 (71 FR 13777, March 17, 2006), and reallocations on March 24, 2006 (71 FR 14825, March 24, 2006) and May 1, 2006 (71 FR 25508, May 1, 2006). See § 679.20(c)(3)(iii), § 679.20(c)(5), and § 679.20(a)(7)(i)(A).

The Acting Administrator, Alaska Region, NMFS, has determined that jig vessels will not be able to harvest 296 mt of the A and B season apportionment of Pacific cod allocated to those vessels under § 679.20(a)(7)(i)(A) and § 679.20(a)(7)(iii)(A)(3). Therefore, in accordance with § 679.20(a)(7)(ii)(C)(1), NMFS apportions 296 mt of Pacific cod from the A and B season jig gear apportionment to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear.

The harvest specifications for Pacific cod included in the harvest specifications for groundfish in the BSAI (71 FR 10894, March 3, 2006) are revised as follows: 93 mt to the B season apportionment for vessels using jig gear and 3,232 mt to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified for jig vessels to catcher vessels less than 60 feet (18.3 m) LOA using pot or hook-and-line gear. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery; allow the industry to plan for the fishing season and avoid potential disruption to the fishing fleet as well as processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 25, 2006.

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

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: July 31, 2006.

Alan D. Risenhoover,

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

[FR Doc. E6–12651 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 679 and 680

[Docket No. 060424108–6204–02; I.D. 040706A]

RIN 0648–AT43

Fisheries of the Exclusive Economic Zone Off Alaska; Cost Recovery Program for North Pacific Halibut, Sablefish, and Bering Sea and Aleutian Islands Crab Individual Fishing Quota Programs

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to amend the Individual Fishing Quota (IFQ) Cost Recovery Program for the Halibut and Sablefish IFQ and the Bering Sea and Aleutian Islands (BSAI) Crab Rationalization Programs. This action modifies the procedure NMFS uses to publish notification of adjustment of the IFQ fee percentage for the IFQ Cost Recovery Program in the Halibut and Sablefish IFQ and the Crab Rationalization Programs. This action is necessary to provide timely and efficient notice of fee obligations while ensuring consistency with all applicable statutes. This action is intended to improve the fee collection methods required for all Alaska IFQ programs under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and is necessary to promote the objectives of the Magnuson-Stevens Act with respect to the IFQ fisheries managed by NMFS in the Alaska Region.

DATES: Effective on September 5, 2006.

ADDRESSES: Copies of the Categorical Exclusion (CE), regulatory impact review (RIR), and regulatory flexibility certification prepared for this action are available from NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Walsh, or from NMFS, Alaska Region, 709 West 9th Street, Room 453, Juneau, AK 99801, or by calling the Sustainable Fisheries Division, Alaska Region, NMFS, at 907–586–7228.

FOR FURTHER INFORMATION CONTACT: Bubba Cook, 907–586–7425 or *bubba.cook@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Halibut and Sablefish IFQ Cost Recovery

On March 20, 2000, NMFS published regulations (65 FR 14919) implementing the IFQ Cost Recovery Program for IFQ landings of halibut and sablefish (set forth at 50 CFR 679.45). Under the regulations, an IFQ permit holder incurs a cost recovery fee liability for every pound of IFQ halibut and IFQ sablefish that is landed under his or her IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee liability for all IFQ halibut and IFQ sablefish landings on his or her permit(s). The IFQ permit holder also is responsible for submitting a fee liability payment to NMFS on or before the due date of January 31, following the year in which the IFQ landings were made. For each permit, the dollar amount of the fee due is determined by multiplying the annual IFQ fee percentage (3 percent or less) by the ex-vessel value of each IFQ landing. If the permit holder has more than one permit, the total amounts of each permit are added.

Section 304(d)(2)(B) of the Magnuson-Stevens Act sets a maximum fee of 3 percent of the ex-vessel value of fish harvested under an IFQ program. Current regulations allow NMFS to reduce the fee percentage if actual management and enforcement costs are recoverable through a lesser percentage. NMFS will not know the actual annual costs of IFQ-related management and enforcement until after the end of each Federal fiscal year (September 30). If the management and enforcement costs total less than the 3 percent fee, NMFS will reduce the fee percentage for the new Federal fiscal year. Fishermen will not know at the time they sell their IFQ fish exactly what fee percentage will be applied to their IFQ landings made from February (season opening) through September (Federal fiscal year-end). Therefore, NMFS encourages IFQ permit holders to set aside the full 3 percent throughout the fishing year so a lump sum payment may be made by January 31 of the following calendar year. Early payments are allowed but do not relieve a permit holder of associated reporting requirements.

Crab Rationalization Cost Recovery

In 2005, section 313(j) of the Magnuson-Stevens Act provided supplementary authority to section 304(d)(2)(A) and additional detail for cost recovery provisions specific to the Crab Rationalization Program. As a quota program, the Crab Rationalization Program must follow the statutory provisions set forth by section 304(d) and section 313(j) of the Magnuson-Stevens Act.

Section 313(j) requires the Secretary to approve a cost recovery program for the Crab Rationalization Program, conducted in accordance with the existing Halibut and Sablefish IFQ cost recovery program. Similar to the Halibut and Sablefish IFQ cost recovery program, the Crab Rationalization cost recovery program allows for the collection of actual management and enforcement costs up to 3 percent of ex-vessel gross revenues and a loan program using 25 percent of the fees collected.

Section 313(j) includes specific cost recovery requirements to accommodate the crab processing industry and to address problems experienced under the Halibut and Sablefish IFQ cost recovery program. This section provides NMFS the authority to collect 133 percent of the actual costs of management and enforcement. By collecting 133 percent, 25 percent of that amount can be set aside for the IFQ loan program, authorized by section 303(d)(4), and the remaining 75 percent more fully reimburses the management and enforcement costs of the program. Additionally, section 313(j) requires cost recovery fees to be paid in equal shares by the harvesting and processing sectors. Catcher/Processors, a combination of both sectors, pay the full fee percentage.

NMFS developed the Crab Rationalization cost recovery program to conform with statutory requirements and to partially compensate the agency for the unique added costs of management and enforcement of the Crab Rationalization Program. Key provisions of the Crab Rationalization cost recovery program include (1) a new definition and application of "fee liability≥; (2) the establishment of a Registered Crab Receiver (RCR) permit system to streamline management and reporting; (3) the establishment of a "crab fishing year" for biological and administrative purposes; and (4) a new administrative process that requires the collection and submission of fees by RCRs rather than requiring separate billings to each person that receives a crab allocation (crab allocation holder). The crab allocations include IFQ, Crew IFQ, Individual Processing Quota (IPQ), Community Development Quota (CDQ), and the Adak community allocation.

In the crab rationalization fishery, a crab allocation holder generally incurs a cost recovery fee liability for every pound of crab landed. The RCR permit holder must collect the fee liability of the crab allocation holder landing crab. Additionally, the RCR permit holder must self-collect his or her own fee liability for all crab delivered to the RCR. The RCR permit holder is responsible for submitting this payment to NMFS on or before the due date of July 31, following the crab fishing year in which payment for the crab is made. The dollar amount of the fee due is determined by multiplying the fee percentage (not to exceed 3 percent) by the ex-vessel value of crab debited from the allocation. Specific details on the Crab Rationalization cost recovery program may be found in the implementing regulations for the Crab Rationalization Program set forth at § 680.44, and published March 2, 2005, at 70 FR 10174.

The Effect of this Action

This final rule amends the existing regulations at §§ 679.45 and 680.44 addressing the methods by which NMFS calculates fee percentages and provides notice under the cost recovery provisions of the Halibut and Sablefish IFQ Program and Crab Rationalization Program. Calculation of the fee percentage under this action becomes a ministerial duty conducted by NMFS. This action does not affect the ex-vessel value determination under either program nor does it affect the current structure or administration of the standard prices calculated for the Halibut and Sablefish IFQ Program or the Catcher/Processor ex-vessel values calculated for the Crab Rationalization Program. NMFS makes minor changes to the current fee regulations to ensure full compliance with the APA (5 U.S.C. 501 *et seq.*, 701 *et seq.*) while improving administrative efficiency.

The principal elements of this amendment are described and explained in detail in the preamble to the proposed rule and are not repeated here. This final rule is substantively the same as the proposed rule published May 8, 2006 (71 FR 26728). However, this final rule corrects an incorrect cross-reference at § 680.44(g) by changing the reference citation for § 680.5(f) to § 680.5(g).

The proposed rule to amend the IFQ Cost Recovery Program for the Halibut and Sablefish IFQ and the BSAI Crab Rationalization Programs was published in the **Federal Register** on May 8, 2006 (71 FR 26728). Comments on the proposed rule were invited through June 7, 2006. NMFS received no comments on the proposed rule.

Classification

The Administrator, Alaska Region, NMFS, determined that the regulatory amendment is necessary for the conservation and management of the groundfish fisheries off Alaska and that it is consistent with the Magnuson-Stevens Act and other applicable laws.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification or the economic impact of the rule. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Parts 679 and 680

Alaska, Determinations and appeals, Fisheries, Recordkeeping and reporting requirements.

Dated: July 31, 2006.

Samuel D. Rauch III

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

■ For the reasons set out in the preamble, 50 CFR parts 679 and 680 are 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.*; 1540(f); 1801 *et seq.*; 1851 note; 3631 *et seq.*

■ 2. In § 679.45 paragraph (d) is revised to read as follows:

§ 679.45 IFQ cost recovery program.

* * * * *

(d) *IFQ fee percentage*—(1) *Established percentage.* The annual IFQ fee percentage is the amount as determined by the factors and methodology described in paragraph (d)(2) of this section. This amount will be announced by publication in the **Federal Register** in accordance with paragraph (d)(3) of this section. This amount must not exceed 3 percent pursuant to 16 U.S.C. 1854(d)(2)(B).

(2) *Calculating fee percentage value.* Each year NMFS shall calculate and publish the fee percentage according to the following factors and methodology:

(i) *Factors.* NMFS must use the following factors to determine the fee percentage:

(A) The catch to which the IFQ fee will apply;

(B) The ex-vessel value of that catch; and

(C) The costs directly related to the management and enforcement of the IFQ program.

(ii) *Methodology.* NMFS must use the following equation to determine the fee percentage:

100 x (DPC / V)

where:

"DPC" is the direct program costs for the IFQ fishery for the previous fiscal year, and

"V" is the ex-vessel value of the catch subject to the IFQ fee for the current year.

(3) *Publication*—(i) *General.* During or before the last quarter of each year, NMFS shall publish the IFQ fee percentage in the **Federal Register**. NMFS shall base any calculations on the factors and methodology in paragraph (d)(2) of this section.

(ii) *Effective period.* The calculated IFQ fee percentage shall remain in effect through the end of the calendar year in which it was determined.

(4) *Applicable percentage.* The IFQ permit holder must use the IFQ fee percentage in effect at the time an IFQ landing is made to calculate his or her fee liability for such landed IFQ pounds. The IFQ permit holder must use the IFQ percentage in effect at the time an IFQ retro-payment is received by the IFQ permit holder to calculate his or her IFQ fee liability for the IFQ retro-payment.

* * * * *

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 3. The authority citation for part 680 continues to read as follows:

Authority: 16 U.S.C. 1862.

■ 4. In § 680.44 paragraphs (a)(2)(iii), (c)(1) through (3), and (g) are revised; paragraph (c)(4) is removed; and paragraph (c)(5) is redesignated as paragraph (c)(4) to read as follows:

§ 680.44 Cost recovery.

(a) * * *

(2) * * *

(iii) NMFS will provide a summary to all RCR permit holders during the last quarter of the crab fishing year. The summary will explain the fee liability determination including the current fee percentage, details of raw crab pounds debited from CR allocations by permit,

port or port-group, species, date, and prices.

* * * * *

(c) * * *

(1) *Established percentage.* The crab fee percentage is the amount as determined by the factors and methodology described in paragraph (c)(2) of this section. This amount will be announced by publication in the **Federal Register** in accordance with paragraph (c)(3) of this section. This amount must not exceed 3 percent pursuant to 16 U.S.C. 1854(d)(2)(B).

(i) The calculated crab fee percentage will be divided equally between the harvesting and processing sectors.

(ii) Catcher/Processors must pay the full crab fee percentage determined by the fee percentage calculation for all CR crab debited from a CR allocation.

(2) *Calculating fee percentage value.* Each year NMFS shall calculate and publish the fee percentage according to the following factors and methodology:

(i) *Factors.* NMFS must use the following factors to determine the fee percentage:

(A) The catch to which the crab cost recovery fee will apply;

(B) The ex-vessel value of that catch; and

(C) The costs directly related to the management and enforcement of the Crab Rationalization Program.

(ii) *Methodology.* NMFS must use the following equations to determine the fee percentage:

Harvesting and Processing Sectors: [100 (DPC/ V)] 0.5

Catcher/Processors: 100 (DPC /V)

where:

"DPC" is the direct program costs for the Crab Rationalization Program for the previous fiscal year, and

"V" is the ex-vessel value of the catch subject to the crab cost recovery fee liability for the current year.

(3) *Publication*—(i) *General.* During the first quarter of each crab fishing year, NMFS shall calculate the crab fee percentage based on the calculations described in paragraph (c)(2) of this section.

(ii) *Effective period.* The calculated IFQ fee percentage remains in effect through the end of the crab fishing year in which it was determined.

* * * * *

(g) *Fee submission form.* An RCR must submit an RCR permit holder fee submission form according to § 680.5(g).

[FR Doc. E6–12647 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 71, No. 150
Friday, August 4, 2006

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 95

[Docket No. APHIS–2006–0113]

Importation of Swine Hides and Skins, Bird Trophies, and Ruminant Hides and Skins

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations governing the importation of animal byproducts to require that untanned swine hides and skins from regions with African swine fever and bird trophies from regions with exotic Newcastle disease go directly to an approved establishment upon importation into the United States. We would also set out certain requirements for the importation of untanned bovine, deer, and other ruminant hides and skins into the United States from Mexico to prevent the spread of bovine babesiosis. These proposed requirements would provide for the importation of these articles under conditions intended to prevent the introduction of African swine fever, bovine babesiosis, and exotic Newcastle disease.

DATES: We will consider all comments that we receive on or before October 3, 2006.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the lower "Search Regulations and Federal Actions" box, select "Animal and Plant Health Inspection Service" from the agency drop-down menu, then click on "Submit." In the Docket ID column, select APHIS–2006–0113 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2006–0113, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2006–0113.

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: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. Tracye Butler, Senior Staff Veterinarian, Technical Trade Services, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; (301) 734–3277.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR parts 93, 94, 95, and 96 (referred to below as the regulations) govern the importation of certain animals, birds, poultry, meat, other animal products and byproducts, hay, and straw into the United States in order to prevent the introduction of various animal diseases, including rinderpest, foot-and-mouth disease (FMD), African swine fever (ASF), and exotic Newcastle disease (END). The regulations in § 95.5 cover the requirements for the unrestricted entry of untanned hides and skins. Section 95.6 sets out restrictions for those hides or skins that do not meet the requirements for unrestricted entry in § 95.5.

The regulations in § 95.5, in their present form, do not address the importation into the United States of swine hides and skins from regions with ASF or bird trophies from regions with END. We have allowed the entry of these articles, however, if, among other requirements, the articles are sent directly to an establishment approved by the Animal and Plant Health Inspection Service (APHIS) for the receipt and handling of restricted imported animal byproducts. These precautions are needed to protect the U.S. swine and bird populations from incursions of these diseases. Both ASF and END are contagious and fatal viral diseases. Outbreaks of the latter in California, Arizona, Nevada, and Texas in 2002 and 2003 resulted in serious economic consequences for the poultry industry in those States. An outbreak of ASF could have similar effects on the U.S. swine industry.

We have also allowed entry into the United States of deer and other ruminant hides and skins from Mexico under certain conditions, even though those conditions are not set out explicitly in the current regulations. Such hides and skins have been deemed eligible for importation into the United States from Mexico if they have been subjected to a hard drying, pickling, or lime treatment; have been frozen solid for 24 hours and accompanied by a written statement from the owner attesting to that fact; or are free from ticks and accompanied by a certificate issued by a full-time salaried veterinary officer of the Government of Mexico stating that the hides or skins have been treated with an acaricide. Bovine hides and skins from Mexico have been deemed eligible for importation under the same conditions as other Mexican ruminant hides and skins if the cattle from which the hides or skins were derived were subjected to a tickicidal dip at the Mexican slaughter facility where they were prepared. We have viewed these precautions as necessary because ruminant hides and skins from Mexico could be infested with ticks, which, if brought into the United States without the above listed treatments, could transmit bovine babesiosis (also known as splenetic or tick fever) to cattle in the United States.

In order to make these conditions of entry more transparent and ensure uniform enforcement and maximum protection for the U.S. swine, bird, and ruminant populations, we are proposing to amend the regulations in § 95.5 to

provide specific conditions under which untanned swine hides and skins from regions with ASF, bird trophies from regions with END, and deer and other ruminant hides and skins from Mexico could be imported into the United States.

For greater clarity, we are also proposing to reorder the provisions of § 95.5. We would retain the provisions for imported hides and skins contained in current paragraphs (a) through (e), albeit with some modifications (which are discussed below), but would redesignate these provisions as paragraphs (a)(1) through (a)(5). New provisions pertaining to deer and other ruminant hides and skins from Mexico would be contained in new proposed paragraph (b). Proposed paragraph (c) would provide for the importation of bird trophies from END-free regions. We would also add references to bird trophies in the section heading and the introductory text, since bird trophies would be covered under these regulations for the first time.

Currently, the introductory text of § 95.5 indicates that untanned hides and skins of cattle, buffalo, sheep, goats, other ruminants, and swine that do not meet the requirements for unrestricted entry specified in paragraphs (a) through (e) of that section can only be imported if subjected to the handling prescribed in § 95.6 after arrival at the port of entry. Unfortunately, while the hard drying, pickling, and lime treatment processes specified in current paragraphs (b), (d), and (e), respectively, of § 95.5 will provide adequate protection against the transmission of FMD and rinderpest if carried out according to the regulations, these treatments may not kill the virus that causes ASF. We are proposing to amend the introductory text of § 95.5, along with the current provisions pertaining to hides and skins, to address the importation of swine hides and skins that could introduce ASF into the U.S. swine population and bird trophies that could introduce END into the avian population. Our proposed introductory text would state that untanned hides and skins and bird trophies may be imported into the United States without restriction if they meet the requirements of § 95.5 and that any untanned hides or skins or bird trophies that do not meet these requirements, including, but not limited to, swine hides and skins imported from regions with ASF and bird trophies from regions with END, must be handled at an approved establishment as set forth in § 95.6.

Current paragraph (a) of § 95.5, which would become paragraph (a)(1) under this proposed rule, states that hides or skins originating in and shipped directly from a region not declared by the Secretary of Agriculture to be infected with FMD or rinderpest may be imported without further restriction. We would amend that paragraph to provide that for untanned swine hides and skins to be imported into the United States without further restriction, they would have to come from regions that are not only free of rinderpest and FMD, but of ASF as well. With respect to ruminant hides and skins, an exception would be noted for deer or other ruminant hides or skins imported from Mexico. Such articles would be subject to the additional requirements of proposed paragraph (b) because they may contain ticks that could transmit bovine babesiosis to the U.S. cattle population.

Current paragraph (b) of § 95.5, which would become paragraph (a)(2) under this proposed rule, states that hides or skins may be imported without other restriction if found upon inspection by an inspector, or by certificate of the shipper or importer satisfactory to said inspector, to be hard dried hides or skins. We would amend this paragraph so that it would apply only to untanned ruminant hides or skins because, as noted earlier, hard drying may not kill the ASF virus.

Current paragraph (c) of § 95.5, which would become paragraph (a)(3) under this proposed rule, allows the importation, under certain conditions, of abattoir hides or skins taken from animals that are slaughtered under national government inspection in a region and in an abattoir which maintains an inspection service approved by APHIS. We are proposing that only those abattoirs that are certified as meeting U.S. Department of Agriculture (USDA) equivalency requirement under 9 CFR part 327 would satisfy the requirements of this rule.[1] The animals from which the hides or skins are taken must have been found free at the time of slaughter from anthrax, FMD, and rinderpest. We are proposing two substantive changes to this paragraph. Due to our concerns about ASF, our proposed paragraph would apply only to ruminant hides or skins. Also, because the provisions in current paragraph (c) do not address the risks posed by the importation of deer or other ruminant hides or skins from Mexico, which could be infested with ticks carrying bovine babesiosis, we would add an exception for those articles. Finally, we are proposing some minor editorial changes to the paragraph to eliminate any possible ambiguity.

Current paragraph (d) of § 95.5, which would become paragraph (a)(4) under this proposed rule, states that hides or skins may be imported without other restriction if shown upon inspection by an inspector, or by certificate of the shipper or importer satisfactory to said inspector, to have been pickled in a solution of salt containing mineral acid and packed in barrels, casks, or tight cases while still wet with such solution. We are proposing to amend this paragraph so that it would apply only to ruminant hides or skins because, as noted earlier, pickling may not kill the ASF virus. In order to ensure the elimination of the rinderpest and FMD viruses, the amended paragraph would also state that the pickling solution must be determined by an inspector to have a pH of less than or equal to 5. A pH of 5 or less has been determined to inactivate viruses of concern, such as those that cause FMD and rinderpest, on ruminant hides. It is currently the requirement that APHIS inspectors use as provided in the Plant Protection and Quarantine Animal Product Manual (APM).[2]

Current paragraph (e) of § 95.5, which would become paragraph (a)(5) under this proposed rule, allows the importation of hides or skins if they have been treated with lime, become dehaired, and have reached the stage of preparation for immediate manufacture into products ordinarily made from rawhide. Because lime treatment, like hard drying and pickling, may not kill the ASF virus, we would amend the paragraph so that it would apply only to untanned ruminant hides or skins.

Under proposed paragraph (b) of § 95.5, we would allow the importation of deer or other ruminant hides and skins from Mexico into the United States if they were subjected to any one of several possible treatment options, all of which we view as effective in eliminating ticks that could spread bovine babesiosis. Specifically, untanned deer or other ruminant hides and skins could be imported from Mexico without further restriction if they are: (1) Subjected to the same hard drying, pickling, or lime treatment

[1] The USDA's Food Safety Inspection Service (FSIS) maintains an Internet site that lists certified foreign establishments under the equivalency requirements. These establishments are listed by establishment number and country. Web site: *http://www.fsis.usda.gov/regulations/index-of-certified-countries/index.asp.*

[2] The APM provides guidance to the port inspectors regarding importation-related issues. The section on hides can be found in Table 3–7–9, "Regulatory Action on Untanned Hides, Skins or Capes of Ruminant and of Swine from Regions of Origin Known to be Affected with FMD, and Are Pickled in a Salt solution Containing Mineral Acid." the APM is available on the Internet at *http://www.aphis.usda.gov/ppq/manuals/port/APMChapters.htm.*

prescribed for ruminant hides or skins in proposed paragraphs (a)(2) through (a)(4); (2) frozen solid for 24 hours and accompanied by a written statement from the owner attesting to that fact; (3) free from ticks and accompanied by a certificate issued by a full-time salaried veterinary officer of the Government of Mexico stating that they have been treated with an acaricide; or (4) abattoir bovine hides taken from cattle that were subjected to a tickicidal dip at a Mexican export facility 7 to 12 days prior to slaughter. The 7-to-12-day range parallels the tickicide dip requirement in § 93.427(b)(2)(ii) for live Mexican cattle offered for importation into the United States. Dipping ruminants within 7 to 12 days of slaughter reflects the residual effect of the tickicide and the life cycle of the female tick. The residual effect of the tickicide lasts about 2 weeks, meaning that any tick to come into contact with the hide within 2 weeks of application would die. Whereas the life cycle of a female tick takes about 2 weeks, since it must come into contact with the hide, be impregnated, engorge on the hide, and lay eggs, if a female tick were to come into contact with the hide within 2 weeks of slaughter and for some reason not die from the tickicide, the life cycle would be interrupted once the ruminant is slaughtered. Therefore, we believe that requiring the dip within 7 to 12 days of slaughter would ensure that the tickicide would still be effective at the time of slaughter and that hides taken from such bovines would be free of ticks.

Under proposed paragraph (c) of § 95.5, bird trophies from END-free regions could be imported without further restriction if they were accompanied by a certificate of origin issued by the national government of the region of export. This certification requirement would help to ensure that any bird trophy imported into the United States will have originated in and been exported from an END-free region.

Taken together, these actions would help to make conditions of entry for ruminant and swine hides and skins and bird trophies more transparent and would protect the U.S. livestock and bird populations from incursions of ASF, bovine babesiosis, and END.

Executive Order 12866 and Regulatory Flexibility Act

This proposed 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.

This proposed rule would amend the regulations in § 95.5 governing the requirements for importation of untanned hides and skins. We are proposing to require that untanned swine hides and skins from regions with ASF and bird trophies from regions with END go directly to an approved establishment upon importation into the United States and be subject to the requirements under § 95.6 of the regulations. We are also proposing to require that deer and other ruminant hides and skins imported into the United States from Mexico be subjected to one of several possible treatments that we view as effective in killing ticks that could transmit bovine babesiosis.

We anticipate that the proposed rule will produce economic benefits by preventing incursions of ASF, END, and bovine babesiosis, which could negatively affect the ability of the U.S. swine, poultry, and ruminant industries to export their products to international markets. The economic effects of END have been demonstrated by the recent 2002 and 2003 outbreak of the disease in the western United States. END was diagnosed in both backyard poultry flocks and in commercial poultry in California, Nevada, Arizona, and Texas. Over the course of the outbreak, more than 18,000 premises were quarantined, and more than 3 million birds were depopulated. The eradication efforts cost taxpayers in excess of $180 million. In addition, over 30 international governments placed varying levels of import restrictions on poultry and poultry products from the United States as a result of this outbreak. These restrictions consisted primarily of bans on poultry and poultry products from the affected areas of the United States, resulting in approximately $121 million of direct total value of exports affected by these restrictions. Incursions of ASF and bovine babesiosis could cause similar serious economic damage to the U.S. swine and cattle industries. These three livestock industries were valued at more than $72 billion in 2000. Specifically, the U.S. cattle industry was valued at $67.1 billion, the swine industry at $4.3 billion, and the poultry industry at $1.2 billion (Agricultural Statistics, 2001).

U.S. imports of untanned swine hides and skins from ASF-affected regions are relatively meager (see table 1 below). The average value of such imports in 2000 and 2001, all of which came from sub-Saharan Africa, was $4,500, while the average value of all U.S. imports of untanned swine hides and skins during the same period was $980,500. There were no U.S. imports of untanned swine hides and skins from ASF-affected regions in 2002 and 2003. We can conclude, then, that the amount of untanned swine hides and skins coming from ASF-affected countries into the United States is insignificant and that the proposed requirement that these hides and skins be consigned to an approved establishment is not likely to have a significant economic effect on U.S. importers of such hides and skins.

TABLE 1.—VALUE OF U.S. IMPORTS OF UNTANNED SWINE HIDES AND SKINS [1]

Region	2000	2001	2002	2003
Sub-Saharan Africa	$3,000	$6,000	0	0
World	1,292,000	669,000	$1,401,000	$868,000

[1] Fresh or salted untanned swine-hides—(HS 4103900060). Import HS–10 Digit-IUSITC Commodities in Detail.
Source: FAS, U.S. Trade Internet System, Imports, FATUS. Web site: *http://www.fas.usda.gov/ustrade.*

U.S. imports of untanned deer hides and skins from Mexico have also been limited. As shown in table 2, the value of U.S. imports of untanned deer hides and skins from Mexico in 2001 was $2,000, accounting for approximately 0.33 percent of the U.S. total for that year. There were no untanned deer hides and skins imported from Mexico in 2000, 2002, and 2003. The average value of total U.S. imports of untanned deer hides and skins in 2000 and 2001 was $700,000, and none were imported in 2002 or 2003. Since Mexico's share of this market has been so small, we can conclude that this proposed rule is not likely to have a significant economic effect on U.S. importers of untanned deer hides and skins.

TABLE 2.—VALUE OF U.S. IMPORTS OF UNTANNED DEER-HIDES AND SKINS [1]

Region	2000	2001	2002	2003
Mexico	0	$2,000	0	0
World	$805,000	604,000	0	0

[1] Fresh or dried or salted, but not tanned deer-skins—(HS 4103900030). Import HS–10 Digit-USITC Commodities in Detail.
Source: FAS, U.S. Trade Internet System, Imports, FATUS. Web site: *http://www.fas.usda.gov/ustrade.*

Other ruminant hides and skins that are currently being imported into the United States from Mexico and that would be subject to provisions of this proposed rule include those of bovines, sheep or lambs, and chamoises. The latest available data on the value of U.S. imports from Mexico of such hides and skins and the percentages of Mexico's market share for the years 1997 through 2001 are presented in tables 3 through 6.

TABLE 3.—VALUE OF U.S. IMPORTS OF UNTANNED BOVINE HIDES, WHOLE, RAW

Region	1997	1998	1999	2000	2001	5-year average
Mexico	$10,000 (0.5%)	0	$1,000 (0.1%)	0	$177,000 (15%)	3.12%
World	1,964,000	$667,000	962,000	$1,135,000	1,217,000	

Source: United Nations (*http://untrade.fas.usda.gov/untrade*).

TABLE 4.—VALUE OF U.S. IMPORTS OF NES1 UNTANNED BOVINE SKINS

Region	1997	1998	1999	2000	2001	5-year average
Mexico	$142,000 (0.8%)	$704,000 (5%)	$372,000 (4%)	$63,000 (0.8%)	$59,000 (0.9%)	2.3%
World	17,733,000	14,974,000	10,123,000	8,319,000	6,768,000	

[1] Not elsewhere specified.
Source: United Nations (*http://untrade.fas.usda.gov/untrade*).

TABLE 5.—VALUE OF U.S. IMPORTS OF SHEEP OR LAMB SKINS, RAW, WITH WOOL ON

Region	1997	1998	1999	2000	2001	5-year average
Mexico	$486,000 (23%)	$59,000 (3.2%)	0	$13,000 (5.8%)	0	6.4%
World	2,116,000	1,828,000	$256,000	226,000	$764,000	

Source: United Nations (*http://untrade.fas.usda.gov/untrade*).

TABLE 6.—VALUE OF U.S. IMPORTS OF UNTANNED CHAMOIS HIDES

Region	1997	1998	1999	2000	2001	5-year average
Mexico	$3,753,000 (27%)	$4,358,000 (29%)	$4,907,000 (34%)	$5,588,000 (38%)	$6,156,000 (48%)	35.2%
World	13,711,000	15,150,000	14,483,000	14,849,000	12,969,000	

Source: United Nations (*http://untrade.fas.usda.gov/untrade*).

As the tables illustrate, with the exception of chamois hides (table 6), imports from Mexico account for a relatively small proportion of the total U.S. imports of these commodities. Over the 5-year period, an average of 3.12 percent of the untanned whole bovine hides, 2.3 percent of the NES untanned bovine skins, and 6.4 percent of the untanned sheep and lamb skins that were imported into the United States came from Mexico. Mexican chamois hides, however, did account for a significantly larger proportion of total imports, averaging 35.2 percent. Still, given the relatively small amounts of most of these commodities that Mexico provides and the fact that the procedures specified in this proposed rule are already being required for entry of ruminant hides and skins into the United States in most cases, it appears unlikely that the proposed rule would have a significant effect on any U.S. importers of untanned ruminant hides or skins from Mexico.

The United States Fish and Wildlife Service grants permits to individuals for the importation of bird trophies but does not require a separate permit for each trophy, whether imported as a finished product or as skin, bones, and feathers, and does not collect data on the number of mounts prepared by each permit holder. Therefore, reliable data on imported bird trophies from END-free regions are not available.

Economic Impact on Small Entities

Agencies are required to analyze the impacts of their regulations on small businesses and to use flexibility to provide regulatory relief when regulations create economic disparities between different-sized entities. Among the small entities that could be affected by this proposed rule are importers of hides and skins. According to the 2002 Economic Census, in that year there were 260 establishments in the United States which primarily engaged in the wholesale distribution of untanned hides and skins. No data were available on how many of these entities were importers. According to the criteria used by the Small Business Administration (SBA), an entity in this category (North American Industrial Classification System [NAICS] 4225159) is considered small if it employs fewer than 100 persons. In 2002, these 260 entities employed a total of 1,983 paid employees, an average of approximately 7 per entity. It is likely, therefore, that the overwhelming majority of these establishments were small. As we have already noted, imports of the commodities potentially affected by this proposed rule are relatively low, and we do not expect this rulemaking to have a significant economic impact on any U.S. entities, large or small. Moreover, any possible negative effects of this proposed rule on U.S. importers of untanned ruminant or swine hides and skins, deer or other ruminant hides and skins from Mexico, and bird trophies would be far outweighed by the benefits to other small entities by preventing outbreaks of ASF, END, and bovine babesiosis. Over 99 percent of U.S. cattle producers and more than 88 percent of U.S. swine producers have annual receipts of $750,000 or less, which is the criterion by which such firms are designated as small entities by the SBA. The majority of meat packing plants (NAICS 311612 and NAICS 311613), which could be affected by an ASF or bovine babesiosis outbreak, and poultry processors (NAICS 311615), which could be affected by an END outbreak, are also small entities, the SBA threshold for these entities being 100 or fewer employees. The latest available data show that in 1997, more than 96 percent of meat packing firms were small. These small firms accounted for approximately 40 percent of the total value of the industry's shipments. All of these small entities would benefit from the proposed rule by being protected from potential outbreaks of ASF, END, and bovine babesiosis.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2006–0113. Please send a copy of your comments to: (1) Docket No. APHIS–2006–0113, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

Some of the import requirements contained in this proposed rule would necessitate the use of additional certification statements in connection with the importation, from certain regions, of commodities such as untanned hides and bird trophies. In addition to meeting all other applicable APHIS provisions, certain untanned deer or other ruminant hides from Mexico would be allowed to enter the United States only if accompanied by a certificate, issued by a full-time salaried veterinary officer of the Government of Mexico, stating that the hides were treated with an acaricide to kill ticks that could carry and spread bovine babesiosis; or if accompanied by a written statement from the owner attesting to the fact that the hides were frozen solid for 24 hours. In addition to meeting all other applicable APHIS provisions, bird trophies from regions that are free of END would be eligible to enter the United States only if accompanied by a certificate of origin issued by the national government of the region of export.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed 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 proposed 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, 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 0.2 hours per response.

Respondents: Federal animal health authorities in certain regions and foreign exporters of certain animal byproducts.

Estimated annual number of respondents: 50.

Estimated annual number of responses per respondent: 4.

Estimated annual number of responses: 200.

Estimated total annual burden on respondents: 40 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.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 734–7477.

List of Subjects in 9 CFR Part 95

Animal feeds, Hay, Imports, Livestock, Reporting and recordkeeping requirements, Straw, Transportation.

Accordingly, we propose to amend 9 CFR part 95 as follows:

PART 95—SANITARY CONTROL OF ANIMAL BYPRODUCTS (EXCEPT CASINGS), AND HAY AND STRAW, OFFERED FOR ENTRY INTO THE UNITED STATES

1. The authority citation for part 95 would continue to read as follows:

Authority: 7 U.S.C. 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

2. Section 95.5 would be revised to read as follows:

§ 95.5 Untanned hides and skins and bird trophies; requirements for unrestricted entry.

Untanned hides and skins and bird trophies may be imported into the United States without restriction if they meet the requirements of this section. Any untanned hides or skins or bird trophies that do not meet the requirements of this section, including, but not limited to, swine hides imported from regions where African swine fever exists and bird trophies imported from regions where exotic Newcastle disease exists, must be handled at an approved establishment as set forth in § 95.6.

(a) *Untanned hides and skins.* (1) Except for ruminant hides or skins from Mexico, any untanned hides or skins of ruminants from regions free of foot-and-mouth disease and rinderpest and any untanned hides or skins of swine from regions free of foot-and-mouth disease, rinderpest, and African swine fever may be imported without further restriction.

(2) Untanned ruminant hides or skins may be imported from any region without other restriction if an inspector determines, based on inspection and upon examination of a shipper or importer certificate, that they are hard dried hides or skins.

(3) Except for ruminant hides or skins from Mexico, untanned abattoir hides or skins of ruminants may be imported from any region without other restriction if the following requirements are met:

(i) The ruminants from which the hides or skins were taken have been slaughtered under national government inspection in a region [1] and in an abattoir in which is maintained an inspection service that meets the requirements and has been approved pursuant to part 327 of this title; and

(ii) The hides or skins are accompanied by a certificate bearing the seal of the proper department of that national government and signed by an official veterinary inspector of the region in which the ruminants were slaughtered. The certificate must state that the hides or skins were taken from ruminants slaughtered in an abattoir that meets the requirements of paragraph (a)(3)(i) of this section and that the hides or skins are free from anthrax, foot-and-mouth disease, and rinderpest.

(4) Untanned ruminant hides or skins from any region may be imported without other restriction if an inspector determines, based on inspection and upon examination of a shipper or importer certificate, that they have been pickled in a solution of salt containing mineral acid and packed in barrels, casks, or tight cases while still wet with such solution. The solution must be determined by the inspector to have a pH of less than or equal to 5.

(5) Untanned ruminant hides or skins from any region may be imported without other restriction if an inspector determines, based on inspection and upon examination of a shipper or importer certificate, that they have been treated with lime in such manner and for such period as to have obviously been processed, to have become dehaired, and to have reached the stage of preparation for immediate manufacture into products ordinarily made from rawhide.

(b) *Ruminant hides and skins from Mexico.* Ruminant hides and skins from Mexico may enter the United States without other restriction if:

(1) They have been subjected to any one of the treatments specified in paragraphs (a)(2), (a)(3), or (a)(4) of this section; or

(2) They have been frozen solid for 24 hours and are accompanied by a written statement from the owner attesting to that fact; or

(3) They are free from ticks and are accompanied by a certificate issued by a full-time salaried veterinary officer of the Government of Mexico stating that they have been treated with an acaricide; or

(4) They are bovine hides taken from cattle that were subjected to a tickicidal dip at a Mexican export facility 7 to 12 days prior to slaughter.

(c) *Bird trophies.* Bird trophies from regions designated in § 94.6 of this subchapter as free of exotic Newcastle disease may be imported without further restriction if accompanied by a certificate of origin issued by the national government of the region of export.

(Approved by the Office of Management and Budget under control number 0579–0015)

Done in Washington, DC, this 31st day of July 2006.

W. Ron DeHaven,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E6–12639 Filed 8–3–06; 8:45 am]

BILLING CODE 3410–34–P

[1] Names of these regions will be furnished upon request to the Animal and Plant Health Inspection Service, Veterinary Services, National Center for Import and Export, 4700 River Road Unit 38, Riverdale, Maryland 20737–1231.

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502 and 546

Class II Definitions and Game Classification Standards

AGENCY: National Indian Gaming Commission.

ACTION: Notice of public hearing; notice of extension of comment period; errata notice.

SUMMARY: This document sets a date, time, place, and procedures for a public hearing in connection with the proposed Class II definitions and game classification standards published in the **Federal Register** on May 25, 2006 (71 FR 30232, 71 FR 30238). Additionally, this document extends the period for comments on the proposed regulations. Finally, this document provides an errata for the preamble to the Notice of Proposed Rulemaking published in the **Federal Register** on May 25, 2006 (71 FR 30238).

DATES: The hearing will begin at 10 a.m. e.d.t. on September 19, 2006. Comment Period: The comment period for the proposed classification regulations is extended from August 23, 2006, to September 30, 2006.

ADDRESSES: United States Department of the Interior, Main Auditorium, 1849 C Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Natalie Hemlock at 202/632–7003; fax 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: Congress established the National Indian Gaming Commission (NIGC or Commission) under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 et seq.) (IGRA) to regulate gaming on Indian lands. On May 25, 2006, proposed Class II definitions and game classification standards were published in the **Federal Register** (71 FR 30238). The purpose of this meeting is to provide the NIGC with information from those impacted by

changes to gaming regulations. The hearing will be non-adversarial and fact-finding in nature and questioning will be limited to the panel topics. This public hearing will be transcribed and the transcription will be made available to the public.

1. Composition of the Hearing Panels

The Hearing Panels will be composed of individuals selected by the NIGC. The Hearing Panel will be headed by the Chairman of the NIGC. The Chairman shall have the authority to administer oaths, regulate the conduct of the public hearing, and rule on any procedural questions or objections.

2. Topic Panels

(1) State Perspective.

(2) Tribal Perspective.

(3) Federal Perspective.

(4) Manufacturers Perspective.

(5) Economic Impacts.

(6) Game Simulation.

3. Public Attendance

The public hearing is open to the public; however, NIGC and the Department of the Interior (DOI) have the authority to put reasonable limitations on use of transcription devices, videotape cameras, still cameras, camera lights and camera flash lights. NIGC and DOI have the right to restrict persons from entering into the hearing room if they believe their conduct will be disruptive and have the right to restrict the number of spectators to the capacity of the meeting room.

Errata: This Errata makes the following corrections to the preamble to the Notice of Proposed Rulemaking published on May 25, 2006 (71 FR 30238).

(1) 71 FR 30243, third paragraph, strike *U.S.* v. 103 *Electronic Gambling Devices*, 223 F.3d 1091, 1093 (10th Cir. 2000), insert *U.S.* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1093 (9th Cir. 2000).

(2) 71 FR 30246, fourth paragraph, last sentence, strike "If all players have covered sooner, the game may proceed."

(3) 71 FR 30248, second paragraph, strike "The minimum two-second opportunity for covering (daubing) the selected numbers or other designations in each release that appears on players' cards may be shortened, and the game may proceed, if all players in the game Cover (daub) their cards in less time."

(4) 71 FR 30248, tenth paragraph, third sentence, strike "or a lesser time if all players have covered."

Dated: July 31, 2006.

Philip N. Hogen,

Chairman, National Indian Gaming Commission.

[FR Doc. E6–12580 Filed 8–3–06; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124152–06]

RIN 1545–BF73

Definition of Taxpayer for Purposes of Section 901 and Related Matters

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: These proposed regulations provide guidance relating to the determination of who is considered to pay a foreign tax for purposes of sections 901 and 903. The proposed regulations affect taxpayers that claim direct and indirect foreign tax credits.

DATES: Written or electronic comments must be received by October 3, 2006. Outlines of topics to be discussed at the public hearing scheduled for October 13, 2006, must be received by October 3, 2006.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–124152–06), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be sent electronically via the IRS Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS and REG–124152–06). The public hearing will be held in the Auditorium, Internal Revenue Service, New Carrollton Building, 5000 Ellin Road, Lanham, MD 20706.

FOR FURTHER INFORMATION CONTACT: Concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Kelly Banks (*Kelly.D.Banks@irscounsel.treas.gov*); concerning the regulations, Bethany A. Ingwalson, (202) 622–3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 901 of the Internal Revenue Code (Code) permits taxpayers to claim a credit for income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States. Section 903 of the Code permits taxpayers to claim a credit for a tax paid in lieu of an income tax.

Section 1.901–2(f)(1) of the current final regulations provides that the person by whom tax is considered paid for purposes of sections 901 and 903 is the person on whom foreign law imposes legal liability for such tax. This legal liability rule applies even if another person, such as a withholding agent, remits the tax. Section 1.901–2(f)(3) provides that if foreign income tax is imposed on the combined income of two or more related persons (for example, a husband and wife or a corporation and one or more of its subsidiaries) and they are jointly and severally liable for the tax under foreign law, foreign law is considered to impose legal liability on each such person for the amount of the foreign income tax that is attributable to its portion of the base of the tax, regardless of which person actually pays the tax.

The existing final regulations were published in 1983. Since that time, numerous questions have arisen regarding the application of the legal liability rule to fact patterns not specifically addressed in the regulations or the case law. These include situations in which the members of a foreign consolidated group may not have in the U.S. sense the full equivalent of joint and several liability for the group's consolidated tax liability, and cases in which the person whose income is included in the foreign tax base is not the person who is obligated to remit the tax. Courts have reached inconsistent conclusions on these matters. Compare *Nissho Iwai American Corp.* v. *Commissioner*, 89 T.C. 765, 773–74 (1987), *Continental Illinois Corp.* v. *Commissioner*, 998 F.2d 513 (7th Cir. 1993), *cert. denied*, 510 U.S 1041 (1994), *Norwest Corp* v. *Commissioner*, 69 F.3d 1404 (8th Cir. 1995), *cert. denied*, 517 U.S. 1203 (1996), *Riggs National Corp. & Subs.* v. *Commissioner*, 107 T.C. 301, *rev'd and rem'd on another issue*, 163 F.3d 1363 (D.C. Cir. 1999) (all holding that U.S. lenders had legal liability for tax imposed on their interest income from Brazilian borrowers, notwithstanding that under Brazilian law the tax could only be collected from the borrowers) with *Guardian Industries Corp. & Subs.* v. *United States*, 65 Fed. Cl. 50 (2005), appeal docketed, No. 2006–5058 (Fed. Cir. December 19, 2005) (concluding that the subsidiary corporations in a Luxembourg consolidated group had no legal liability for tax imposed on their income, because under Luxembourg law the

parent corporation was solely liable to pay the tax).

Questions have also arisen regarding the application of the legal liability rule to entities that have different classifications for U.S. and foreign tax law purposes (*e.g.*, hybrid entities and reverse hybrids). This is particularly the case following the promulgation of §§ 301.7701–1 through –3 (the check the box regulations) in 1997. A hybrid entity is an entity that is treated as a taxable entity (*e.g.*, a corporation) under foreign law and as a partnership or disregarded entity for U.S. tax purposes. For purposes of these regulations, a reverse hybrid is an entity that is a corporation for U.S. tax purposes but is treated as a pass-through entity for foreign tax purposes (*i.e.*, income of the entity is taxed under foreign law at the owner level). Current § 1.901–2(f) does not explicitly address how to determine the person that is considered to pay foreign tax imposed on the income of hybrid entities or reverse hybrids.

The IRS and the Treasury Department have determined that the regulations should be updated to clarify the application of the legal liability rule in these situations, and request comments on additional matters that should be addressed in published guidance.

Explanation of Provisions

A. Overview

The IRS and Treasury Department have received substantial comments as to matters that may be addressed under the legal liability rule of § 1.901–2(f). These matters include rules relating to the treatment of foreign consolidated groups, reverse hybrids, hybrid entities, hybrid instruments and payments, and other issues. The proposed regulations would provide guidance on foreign consolidated groups, reverse hybrids, and hybrid entities. However, the proposed regulations reserve on issues relating to hybrid instruments and payments, specifically on the question of who is considered to pay tax imposed on income attributable to amounts paid or accrued between related parties under a hybrid instrument or payments that are disregarded for U.S. tax purposes. These and other issues will be addressed in a subsequent guidance project.

The proposed regulations would retain the general principle that tax is considered paid by the person who has legal liability under foreign law for the tax. However, the proposed regulations would further clarify application of the legal liability rule in situations where foreign law imposes tax on the income of one person but requires another person to remit the tax. The proposed regulations make clear that foreign law is considered to impose legal liability for income tax on the person who is required to take such income into account for foreign tax purposes even if another person has the sole obligation to remit the tax (subject to the above-referenced reservation for hybrid instruments and payments).

The proposed regulations would provide detailed guidance regarding how to treat taxes paid on the combined income of two or more persons. First, the proposed regulations would clarify the application of § 1.901–2(f) to foreign consolidated-type regimes where the members are not jointly and severally liable in the U.S. sense for the group's tax. The proposed regulations would make clear that the foreign tax must be apportioned among all the members pro rata based on the relative amounts of net income of each member as computed under foreign law. The proposed regulations would provide guidance in determining the relative amounts of net income.

Second, the proposed regulations would revise § 1.901–2(f) to provide that a reverse hybrid is considered to have legal liability under foreign law for foreign taxes imposed on an owner of the reverse hybrid in respect of the owner's share of income of the reverse hybrid. The reverse hybrid's foreign tax liability would be determined based on the portion of the owner's taxable income (as computed under foreign law) that is attributable to the owner's share of the income of the reverse hybrid.

Third, the proposed regulations would clarify that a hybrid entity that is treated as a partnership for U.S. income tax purposes is legally liable under foreign law for foreign income tax imposed on the income of the entity, and that the owner of an entity that is disregarded for U.S. income tax purposes is considered to have legal liability for such tax.

These provisions are discussed in more detail below.

B. Legal Liability Under Foreign Law

Section 1.901–2(f)(1)(i) of the proposed regulations clarifies that, except for income attributable to related party hybrid payments described in § 1.901–2(f)(4), foreign law is considered to impose legal liability for income tax on the person who is required to take such income into account for foreign tax purposes. This paragraph of the proposed regulations further clarifies that such person has legal liability for the tax even if another person is obligated to remit the tax, another person actually remits the tax, or the foreign country (defined in § 1.901–2(g) to include political subdivisions and U.S. possessions) can proceed against another person to collect the tax in the event the tax is not paid.

Similarly, § 1.902–1(f)(1)(ii) of the proposed regulations clarifies that, in the case of a tax imposed with respect to a base other than income, foreign law is considered to impose legal liability for the tax on the person who is the owner of the tax base for foreign tax purposes. Thus, in the case of a gross basis withholding tax that qualifies as a tax in lieu of an income tax under § 1.903–1(a), the proposed regulations provide that the person that is considered under foreign law to earn the income on which the foreign tax is imposed has legal liability for the tax, even if the foreign tax cannot be collected from such person.

The IRS and Treasury Department request comments on whether the regulations should provide a special rule on where legal liability resides in the case of withholding taxes imposed on an amount received by one person on behalf of the beneficial owner of such amount. In certain cases, a foreign country may consider the recipient to earn income (or be the owner of the tax base) while the United States considers the recipient to be a nominee receiving the payment on behalf of the beneficial owner. Comments should focus on how a special rule for such nominee arrangements could be narrowly drawn to prevent opportunities for abuse while maintaining the administrative advantages of the legal liability rule, which generally operates to classify as the *taxpayer* the person who is in the best position to prove the tax was required to be, and actually was, paid.

C. Taxes Imposed on Combined Income

1. Foreign Consolidated Groups

The IRS and Treasury Department believe that § 1.901–2(f)(1) of the current final regulations requires allocation of foreign consolidated tax liability among the members of a foreign consolidated group pro rata based on each member's share of the consolidated taxable income included in the foreign tax base. In addition, the IRS and Treasury Department believe that § 1.901–2(f)(3) confirms this rule in situations in which foreign consolidated regimes impose joint and several liability for the group's tax on each member. With respect to a foreign consolidated-type regime where the members do not have the full equivalent of joint and several liability in the U.S. sense, or where the income of the consolidated group members is attributed to the parent corporation in

computing the consolidated taxable income, the current regulations do not include a specific illustration of how the consolidated tax should be allocated among the members of the group for foreign tax credit purposes.

Thus, the IRS and Treasury Department believe that § 1.901–2(f)(1) of the current final regulations requires as a general rule pro rata allocation of foreign tax among the members of a foreign consolidated group, and that § 1.901–2(f)(3) illustrates the application of the general rule in cases where the group members are jointly and severally liable for that consolidated tax. Failure to allocate appropriately the consolidated tax among the members of the group may result in a separation of foreign tax from the income on which the tax is imposed. This type of splitting of foreign tax and income is contrary to the general purpose of the foreign tax credit to relieve double taxation of foreign-source income. Accordingly, § 1.901–2(f)(2) of the proposed regulations would explicitly cover all foreign consolidated-type regimes, including those in which the regime imposes joint and several liability in the U.S. sense, those in which the regime treats subsidiaries as branches of the parent corporation (or otherwise attributes income of subsidiaries to the parent corporation), and those in which some of the group members have limited obligations, or even no obligation, to pay the consolidated tax. Several significant commentators recommended that the regulations be clarified in this manner.

The proposed regulations would define *combined income* to include cases where the foreign country initially recognizes the subsidiaries as separate taxable entities, but pursuant to the applicable consolidated tax regime treats subsidiaries as branches of the parent, requires or treats all income as distributed to the parent, or otherwise attributes all income to the parent. This approach will minimize the need for extensive analysis of the intricacies of the relevant foreign consolidated tax regime, by treating a foreign subsidiary as legally liable for its share of the consolidated tax without regard to the precise mechanics of the foreign consolidated regime. This approach will not only reduce inappropriate foreign tax credit splitting but will also reduce administrative burdens on taxpayers and the IRS.

Section 1.902–1(f)(2) of the proposed regulations retains the general principle that the foreign tax must be apportioned among the persons whose income is included in the combined base pro rata based on the relative amounts of net income of each person as computed under foreign law. As under current law, this rule would apply regardless of which person is obligated to remit the tax, which person actually remits the tax, and which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. Under § 1.902–1(f)(2)(i), *person* for this purpose includes a disregarded entity.

2. Reverse Hybrid Entities

The proposed regulations would revise § 1.901–2(f) to provide that a reverse hybrid is considered to have legal liability under foreign law for foreign taxes imposed on the owners of the reverse hybrid in respect of each owner's share of the reverse hybrid's income. Proposed regulation § 1.902–1(f)(2)(iii). This rule is necessary to prevent the inappropriate separation of foreign tax from the related income and to prevent dissimilar treatment of foreign consolidated groups and foreign groups containing reverse hybrids, which are treated identically for U.S. tax purposes. Under the proposed rule, the reverse hybrid's foreign tax liability would be determined based on the portion of the owner's taxable income (as computed under foreign law) that is attributable to the owner's share of the reverse hybrid's income. Thus, for example, if an owner of a reverse hybrid has no other income on which tax is imposed by the foreign country, then the entire amount of foreign tax that is imposed on the owner is treated as attributable to the reverse hybrid for U.S. income tax purposes and, accordingly, is tax for which the reverse hybrid has legal liability. This rule would apply irrespective of whether the owner and the reverse hybrid are located in the same foreign country. If the owner pays tax to more than one foreign country with respect to income of the reverse hybrid, tax paid to each foreign country would be separately apportioned on the basis of the income included in that country's tax base. The treatment of reverse hybrids in the proposed regulations is consistent with the treatment recommended by a significant commentator.

3. Apportionment of Tax on Combined Income

Section 1.901–2(f)(2)(iv) of the proposed regulations includes rules for determining each person's share of the combined income tax base, generally relying on foreign tax reporting of separate taxable income or books maintained for that purpose. The regulations provide that payments between group members that result in a deduction under both U.S. and foreign tax law will be given effect in determining each person's share of the combined income, but, as noted above, explicitly reserve with respect to the effect of hybrid instruments and disregarded payments between related parties (to be dealt with in a separate guidance project). Special rules address the effect of dividends (and deemed dividends) and net losses of group members on the determination of separate taxable income.

Once an amount of foreign tax is determined to be paid by a consolidated group member or reverse hybrid under the combined income rule, applicable provisions of the Code would determine the specific U.S. tax consequences of that treatment. For example, a parent corporation's payment of tax on its subsidiary's share of consolidated taxable income, or the payment of tax by the owner of a reverse hybrid with respect to its share of the income of the reverse hybrid, ordinarily would result in a capital contribution to the subsidiary or reverse hybrid. Further, under sections 902 and 960, domestic corporate owners that own 10 percent or more of a foreign corporation's voting stock are eligible to claim indirect credits. Thus, domestic corporations that are considered to own 10 percent or more of a reverse hybrid's voting stock would be able to claim indirect credits for the taxes attributable to the earnings of the reverse hybrid that are distributed as dividends or otherwise included in the owner's income for U.S. tax purposes.

D. Hybrid Entities

Section 1.901–2(f)(3) of the proposed regulations would also clarify the treatment of hybrid entities. In the case of an entity that is a partnership for U.S. income tax purposes but taxable under foreign law as an entity, foreign law is considered to impose legal liability for the tax on the entity. This is the case even if the owners of the entity also have a secondary obligation to pay the tax. Sections 702, 704, and 901(b)(5) and the Treasury regulations thereunder apply for purposes of allocating the foreign tax among the owners of a hybrid entity that is a partnership for U.S. tax purposes. In the case of tax imposed on an entity that is disregarded as separate from its owner for U.S. income tax purposes, foreign law is considered to impose legal liability for the tax on the owner.

E. Effective Date

The regulations are proposed to be effective for foreign taxes paid or accrued during taxable years beginning

on or after January 1, 2007. Comments are requested as to how to determine which person paid a foreign tax in cases where a foreign taxable year ends, and foreign tax accrues, within a post-effective date U.S. taxable year of a reverse hybrid and a pre-effective date U.S. taxable year of its owner.

F. Request for Additional Comments

As indicated above, in developing these proposed regulations, the IRS and Treasury Department considered comments on the proper scope and content of the regulations. Commentators generally agreed that amendments to clarify that foreign tax is properly apportioned among the members of a foreign consolidated group were appropriate. Commentators also agreed that the regulations should clarify that tax imposed on a disregarded entity is considered paid by its owner, and that tax imposed on a hybrid partnership should be allocated under the rules of sections 702, 704, and 901(b)(5). Some comments strongly stated that the IRS and Treasury Department have authority to extend the scope of the regulations to require the attribution of foreign tax to reverse hybrids. One comment, however, suggested that the IRS and Treasury Department may lack such authority. The IRS and Treasury Department considered these comments and concluded that the proposed regulations are well within applicable regulatory authority and fully consistent with the case law, including *Biddle* v. *Commissioner*, 302 U.S. 573 (1938).

Comments also suggested that the IRS and Treasury Department should extend the scope of the regulations to ensure that hybrid instruments and hybrid entities could not be used effectively to separate foreign tax from the related foreign income. As indicated above, however, the IRS and Treasury Department have decided not to exercise this authority in these regulations. The proposed regulations reserve on the effect given to hybrid payments and disregarded payments in determining the person whose income is subject to foreign tax. The IRS and Treasury Department are continuing to study certain transactions employing hybrid instruments and other transactions designed to generate inappropriate foreign tax credit results. These include the use of hybrid instruments that accrue income for foreign tax purposes, but not U.S. tax purposes, to accelerate the payment of creditable foreign taxes before the related income is subject to U.S. tax. These also include the use of disregarded payments to shift foreign tax liabilities away from the person that is considered to earn the associated taxable income for U.S. tax purposes. It is contemplated that some or all of these issues will be addressed in a separate guidance project, and that any such regulations may also be effective for taxable years beginning on or after January 1, 2007.

The IRS and Treasury Department request additional comments regarding the appropriate application of the legal liability rule to hybrid instruments and payments that are disregarded for U.S. tax purposes. They also request comments on other issues that might be incorporated into final regulations.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for October 13, 2006, beginning at 10 a.m., in the Auditorium, Internal Revenue Service, New Carrollton Building, 5000 Ellin Road, Lanham, MD 20706. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit electronic or written comments and an outline of the topics to be discussed and time to be devoted to each topic (a signed original and eight (8) copies) by October 3, 2006. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Bethany A. Ingwalson, Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. In § 1.706–1, paragraph (c)(6) is added to read as follows:

§ 1.706–1 Taxable years of partner and partnership.

* * * * *

(c) * * *

(6) *Foreign taxes.* For rules relating to the treatment of foreign taxes paid or accrued by a partnership, see § 1.901–2(f)(3)(i) and (ii).

* * * * *

Par. 3. In § 1.901–2, paragraphs (f) and (h) are revised to read as follows:

§ 1.901–2 Income, war profits, or excess profits tax paid or accrued.

* * * * *

(f) *Taxpayer*—(1) *In general*—(i) *Income taxes.* Income tax (within the meaning of paragraphs (a) through (c) of this section) is considered paid for U.S. income tax purposes by the person on whom foreign law imposes legal liability for such tax. In general, foreign law is considered to impose legal liability for tax on income on the person who is required to take the income into account for foreign income tax purposes

(paragraph (f)(4) of this section reserves with respect to certain related party hybrid payments). This rule applies even if under foreign law another person is obligated to remit the tax, another person (e.g., a withholding agent) actually remits the tax, or foreign law permits the foreign country to proceed against another person to collect the tax in the event the tax is not paid. However, see section 905(b) and the regulations thereunder for rules relating to proof of payment. Except as provided in paragraph (f)(2)(i) of this section, for purposes of this section the term *person* has the meaning set forth in section 7701(a)(1), and so includes an entity treated as a corporation, trust, estate or partnership for U.S. tax purposes, but not a disregarded entity described in § 301.7701–2(c)(2)(i) of this chapter. The person on whom foreign law imposes legal liability is referred to as the "taxpayer" for purposes of this section, § 1.901–2A, and § 1.903–1.

(ii) *Taxes in lieu of income taxes.* The principles of paragraph (f)(1)(i) and paragraphs (f)(2) through (f)(5) of this section shall apply to determine the person who is considered to have legal liability for, and thus to have paid, a tax in lieu of an income tax (within the meaning of § 1.903–1(a)). Accordingly, foreign law is considered to impose legal liability for any such tax on the person who is the owner of the base on which the tax is imposed for foreign tax purposes.

(2) *Taxes on combined income of two or more persons*—(i) *In general.* If foreign tax is imposed on the combined income of two or more persons (for example, a husband and wife or a corporation and one or more of its subsidiaries), foreign law is considered to impose legal liability on each such person for the amount of the tax that is attributable to such person's portion of the base of the tax. Therefore, if foreign tax is imposed on the combined income of two or more persons, such tax shall be allocated among, and considered paid by, such persons on a pro rata basis. For this purpose, the term pro rata means in proportion to each person's portion of the combined income, as determined under paragraph (f)(2)(iv) of this section and, generally, under foreign law. The rules of this paragraph (f)(2) apply regardless of which person is obligated to remit the tax, which person actually remits the tax, or which person the foreign country could proceed against to collect the tax in the event all or a portion of the tax is not paid. For purposes of this paragraph (f)(2), the term *person* shall include a disregarded entity described in § 301.7701–2(c)(2)(i) of this chapter. In determining the amount of tax paid by an owner of a hybrid partnership or disregarded entity (as defined in paragraph (f)(3) of this section), this paragraph (f)(2) shall first apply to determine the amount of tax paid by the hybrid partnership or disregarded entity, and then paragraph (f)(3) of this section shall apply to allocate the amount of such tax to the owner.

(ii) *Combined income.* For purposes of this paragraph (f)(2), foreign tax is imposed on the combined income of two or more persons if such persons compute their taxable income on a combined basis under foreign law. Foreign tax is considered to be imposed on the combined income of two or more persons even if the combined income is computed under foreign law by attributing to one such person (e.g., the foreign parent of a foreign consolidated group) the income of other such persons. However, foreign tax is not considered to be imposed on the combined income of two or more persons solely because foreign law:

(A) Permits one person to surrender a net loss to another person pursuant to a group relief or similar regime;

(B) Requires a shareholder of a corporation to include in income amounts attributable to taxes imposed on the corporation with respect to distributed earnings, pursuant to an integrated tax system that allows the shareholder a credit for such taxes; or

(C) Requires a shareholder to include, pursuant to an anti-deferral regime (similar to subpart F of the Internal Revenue Code (sections 951 through 965)), income attributable to the shareholder's interest in the corporation.

(iii) *Reverse hybrid entities.* For purposes of this paragraph (f)(2), if an entity is a corporation for U.S. income tax purposes and a person is required to take all or a part of the income of one or more such entities into account under foreign law because the entity is treated as a branch or a pass-through entity under foreign law (a *reverse hybrid*), tax imposed on the person's share of income from each reverse hybrid and tax imposed by the foreign country on other income of the person, if any, is considered to be imposed on the combined income of the person and each reverse hybrid. Therefore, under paragraph (f)(2)(i) of this section, foreign tax imposed on the combined income of the person and each reverse hybrid shall be allocated between the person and the reverse hybrid on a pro rata basis. For this purpose, the term pro rata means in proportion to the portion of the combined income included in the foreign tax base that is attributable to the person's share of income from each reverse hybrid and the portion of the combined income that is attributable to the other income of the person (including income received from a reverse hybrid other than in the owner's capacity as an owner). If the person has a share of income from the reverse hybrid but no other income on which tax is imposed by the foreign country, the entire amount of foreign tax is allocated to and considered paid by the reverse hybrid.

(iv) *Portion of combined income*—(A) *In general.* Except with respect to income attributable to related party hybrid payments or accrued amounts described in paragraph (f)(4) of this section, each person's portion of the combined income shall be determined by reference to any return, schedule or other document that must be filed or maintained with respect to a person showing such person's income for foreign tax purposes, as properly amended or adjusted for foreign tax purposes. If no such return, schedule or document must be filed or maintained with respect to a person for foreign tax purposes, then, for purposes of this paragraph (f)(2), such person's income shall be determined from the books of account regularly maintained by or on behalf of the person for purposes of computing its taxable income under foreign law.

(B) *Effect of certain payments.* Each person's portion of the combined income shall be determined by giving effect to payments and accrued amounts of interest, rents, royalties, and other amounts to the extent such payments or accrued amounts are taken into account in computing the separate taxable income of such person both under foreign law and under U.S. tax principles. With respect to certain related party hybrid payments, see the reservation in paragraph (f)(4) of this section. Thus, for example, interest paid by a reverse hybrid to one of its owners with respect to an instrument that is treated as debt for both U.S. and foreign tax purposes would be considered income of the owner and would reduce the taxable income of the reverse hybrid. However, each person's portion of the combined income shall be determined without taking into account any payments from other persons whose income is included in the combined base that are treated as dividends under foreign law, and without taking into account deemed dividends or any similar attribution of income made for purposes of computing the combined income under foreign law. This rule applies regardless of whether any such dividend, deemed dividend or

attribution of income results in a deduction or inclusion under foreign law.

(C) *Net losses.* If tax is considered to be imposed on the combined income of three or more persons and one or more of such persons has a net loss for the taxable year for foreign tax purposes, the following rules apply. If foreign law provides mandatory rules for allocating the net loss among the other persons, then the rules that apply for foreign tax purposes shall apply for purposes of paragraph (f)(2)(iv) of this section. If foreign law does not provide mandatory rules for allocating the net loss, the net loss shall be allocated among all other such persons pro rata based on the amount of each person's income, as determined under paragraphs (f)(2)(iv)(A) and (B) of this section. For purposes of this paragraph (f)(2)(iv)(C), foreign law shall not be considered to provide mandatory rules for allocating a loss solely because such loss is attributed from one person to a second person for purposes of computing combined income, as described in paragraph (f)(2)(ii) of this section.

(v) *Collateral consequences.* U.S. tax principles shall apply to determine the tax consequences if one person remits a tax that is the legal liability of, and thus is considered paid by, another person. For example, a payment of tax for which a corporation has legal liability by a shareholder of that corporation (including an owner of a reverse hybrid) will ordinarily result in a deemed capital contribution and deemed payment of tax by the corporation. If the corporation reimburses the shareholder for the tax payment, such reimbursement would ordinarily be treated as a distribution for U.S. tax purposes.

(3) *Taxes on income of hybrid partnerships and disregarded entities*—(i) *Hybrid partnerships.* If foreign law imposes tax at the entity level on the income of an entity that is treated as a partnership for U.S. income tax purposes (a *hybrid partnership*), the hybrid partnership is considered to be legally liable for such tax under foreign law. Therefore, the hybrid partnership is considered to pay the tax for U.S. income tax purposes. See § 1.704–1(b)(4)(viii) for rules relating to the allocation of such tax among the partners of the partnership. If the hybrid partnership's U.S. taxable year closes for all partners due to a termination of the partnership under section 708 and the regulations thereunder (other than in the case of a termination under section 708(b)(1)(A)) and the foreign taxable year of the partnership does not close, then foreign tax paid or accrued by the partnership with respect to the foreign taxable year that ends with or within the new partnership's first U.S. taxable year shall be allocated between the terminating partnership and the new partnership. The allocation shall be made under the principles of § 1.1502–76(b) based on the respective portions of the taxable income of the partnership (as determined under foreign law) for the foreign taxable year that are attributable to the period ending on and the period ending after the last day of the terminating partnership's U.S. taxable year. The principles of the preceding sentence shall also apply if the hybrid partnership's U.S. taxable year closes with respect to one or more, but less than all, partners or, except as otherwise provided in section 706(d)(2) or (d)(3) (relating to certain cash basis items of the partnership), there is a change in any partner's interest in the partnership during the partnership's U.S. taxable year. If, as a result of a change in ownership during a hybrid partnership's foreign taxable year, the hybrid partnership becomes a disregarded entity and the entity's foreign taxable year does not close, foreign tax paid or accrued by the disregarded entity with respect to the foreign taxable year shall be allocated between the hybrid partnership and the owner of the disregarded entity under the principles of this paragraph (f)(3)(i).

(ii) *Disregarded entities.* If foreign tax is imposed at the entity level on the income of an entity described in § 301.7701–2(c)(2)(i) of this chapter (a *disregarded entity*), foreign law is considered to impose legal liability for the tax on the person who is treated as owning the assets of the disregarded entity for U.S. income tax purposes. Such person shall be considered to pay the tax for U.S. income tax purposes. If there is a change in the ownership of such disregarded entity during the entity's foreign taxable year and such change does not result in a closing of the disregarded entity's foreign taxable year, foreign tax paid or accrued with respect to such foreign taxable year shall be allocated between the old owner and the new owner. The allocation shall be made under the principles of § 1.1502–76(b) based on the respective portions of the taxable income of the disregarded entity (as determined under foreign law) for the foreign taxable year that are attributable to the period ending on the date of the ownership change and the period ending after such date. If, as a result of a change in ownership, the disregarded entity becomes a hybrid partnership and the entity's foreign taxable year does not close, foreign tax paid or accrued by the hybrid partnership with respect to the foreign taxable year shall be allocated between the old owner and the hybrid partnership under the principles of this paragraph (f)(3)(ii). If the person who owns a disregarded entity is a partnership for U.S. income tax purposes, see § 1.704–1(b)(4)(viii) for rules relating to the allocation of such tax among the partners of the partnership.

(4) *Tax on income attributable to related party payments or accrued amounts that are deductible for foreign (or U.S.) tax law purposes and that are nondeductible for U.S. (or foreign) tax law purposes.* [Reserved].

(5) *Party undertaking tax obligation as part of transaction.* Tax is considered paid by the taxpayer even if another party to a direct or indirect transaction with the taxpayer agrees, as a part of the transaction, to assume the taxpayer's foreign tax liability. The rules of the foregoing sentence apply notwithstanding anything to the contrary in paragraph (e)(3) of this section. See § 1.901–2A for additional rules regarding dual capacity taxpayers.

(6) *Examples.* The following examples illustrate the rules of paragraphs (f)(1) through (f)(5) of this section.

Example 1. (i) *Facts.* Under a loan agreement between A, a resident of country X, and B, a United States person, A agrees to pay B a certain amount of interest net of any tax that country X may impose on B with respect to its interest income. Country X imposes a 10 percent tax on the gross amount of interest income received by nonresidents of country X from sources in country X, and it is established that this tax is a tax in lieu of an income tax within the meaning of § 1.903–1(a). Under the law of country X this tax is imposed on the interest income of the nonresident recipient, and any resident of country X that pays such interest to a nonresident is required to withhold and pay over to country X 10 percent of the amount of such interest. Under the law of country X, the country X taxing authority may proceed against A, but not B, if A fails to withhold and pay over the tax to country X.

(ii) *Result.* Under paragraph (f)(1)(ii) of this section, B is considered legally liable for the country X tax because such tax is imposed on B's interest income. Therefore, for U.S. income tax purposes, B is considered to pay the country X tax, and B's interest income includes the amount of country X tax that is imposed with respect to such interest income and paid on B's behalf by A. No portion of such tax is considered paid by A.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that in collecting and receiving the interest B is acting as a nominee for, or agent of, C, who is a United States person. Accordingly, C, not B, is the beneficial owner of the interest for U.S. income tax purposes. Country X law also

recognizes the nominee or agency arrangement and, thus, considers C to be the beneficial owner of the interest income.

(ii) *Result.* Under paragraph (f)(1)(ii) of this section, legal liability for the tax is considered to be imposed on C, not B (C's nominee or agent). Thus, C is the taxpayer with respect to the country X tax imposed on C's interest income from C's loan to A. Accordingly, C's interest income for U.S. income tax purposes includes the amount of country X tax that is imposed on C with respect to such interest income and that is paid on C's behalf by A pursuant to the loan agreement. Under paragraph (f)(1)(ii) of this section, such tax is considered for U.S. income tax purposes to be paid by C. No such tax is considered paid by B.

Example 3. (i) *Facts.* A, a U.S. person, owns a bond issued by C, a resident of country X. On January 1, 2008, A and B enter into a transaction in which A, in form, sells the bond to B, also a U.S. person. As part of the transaction, A and B agree that A will repurchase the bond from B on December 31, 2013 for the same amount. In addition, B agrees to make payments to A equal to the amount of interest B receives from C. As a result of the arrangement, legal title to the bond is transferred to B. The transfer of legal title has the effect of transferring ownership of the bond to B for country X tax purposes. A remains the owner of the bond for U.S. income tax purposes. Country X imposes a 10 percent tax on the gross amount of interest income received by nonresidents of country X from sources in country X, and it is established that this tax is a tax in lieu of an income tax within the meaning of § 1.903–1(a). Under the law of country X this tax is imposed on the interest income of the nonresident recipient, and any resident of country X that pays such interest to a nonresident is required to withhold and pay over to country X 10 percent of the amount of such interest. On December 31, 2008, C pays B interest on the bond and withholds 10 percent of country X tax.

(ii) *Result.* Under paragraph (f)(1)(ii) of this section, B is considered legally liable for the country X tax because B is the owner of the interest income for country X tax purposes, even though A and not B recognizes the interest income for U.S. tax purposes. The result would be the same if the transaction had the effect of transferring ownership of the bond to B for U.S. income tax purposes.

Example 4. (i) *Facts.* On January 1, 2007, A, a United States person, purchases a bond issued by X, a foreign person resident in county Y. A accrues interest income on the bond for U.S. tax purposes from January 1, 2007, until A sells the bond to B, another United States person, on July 1, 2007. On December 31, 2007, X pays interest on the bond that accrued for the entire year to B. Country Y imposes a 10 percent tax on the gross amount of interest income received by nonresidents of country Y from sources in country Y, and it is established that this tax is a tax in lieu of an income tax within the meaning of § 1.903–1(a). Under the law of country Y this tax is imposed on the interest income of the nonresident recipient, and any resident of country Y that pays such interest to a nonresident is required to withhold and pay over to country X 10 percent of the amount of such interest. Pursuant to the law of country Y, X withholds tax from the interest paid to B.

(ii) *Result.* Under paragraph (f)(1)(ii) of this section, legal liability for the tax is considered to be imposed on B. Thus, B is the taxpayer with respect to the entire amount of the country Y tax even though, for U.S. income tax purposes, B only recognizes interest that accrues on the bond on and after July 1, 2007. No portion of the country Y tax is considered to be paid by A even though, for U.S. income tax purposes, A recognizes interest on the bond that accrues prior to July 1, 2007.

Example 5. (i) *Facts.* A, a United States person and resident of country X, is an employee of B, a corporation organized in country X. Under the laws of country X, B is required to withhold from A's wages and pay over to country X foreign social security tax of a type described in paragraph (a)(2)(ii)(C) of this section, and it is established that this tax is an income tax described in paragraph (a)(1) of this section.

(ii) *Result.* Under paragraph (f)(1)(i) of this section, A is considered legally liable for the country X tax because such tax is imposed on A's wages. Therefore, for U.S. income tax purposes, A is considered to pay the country X tax.

Example 6. (i) *Facts.* A, a United States person, owns 100 percent of B, an entity organized in country X. B is a corporation for country X tax purposes, and a disregarded entity for U.S. income tax purposes. B owns 100 percent of corporation C and corporation D, both of which are also organized in country X. B, C and D use the "u" as their functional currency and file on a combined basis for country X income tax purposes. Country X imposes an income tax described in paragraph (a)(1) of this section at the rate of 30 percent on the taxable income of corporations organized in country X. Under the country X combined reporting regime, income (or loss) of C and D is attributed to, and treated as income (or loss) of, B. B has the sole obligation to pay country X income tax imposed with respect to income of B and income of C and D that is attributed to, and treated as income of, B. Under the law of country X, country X may proceed against B, but not C or D, if B fails to pay over to country X all or any portion of the country X income tax imposed with respect to such income. In year 1, B has taxable income of 100u, C has taxable income of 200u, and D has a net loss of (60u). Under the law of country X, B is considered to have 240u of taxable income with respect to which 72u of country X income tax is imposed. Country X does not provide mandatory rules for allocating D's loss.

(ii) *Result.* Under paragraph (f)(2)(ii) of this section, the 72u of country X tax is considered to be imposed on the combined income of B, C, and D. Because country X law does not provide mandatory rules for allocating D's loss between B and C, under paragraph (f)(2)(iv)(C) of this section D's (60u) loss is allocated pro rata: 20u to B ((100u/300u) × 60u) and 40u to C ((200u/300u) × 60u). Under paragraph (f)(2)(i) of this section, the 72u of country X tax must be allocated pro rata among B, C, and D. Because D has no income for country X tax purposes, no country X tax is allocated to D. Accordingly, 24u (72u × (80u/240u)) of the country X tax is allocated to B, and 48u (72u × (160u/240u)) of such tax is allocated to C. Under paragraph (f)(3)(ii) of this section, A is considered to have legal liability for the 24u of country X tax allocated to B under paragraph (f)(2) of this section.

Example 7. (i) *Facts.* A, a domestic corporation, owns 95 percent of the voting power and value of C, an entity organized in country Z that uses the "u" as its functional currency. B, a domestic corporation, owns the remaining 5 percent of the voting power and value of C. Pursuant to an election made under § 301.7701–3(a), C is treated as a corporation for U.S. income tax purposes, but as a partnership for country Z income tax purposes. Accordingly, under country Z law, A and B are required to take into account their respective shares of the taxable income of C. Country Z imposes an income tax described in paragraph (a)(1) of this section at the rate of 30 percent on such taxable income. For 2007, C has 500u of taxable income for country Z tax purposes. A's and B's shares of such income are 475u and 25u, respectively. In addition, A has 125u of taxable income attributable to a permanent establishment in country Z. Income of nonresidents that is attributable to a permanent establishment in country Z is also subject to the country Z income tax at a rate of 30 percent. Accordingly, country Z imposes 180u of tax on A's total taxable income of 600u (475u of income from C and 125u of income from the permanent establishment). Country Z imposes 7.5u of tax on B's 25u of taxable income from C.

(ii) *Result.* Under paragraph (f)(2)(iii) of this section, the 180u of tax imposed on the taxable income of A is considered to be imposed on the combined income of A and C. Under paragraph (f)(2)(i) of this section, such tax must be allocated between A and C on a pro rata basis. Accordingly, C is considered to be legally liable for the 142.5u (180u × (475u/600u)) of country Z tax imposed on A's 475u share of C's income, and A is considered to be legally liable for the 37.5u (180u × (125u/600u)) of the country Z tax imposed on A's 125u of income from its permanent establishment. Under paragraph (f)(2)(iii) of this section, the 7.5u of tax imposed on the taxable income of B is considered to be imposed on the combined income of B and C. Since B has no other income on which income tax is imposed by country Z, under paragraph (f)(2)(iii) of this section the entire amount of such tax is allocated to and considered paid by C. C's post-1986 foreign income taxes include the U.S. dollar equivalent of 150u of country Z income tax C is considered to pay for U.S. income tax purposes. A, but not B, is eligible to compute deemed-paid taxes under section 902(a) in connection with dividends received from C. Under paragraph (f)(2)(v) of this section, the payment by A or B of tax for which C is considered legally liable is treated as a capital contribution by A or B to C.

Example 8. (i) *Facts.* A, B, and C are U.S. persons that each use the calendar year as their taxable year. A and B each own 50

percent of the capital and profits of D, an entity organized in country M. D is a partnership for U.S. income tax purposes, but is a corporation for country M tax purposes. D uses the "u" as its functional currency and the calendar year as its taxable year for both U.S. tax purposes and country M tax purposes. Country M imposes an income tax described in paragraph (a)(1) of this section at a rate of 30 percent at the entity level on the taxable income of D. On September 30, 2008, A sells its 50 percent interest in D to C. A's sale of its partnership interest results in a termination of the partnership under section 708(b) for U.S. tax purposes. As a result of the termination, "old" D's taxable year closes on September 30, 2008 for U.S. tax purposes. New D also has a short U.S. taxable year, beginning on October 1, 2008, and ending on December 31, 2008. The sale of A's interest does not close D's taxable year for country M tax purposes. D has 400u of taxable income for its 2008 foreign taxable year with respect to which country M imposes 120u equal to $120 of income tax.

(ii) *Result.* Under paragraph (f)(3)(i) of this section, hybrid partnership D is legally liable for the $120 of country M income tax imposed on its net income. Because D's taxable year closes on September 30, 2008, for U.S. tax purposes, but does not close for country M tax purposes, under paragraph (f)(3)(i) of this section the $120 of country M tax must be allocated under the principles of § 1.1502–76(b) between the short U.S. taxable years of terminating D and new D. See § 1.704–1(b)(4)(viii) for rules relating to the allocation of terminating D's country M taxes between A and B and the allocation of new D's country M taxes between B and C.

Example 9. (i) *Facts.* A, a United States person engaged in construction activities in country X, is subject to the country X income tax. Country X has contracted with A for A to construct a naval base. A is a dual capacity taxpayer (as defined in paragraph (a)(2)(ii)(A) of this section) and, in accordance with paragraphs (a)(1) and (c)(1) of § 1.901–2A, A has established that the country X income tax as applied to dual capacity persons and the country X income tax as applied to persons other than dual capacity persons together constitute a single levy. A has also established that that levy is an income tax within the meaning of paragraph (a)(1) of this section. Pursuant to the terms of the contract, country X has agreed to assume any country X income tax liability that A may incur with respect to A's income from the contract.

(ii) *Result.* For U.S. income tax purposes, A's income from the contract includes the amount of tax that is imposed by country X on A with respect to its income from the contract and that is assumed by country X; and the amount of the tax liability assumed by country X is considered to be paid by A. By reason of paragraph (f)(5) of this section, country X is not considered to provide a subsidy, within the meaning of section 901(i) and paragraph (e)(3) of this section, to A.

* * * * *

(h) *Effective Date.* Paragraphs (a) through (e) and paragraph (g) of this section, § 1.901–2A and § 1.903–1 apply to taxable years beginning after November 14, 1983. Paragraph (f) of this section is effective for foreign taxes paid or accrued during taxable years of the taxpayer beginning on or after January 1, 2007.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E6–12358 Filed 8–3–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG–146893–02; REG–115037–00; REG–138603–03]

RIN 1545–BB31, 1545–AY38, 1545–BC52

Treatment of Services Under Section 482 Allocation of Income and Deductions From Intangibles Stewardship Expense

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations, notice of proposed rulemaking, and notice of public hearing.

SUMMARY: In a separate part to this issue of the **Federal Register**, the IRS is issuing temporary regulations relating to the treatment of controlled services transactions under section 482. These temporary regulations also provide guidance regarding the allocation of income from intangibles, in particular with respect to contribution by a controlled party to the value of an intangible owned by another controlled party as it relates to controlled services transactions and modify the regulations under section 861 concerning stewardship expenses to be consistent with the changes made to the regulations under section 482. The text of those regulations also serves as the text of these proposed regulations. These proposed regulations also contain a coordination rule with global dealing operations. The Treasury Department and the IRS are presently working on new global dealing regulations and intend that when final regulations are issued, those regulations, not § 1.482–9T, will govern the evaluation of the activities performed by a global dealing operation within the scope of those regulations. Pending finalization of the global dealing regulations, taxpayers may rely on the proposed global dealing regulations, not the temporary services regulations, to govern financial transactions entered into in connection with a global dealing operation as defined in proposed § 1.482–8. Therefore, proposed regulations under § 1.482–9(m)(5) clarify that a controlled services transaction does not include a financial transaction entered into in connection with a global dealing operation. These proposed regulations potentially affect controlled taxpayers within the meaning of section 482. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by November 2, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–146893–02, REG–115037–00, and REG–138603–03), Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be sent electronically, via the IRS Internet site at *http://www.irs.gov/regs* or via Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–146893–02, REG–115037–00, and REG–138603–03).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Thomas A. Vidano, (202) 435–5265, or Carol B. Tan, (202) 435–5265 for matters relating to section 482, or David Bergkuist (202) 622–3850 for matters relating to stewardship expenses; concerning submission of comments, the hearing, and/or, to be placed on the building access list to attend the hearing, [Insert Name], (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR parts 1 and 31) relating to section 482. The temporary regulations set forth guidance on the treatment of controlled services transactions, the allocation from intangibles under section 482, and stewardship expenses under section 861. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations. These proposed regulations potentially affect controlled taxpayers within the meaning of section 482.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined

in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code (Code), this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Thomas A. Vidano and Carol B. Tan, Office of Associate Chief Counsel (International).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security and Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph. 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.482–9 also issued under 26 U.S.C. 482. * * *

Par. 2. Section 1.482–0 is amended as follows:

1. The section heading is revised.
2. The entries for § 1.482–2(b) are revised.
3. The entries for § 1.482–4(f)(3), (f)(4) and (f)(5) are revised and new entries for § 1.482–4(f)(6) are added.
4. New entries for §§ 1.482–6T(c)(3)(i)(B)(*1*) and (*2*) and 1.482–9T are added.

The revisions and additions read as follows:

§ 1.482–0 Outline of regulations under section 482.

* * * * *

[The text of the proposed amendment to § 1.482–0 is the same as the text of § 1.482–0T published elsewhere in this issue of the **Federal Register**].

Par. 3. Section 1.482–1 is amended as follows:

1. Paragraphs (a)(1), (b)(2)(i), (d)(3)(ii)(C) *Example 3*, (d)(3)(v), (f)(2)(ii)(A), (f)(2)(iii)(B), (g)(4)(i), (g)(4)(iii) and paragraph (i) are revised.
2. Paragraphs (d)(3)(ii)(C), *Example 4* and *Example 5* and (j) are added.

The additions and revisions read as follows:

§ 1.482–1 Allocation of income and deductions among taxpayers.

(a)(1) [The text of the proposed amendment to § 1.482–1(a)(1) is the same as the text of § 1.482–1T(a)(1) published elsewhere in this issue of the **Federal Register**].

* * * * *

(b) * * *

(1) * * *

(b)(2)(i) [The text of the proposed amendment to § 1.482–1(b)(2)(i) is the same as the text of § 1.482–1T(b)(2)(i) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(C) * * *

Example 3. [The text of the proposed amendment to § 1.482–1(d)(3)(ii)(C), *Example 3* is the same as the text of § 1.482–1T(d)(3)(ii)(C) *Example 3* published elsewhere in this issue of the **Federal Register**].

Example 4. [The text of the proposed amendment to § 1.482–1(d)(3)(ii)(C) *Example 4* is the same as the text of § 1.482–1T(d)(3)(ii)(C) *Example 4* published elsewhere in this issue of the **Federal Register**].

Example 5. [The text of the proposed amendment to § 1.482–1(d)(3)(ii)(C) *Example 5* is the same as the text of § 1.482–1T(d)(3)(ii)(C) *Example 5* published elsewhere in this issue of the **Federal Register**].

Example 6. [The text of the proposed amendment to § 1.482–1(d)(3)(ii)(C) *Example 6* is the same as the text of § 1.482–1T(d)(3)(ii)(C) *Example 6* published elsewhere in this issue of the **Federal Register**].

(v) *Property or services.* [The text of the proposed amendment to § 1.482–1(d)(3)(v) is the same as the text of § 1.482–1T(d)(3)(v) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) * * *

(2) * * *

(ii)(A) [The text of the proposed amendment to § 1.482–1(f)(2)(ii)(A) is the same as the text of § 1.482–1T(f)(2)(ii)(A) published elsewhere in this issue of the **Federal Register**].

(iii) * * *

(B) [The text of the proposed amendment to § 1.482–1(f)(3)(iii)(B) is the same as the text of § 1.482–1T(f)(3)(iii)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(g) * * *

(4) * * *

(i) * * * [The text of the proposed amendment to § 1.482–1(g)(4)(i) is the same as the text of § 1.482–1T(g)(4)(i) published elsewhere in this issue of the **Federal Register**].

(iii) * * *

Example 1. [The text of the proposed amendment to § 1.482–1(g)(4)(iii) *Example 1* is the same as the text of § 1.482–1T(g)(4)(iii) *Example 1* published elsewhere in this issue of the **Federal Register**].

* * * * *

(i) [The text of the proposed amendment to § 1.482–1(i) is the same as the text of § 1.482–1T(i) published elsewhere in this issue of the **Federal Register**].

* * * * *

(j) [The text of the proposed amendment to § 1.482–1(j) is the same as the text of § 1.482–1T(j)(1) and (2) published elsewhere in this issue of the **Federal Register**].

Par. 4. Section 1.482–2 is amended as follows:

1. Paragraph (b) is revised.
2. Paragraph (e) is added.

The revision and addition reads as follows:

§ 1.482–2 Determination of taxable income in specific situations.

* * * * *

(b) [The text of the proposed amendment to § 1.482–2(b) is the same as the text of § 1.482–2T(b) published elsewhere in this issue of the **Federal Register**].

* * * * *

(e) [The text of the proposed amendment to § 1.482–2(e) is the same as the text of § 1.482–2T(e)(1) and (2) published elsewhere in this issue of the **Federal Register**].

Par. 5. Section 1.482–4 is amended as follows:

1. Paragraph (f)(3) is revised.
2. Paragraphs (f)(4) and (f)(5) are redesignated as paragraphs (f)(5) and (f)(6), respectively.
3. New paragraphs (f)(4) and (f)(7) are added.

The revision and addition read as follows:

§ 1.482–4 Methods to determine taxable income in connection with a transfer of intangible property.

* * * * *

(f) * * *

(3) [The text of the proposed amendment to § 1.482–4(f)(3) is the same as the text of § 1.482–4T(f)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

(4) [The text of the proposed amendment to § 1.482–4(f)(4) is the same as the text of § 1.482–4T(f)(4) published elsewhere in this issue of the **Federal Register**].

* * * * *

(7) [The text of the proposed amendment to § 1.482–4(f)(7) is the same as the text of § 1.482–4T(f)(7)(i) and (ii) published elsewhere in this issue of the **Federal Register**].

* * * * *

Par. 6. Section 1.482–6 is amended by revising paragraphs (c)(2)(ii)(B)(*1*), (c)(2)(ii)(D), (c)(3)(i)(A), (c)(3)(i)(B), and (c)(3)(ii)(D), and adding paragraph (d) to read as follows:

§ 1.482–6 Profit split method.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) * * * (*1*) * * * [The text of the proposed amendment to § 1.482–6(c)(2)(ii)(B)(*1*) is the same as the text of § 1.482–6T(c)(2)(ii)(B)(*1*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(D) [The text of the proposed amendment to § 1.482–6(c)(2)(ii)(D) is the same as the text of § 1.482–6T(c)(2)(ii)(D) published elsewhere in this issue of the **Federal Register**].

* * * * *

(3) * * *

(i) * * * (A) [The text of the proposed amendment to § 1.482–6(c)(3)(i)(A) is the same as the text of § 1.482–6T(c)(3)(i)(A) published elsewhere in this issue of the **Federal Register**].

(B) [The text of the proposed amendment to § 1.482–6(c)(3)(i)(B) is the same as the text of § 1.482–6T(c)(3)(i)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(ii) * * *

(D) [The text of the proposed amendment to § 1.482–6(c)(3)(ii)(D) is the same as the text of § 1.482–6T(c)(3)(ii)(D) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) [The text of the proposed amendment to § 1.482–6(d) is the same as the text of § 1.482–6T(d)(1) and (2) published elsewhere in this issue of the **Federal Register**].

Par. 7. Section 1.482–8 is amended by adding *Examples 10* through *12* to read as follows:

§ 1.482–8 Examples of the best method rule.

* * * * *

(a) Example 10. Cost of services plus method preferred to other methods. [The text of the proposed amendment to § 1.482–8(a) *Example 10* is the same as the text of § 1.482–8T(a) *Example 10* published elsewhere in this issue of the **Federal Register**].

Example 11. CPM for services preferred to other methods. [The text of the proposed amendment to § 1.482–8(a) *Example 11* is the same as the text of § 1.482–8T(a) *Example 11* published elsewhere in this issue of the **Federal Register**].

Example 12. Residual profit split preferred to other methods. [The text of the proposed amendment to § 1.482–8(a) *Example 12* is the same as the text of § 1.482–8T(a) *Example 12* published elsewhere in this issue of the **Federal Register**].

(b) [The text of the proposed amendment to § 1.482–8(b) is the same as the text of § 1.482–8T(b)(1) and (2) published elsewhere in this issue of the **Federal Register**].

Par. 8. A new § 1.482–9 is added to read as follows:

§ 1.482–9 Methods to determine taxable income in connection with a controlled services transaction.

(a) through (m)(5) [The text of the proposed § 1.482–9(a) through (m)(5) is the same as the text of § 1.482–9T(a) through (m)(5) published elsewhere in this issue of the **Federal Register**].

(m)(6) *Global dealing operations.* A controlled services transaction does not include a financial transaction entered into in connection with a global dealing operation as defined in § 1.482–8.

(n) [The text of the proposed § 1.482–9(n) is the same as the text of § 1.482–9T(n)(1) and (n)(2) published elsewhere in this issue of the **Federal Register**].

Par. 9. Section 1.861–8 is amended by revising paragraphs (a)(5), the fifth and sixth sentences in paragraph (b)(3), (e)(4), (f)(4)(i), (g) *Examples 17*, *18*, and *30*, and the first sentence in paragraph (h) introductory text to read as follows:

§ 1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

(a) * * *

(5) [The text of the proposed amendment to § 1.861–8(a)(5) is the same as the text of § 1.861–8T (a)(5) published elsewhere in this issue of the **Federal Register**]

(b) * * *

(3) * * * [The text of the proposed amendment to § 1.861–8(b)(3) is the same as the text in § 1.861–8T(b)(3) published elsewhere in this issue of the **Federal Register**]. * * *

* * * * *

(e) * * *

(4) [The text of the proposed amendment to § 1.861–8(e)(4) is the same as the text of § 1.861–8T(e)(4) published elsewhere in this issue of the **Federal Register**].

(f) * * *

(4) * * * (i) [The text of the proposed amendment to § 1.861–8(f)(4)(i) is the same as the text of § 1.861–8T(e)(4)(i) published elsewhere in this issue of the **Federal Register**].

(g) * * *

Example 17. [The text of the proposed amendment to § 1.861–8(g) *Example 17* is the same as the text of § 1.861–8T(g) *Example 17*, published elsewhere in this issue of the **Federal Register**].

Example 18. [The text of the proposed amendment to § 1.861–8(g) *Example 18* is the same as the text of § 1.861–8T(g) *Example 18*, published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 30. [The text of the proposed amendment to § 1.861–8(g) *Example 30* is the same as the text of § 1.861–8T(g) *Example 30*, published elsewhere in this issue of the **Federal Register**].

(h) [The text of the proposed amendment to § 1.861–8(h) is the same as the text of § 1.861–8T(h)(1) published elsewhere in this issue of the **Federal Register**]. * * *

* * * * *

Par. 10. Section 1.6038A–3(a)(3) is amended by revising paragraph (a)(3) *Example 4* and (i) to read:

§ 1.6038A–3 Record maintenance.

(a) * * *

(3) * * *

Example 4. [The text of the proposed amendment to § 1.6038A–3, *Example 4* is the same as the text of § 1.6038A–3T, *Example 4* published elsewhere in this issue of the **Federal Register**].

* * * * *

(i) [The text of the proposed amendment to § 1.6038A–3(i) is the

same as the text of § 1.6038A–3T(i)(1) and (2) published elsewhere in this issue of the **Federal Register**].

Par. 11. Section 1.6662–6 is amended by revising paragraphs (d)(2)(ii)(B), (d)(2)(iii)(B)(*4*), (d)(2)(iii)(B)(*6*) and (g) to read as follows:

§ 1.6662–6 Transactions between persons described in section 482 and net section 482 transfer price adjustments.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(B) [The text of the proposed amendment to § 1.6662–6(d)(2)(ii)(B) is the same as the text of § 1.6662–6T(d)(2)(ii)(B) published elsewhere in this issue of the **Federal Register**].

* * * * *

(iii) * * *

(B) * * * (*4*) [The text of the proposed amendment to § 1.6662–6(d)(2)(iii)(B)(*4*) is the same as the text of § 1.6662–6T(d)(2)(iii)(B)(*4*) published elsewhere in this issue of the **Federal Register**].

* * * * *

(6) [The text of the proposed amendment to § 1.6662–6(d)(2)(iii)(B)(6) is the same as the text of § 1.6662–6T(d)(2)(iii)(B)(6) published elsewhere in this issue of the **Federal Register**].

* * * * *

(g) [The text of the proposed amendment to § 1.6662–6(g) is the same as the text of § 1.6662–6T(g)(1) and (2) published elsewhere in this issue of the **Federal Register**].

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 12. The authority citation for part 31 continues to read as follows:

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

Par. 13. Section 31.3121(s)–1 is amended by revising paragraphs (c)(2)(iii) and (d) to read as follows:

§ 31.3121(s)–1 Concurrent employment by related corporations with common paymaster.

* * * * *

(c) * * *

(2) * * *

(iii) [The text of the proposed amendment to § 31.3121(s)–1(c)(2)(iii) is the same as the text of § 31.3121(s)–1T(c)(2)(iii) published elsewhere in this issue of the **Federal Register**].

* * * * *

(d) [The text of the proposed amendment to § 31.3121(s)–1(d) is the same as the text of § 31.3121(s)–1T(d)(1) and (2) published elsewhere in this issue of the **Federal Register**].

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 06–6674 Filed 7–31–06; 4:40 pm]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–06–122]

RIN 1625–AA00

Safety Zone; St. Louis River/Duluth/Interlake Tar Remediation Site, Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a safety zone on the St. Louis River in Duluth, Minnesota. The purpose of the safety zone is to protect the boating public from dangers associated with the cleanup operation in and around Stryker Bay. Entry into this zone will be prohibited unless authorized by the Captain of the Port or his duly appointed representative.

DATES: Comments and related materials must reach the Coast Guard on or before September 30, 2006.

ADDRESSES: You may mail comments and related material to Coast Guard Marine Safety Unit Duluth, 600 S. Lake Ave., Duluth, MN 55802. Coast Guard Marine Safety Unit (MSU) Duluth maintains the public docket for this rulemaking. Comments and material received from the public are part of the docket [CGD09–06–122] and are available for inspection or copying at U.S. Coast Guard Marine Safety Unit Duluth at the above address between the hours of 7:30 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: LCDR Scott Stoermer, U.S. Coast Guard Marine Safety Unit Duluth, at (218) 720–5286, ext. 111.

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 (CGD09–06–122), 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 that 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 plan to hold a public meeting. But you may submit a request for a meeting by writing to MSU Duluth 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 June 23, 2006, the Captain of the Port Duluth issued a Temporary Final Rule (71 FR 36012, CGD9–06–031, 33 CFR 165.T09–031) establishing a safety zone in Stryker Bay and Hallett Slips 6 & 7, which expires on November 30, 2003. The Coast Guard, through this action, intends to continue to ensure the safety of the public and boating traffic in the Stryker Bay area during the course of an environmental remediation project by establishing a permanent safety zone. This safety zone is intended to restrict vessel traffic from the portion of St. Louis River where construction and dredging are occurring. The size of the zone was determined by placing the boundaries approximately 50 feet beyond the outermost extent of dredging operations, encompassing all of Stryker Bay and Hallett Slips 6&7. The Coast Guard intends to cancel this safety zone upon completion of the mediation which is currently anticipated to last for three years.

Discussion of Proposed Rule

The Coast Guard proposes a safety zone to ensure the safety of boaters transiting this portion of the St. Louis River. This proposed safety zone is identical to the current safety zone established by the temporary final rule discussed above.

The proposed safety zone would encompass all waters of Stryker Bay and Hallett Slips 6 & 7 which are located north of a boundary line delineated by the following points: From the shoreline at 46°43′10.00″ N, 092°10′31.66″ W, then south to 46°43′06.24″ N, 092°10′31.66″ W, then east to

46°43′06.24″ N, 092°09′41.76″ W, then north to the shoreline at 46°43′10.04″ N, 092°09′41.76″ W. These coordinates are based upon North American Datum 1983 [NAD 83].

The proposed safety zone requires that all persons and vessels comply with the instructions of the Captain of the Port Duluth or the designated on-scene representative. Entry into, transiting, or anchoring within the safety zone would be prohibited unless authorized by the Captain of the Port Duluth or his designated on-scene representative. The Captain of the Port or his designated representative may be contacted at Coast Guard Marine Safety Unit Duluth at (218) 720–5286.

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).

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 determination is based on the absence of any commercial vessel traffic in this portion of the St. Louis River. There are currently no operational marine terminals west of Hallett Slip 7, which is part of the remediation.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the St. Louis River in the above described zone during the effective period.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: Hallett Slips 6&7 are industrial properties not generally used by the public, and Stryker Bay already has posted warnings against use of those waters. Vessel traffic may enter or transit through the safety zone with the permission of the Captain of the Port Duluth or his designated on-scene representative. Before the effective period, we will issue maritime advisories and ensure they are widely available to users of the St. Louis River.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. 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 MSU Duluth (see **ADDRESSES**). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Unfunded Mandates Reform Act

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

Taking of Private Property

This proposed rule 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 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 does not concern an environmental risk to health or risk to safety that may 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 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 proposed rule under Executive order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination 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, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This event establishes a safety zone therefore paragraph (34)(g) of the Instruction applies.

A preliminary "Environmental Analysis Check List" is 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. A new § 165.927 is added to read as follows:

§ 165.927 Safety Zone; St. Louis River, Duluth/Interlake Tar Remediation Site, Duluth, MN.

(a) *Location:* The following area is a safety zone: All waters of Stryker Bay and Hallett Slips 6 & 7 which are located north of a boundary line delineated by the following points: From the shoreline at 46°43′10.00″ N, 092°10′31.66″ W, then south to 46°43′06.24″ N, 092°10′31.66″ W, then east to 46°43′06.24″ N, 092°09′41.76″ W, then north to the shoreline at 46°43′10.04″ N, 092°09′41.76″ W. [Datum NAD 83].

(b) Regulations.

(1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Duluth, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Duluth or his designated on-scene representative.

(3) The "designated on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The designated on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on-scene representative may be contacted by calling Coast Guard Marine Safety Unit Duluth at (218) 720–5286.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Duluth to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone shall comply with all directions given to them by the Captain of the Port Duluth or his designated on-scene representative.

Dated: July 25, 2006.

G.T. Croot,

Commander, U.S. Coast Guard, Captain of the Port Duluth.

[FR Doc. E6–12661 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 412

[EPA–HQ–OW–2005–0037; FRL–8206–2]

RIN 2040–AE80

Extension of Public Comment Period for the National Pollutant Discharge Elimination System (NPDES) Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of the public comment period.

SUMMARY: On Friday, June 30, 2006, the Environmental Protection Agency published a proposed rule entitled "Revised National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision Proposed Rule." As initially published in the **Federal Register** on June 30, 2006, written comments on the proposed rulemaking were to be submitted to EPA on or before August 14, 2006 (a 45-day public comment period). Since publication, EPA has received several requests for additional time to submit comments. Therefore, the public comment period is being extended for 15 days and will now end on August 29, 2006.

DATES: Comments must be received on or before August 29, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2005–0037 by one of the following methods:

(1) Federal eRulemaking Portal: &fnl;*http://www.regulations.gov*. Follow the on-line instructions for submitting comments. EPA prefers to receive comments submitted electronically.

(2) E-mail: *ow-docket@epa.gov,* Attention Docket ID No. EPA–HQ–OW–2005–0037.

(3) Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mailcode 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OW–2005–0037.

(4) Hand Delivery: Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention: Docket ID No. EPA–HQ–OW–2005–0037. Such deliveries are only accepted during the Docket's normal

hours of operation and special arrangements should be made.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2005–0037. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The Federal regulations.gov Web sites 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the Regulations index at *http://www.regulations.gov/.* Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by 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 at *http://www.regulations.gov* or in hard copy at the Water Docket in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to make hand deliveries or visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket operations, locations and telephone numbers. The Docket Center's mailing address for U.S. mail and the procedure for submitting comments to *http://www.regulations.gov* are not affected by the flooding and will remain the same.

FOR FURTHER INFORMATION CONTACT: For additional information contact Kawana Cohen, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–2435, e-mail address: *cohen.kawana@epa.gov.*

Dated: July 31, 2006.

Benjamin H. Grumbles,

Assistant Administrator, Office of Water.

[FR Doc. E6–12626 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 71, No. 150
Friday, August 4, 2006

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Kootenai and Idaho Panhandle National Forests Proposed Land Management Plans

AGENCY: Forest Service, USDA.

ACTION: Extension of comment period on the Proposed Land Management Plans for the Kootenai and Idaho Panhandle National Forests.

SUMMARY: The Forest Service published a notice in the **Federal Register** on May 12, 2006 initiating a 90-day comment period on the Proposed Land Management Plans for the Kootenai and Idaho Panhandle National Forests. The closing date for submitting comments has been extended to September 9, 2006.

ADDRESSES: Comments on the Kootenai Plan should be sent to: KIPZ Forest Plan Revision Team, Kootenai National Forest, 1101 Hwy 2 West, Libby, Montana 59923. Comments on the Idaho Panhandle Plan should be sent to: KIPZ Forest Plan Revision Team, Idaho Panhandle National Forests, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815. Comments by e-mail should be sent to: *rl_kipz_@fs.fed.us.*

DATES: The comment period closing date has been extended, from August 10, 2006 to September 9, 2006.

FOR FURTHER INFORMATION CONTACT: Kirsten Kaiser at 406–283–7659 or Jodi Kramer at 208–765–7235.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 12, 2006, (FR Vol. 71, Num. 92, page 27671) the Forest Service initiated a 90-day comment period on the Proposed Land Management Plans for the Kootenai and Idaho Panhandle National Forests. The closing date for submitting comments has been extended from August 10, 2006 to September 9, 2006.

Pursuant to 36 CFR 219.9(b)(2), the Kootenai and Idaho Panhandle National Forests are extending the comment period on their Proposed Forest Land Management Plans to September 10, 2006. The Plans are available for viewing and downloading at the Web site *http://www.fs.fed.us/kipz.* Compact Discs (CDs) of the Plans were mailed to persons who have requested a copy and are available to others upon request. Plans are also available for viewing at the Supervisors Offices and Ranger Stations on the Kootenai and Idaho Panhandle Forests. Plan supporting documentation (the comprehensive evaluation report) is posted on the Web site and is available by CD upon request.

The opportunity to object to a Final Plan will be during a 30-day objection period before Plan approval (36 CFR 219.13(a)). Only individuals or organizations, other than a federal agency, who participated in the planning process through the submission of written comments, may object to a Plan.

Please note that all comments, names, and addresses become part of the public record and are subject to the Freedom of Information Act (FOIA), except for proprietary documents and information.

Dated: July 28, 2006.

Ranotta K. McNair,

Forest Supervisor, Idaho Panhandle National Forests.

[FR Doc. 06–6657 Filed 8–3–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: North Central Idaho Resource Advisory Committee, Kamiah, Idaho, USDA, Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Nez Perce and Clearwater National Forests' North Central Idaho Resource Advisory Committee will meet Wednesday and Thursday, September 6–7, 2006 in Orofino, Idaho for a business meeting. The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The business meeting on September 6–7 will be held at the Supervisors Office of the Clearwater National Forest, 12730 Highway 12, Orofino, Idaho, beginning at 10 a.m. (PST) on September 6th and at 9 a.m. (PST) on September 7th. Agenda topics will include discussion of potential projects. A public forum will begin at 2:30 p.m. (PST).

FOR FURTHER INFORMATION CONTACT: Ihor Mereszczak, Staff Officer and Designated Federal Officer, at (208) 935–2513.

Dated: July 17, 2006.

Ihor Mereszczak,

Acting Forest Supervisor.

[FR Doc. 06–6687 Filed 8–3–06; 8:45 am]

BILLING CODE 3410–11–M

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.

DATES: *Effective Date:* September 3, 2006.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or E-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: On June 9, 2006, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (71 FR 33438) of proposed addition to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the service and impact of the addition on the current or most recent

contractors, the Committee has determined that the service listed below is 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: Custodial Services, GSA, Federal Courthouse, 1101 Court Street, Lynchburg, Virginia.

NPA: Goodwill Industries of the Valleys, Inc., Roanoke, Virginia.

Contracting Activity: GSA, PBS, Region 3 (3PMT), Philadelphia, PA.

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. E6–12603 Filed 8–3–06; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete services previously furnished by such agencies.

Comments Must Be Received on or Before: September 3, 2006.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or To Submit Comments Contact: Sheryl D. Kennerly, Telephone: (703) 603–7740, Fax: (703) 603–0655, or E-mail *SKennerly@jwod.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. If approved, the action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Document Destruction, Internal Revenue Service, 1901 Butterfield Road, Downers Grove, Illinois; 2001 Butterfield Road, Downers Grove, Illinois; 230 S. Dearborn Street, IRS Field Procurement Operation, Chicago, Illinois; 3615 Park Drive, Olympia Fields, Illinois; 5860 W. 111th Street, Chicago, Illinois; 860 Algonquin Road, Schaumburg, Illinois; 8125 River Drive, Morton Grove, Illinois; 945 Lake View Parkway, Vernon Hills, Illinois.

NPA: Opportunity, Inc., Highland Park, Illinois.

Contracting Activity: Internal Revenue Service, Dallas, Texas.

Service Type/Location: Document Destruction, U.S. Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois.

NPA: Opportunity, Inc., Highland Park, Illinois.

Contracting Activity: U.S. Railroad Retirement Board, Chicago, Illinois.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for deletion from the Procurement List.

End of Certification

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Grounds Maintenance, U.S. Army Reserve Center (Anthony F. Eafrati, Weirton), Weirton, West Virginia.

NPA: Hancock County Sheltered Workshop, Inc., Weirton, West Virginia.

Contracting Activity: Department of the Army.

Service Type/Location: Janitorial/Custodial, GSA, Distribution Depot, 500 Edwards Avenue, Harahan, Louisiana.

NPA: Louisiana Industries for the Disabled, Inc., Baton Rouge, Louisiana.

Contracting Activity: General Services Administration, Public Buildings Service, New Orleans, Louisiana.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. E6–12604 Filed 8–3–06; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–813]

Canned Pineapple Fruit from Thailand: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests by certain producers/exporters of the subject merchandise and the petitioners,[1] the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on canned pineapple fruit (CPF) from Thailand. This review covers two producers/exporters of the subject merchandise. The period of review (POR) is July 1, 2004, through June 30, 2005.

The Department has preliminarily determined that the companies subject to this review made U.S. sales at prices less than normal value (NV). If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on these preliminary results of review. We will issue the final results of review no later than 120 days from the date of publication of this notice.

EFFECTIVE DATE: August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Magd Zalok or Howard Smith, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482–4162 and (202) 482–5193, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2005, the Department published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on CPF from Thailand. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 70 FR 38099 (July 1, 2005). In accordance with 19 CFR § 351.213(b)(2), on July 19, 2005, the producer/exporter, Vita Food Factory (1989) Ltd. (Vita), requested that the Department conduct an administrative review of its sales and entries of subject merchandise into the United Stated during the POR. Additionally, in accordance with 19 CFR § 351.213(b)(1), on July 29, 2005, the petitioners requested that the Department conduct a review of Tropical Food Industries Co., Ltd. (TROFCO), The Prachuab Fruit Canning Company (PRAFT), and Vita. On August 29, 2005, the Department initiated an administrative review of TROFCO, PRAFT, and Vita. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 70 FR 51009 (August 29, 2005).

On August 5, 2005, the Department issued its antidumping questionnaire to TROFCO, PRAFT, and Vita. On August 10, 2005, PRAFT informed the Department that it had no U.S. sales or shipments of the subject merchandise during the POR. In August and September 2005, Vita responded to the Department's antidumping questionnaire. Subsequently, the Department issued supplemental questionnaires to Vita. Throughout this administrative review, the petitioners have submitted comments regarding Vita's questionnaire responses. In a letter submitted to the Department on August 24, TROFCO requested an extension of time to respond to the Department's questionnaire. Based on TROFCO's request, the Department granted TROFCO an extension of time to respond to section A of the questionnaire until September 12, 2005, and to sections B, C, and D of the questionnaire until September 27, 2005. However, TROFCO did not respond to the Department's questionnaire. On October 6, 2005, the Department issued a letter to TROFCO requesting that it explain in writing whether it had no shipment or sales of CPF to the United States during the POR. In the letter, we informed TROFCO that if it did not respond to the Department's letter by October 13, 2005, the Department may conclude that TROFCO decided not to cooperate and may use facts available that are adverse to TROFCO's interests in determining the company's dumping margin. The Department did not receive a response from TROFCO.

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), the Department may extend the deadline for completion of an administrative review if it determines that it is not practicable to complete the review within the statutory time limit of 245 days. On March 16, 2006, the Department extended the time limit for the preliminary results of review until July 31, 2006 (*see Canned Pineapple Fruit From Thailand: Notice of Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 14497 (March 22, 2006)).

The Department is conducting this administrative review in accordance with section 751 of the Act.

Period of Review

The POR is July 1, 2004, through June 30, 2005.

Scope of the Order

The product covered by the order is canned pineapple fruit, defined as pineapple processed and/or prepared into various product forms, including rings, pieces, chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added. Imports of canned pineapple fruit are currently classifiable under subheadings 2008.20.0010 and 2008.20.0090 of the Harmonized Tariff Schedule of the United States (HTSUS). HTSUS 2008.20.0010 covers canned pineapple fruit packed in a sugar–based syrup; HTSUS 2008.20.0090 covers CPF packed without added sugar (*i.e.*, juice–packed). The HTSUS subheadings are provided for convenience and customs purposes. The written description of the merchandise covered by this order is dispositive.

Partial Preliminary Rescission of Review

As noted above, PRAFT informed the Department that it had no shipments of subject merchandise to the United States during the POR. After receiving PRAFT's "no shipments" claim, the Department examined CBP entry data for the POR. These data support the conclusion that there were no entries, exports, or sales of subject merchandise from PRAFT during the POR. See memorandum to the file from Magd Zalok dated May 15, 2006. Further, on May 22, 2006, the Department requested that CBP notify it within 10 days if CBP had evidence of exports of subject merchandise from PRAFT during the POR. CBP has not notified the Department of such exports. See the memorandum to the file from Magd Zalok dated June 15, 2006. Therefore, in accordance with 19 CFR § 351.213(d)(3), and consistent with the Department's practice, we are preliminarily rescinding our review of PRAFT. *See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 68 FR 53127, 53128 (September 9, 2003).

[1] The petitioners are Maui Pineapple Company Ltd. and the International Longshoreman's and Warehouseman's Union.

Use of Adverse Facts Available (AFA)

Section 776(a)(2) of the Act provides that, if an interested party (A) Withholds information requested by the Department, (B) fails to provide such information by the deadline, or in the form or manner requested, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

The evidence on the record of this review establishes that, pursuant to section 776(a)(2)(A) and (C) of the Act, the use of total facts available is warranted in determining the dumping margin for TROFCO because this company failed to provide requested information. Specifically, TROFCO failed to respond to the Department's antidumping questionnaire.

On October 6, 2005, the Department informed TROFCO by letter that failure to respond to the request for information by October 13, 2005, may result in the use of AFA in determining its dumping margin. TROFCO, however, did not respond to the Department's October 6, 2005, letter. Because TROFCO failed to provide any of the necessary information requested by the Department and thus significantly impeded this segment of the proceeding, pursuant to sections 776(a)(2)(A) and (C) of the Act, we have based the dumping margin for TROFCO on the facts otherwise available (FA).

Use of Adverse Inferences

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission ..., in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *See also* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act (URAA), H. Rep. No. 103–316 at 870 (1994). Section 776(b) of the Act goes on to note that an adverse inference may include reliance on information derived from (1) the petition; (2) a final determination in the investigation under this title; (3) any previous review under section 751 or determination under section 753; or (4) any other information on the record. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See* SAA at 870. The Court of Appeals for the Federal Circuit (CAFC), in *Nippon Steel Corporation v. United States*, 337 F.3d 1373, 1380 (Fed. Cir. 2003), held that the Department need not show intentional conduct existed on the part of the respondent, but merely that a "failure to cooperate to the best of a respondent's ability" existed, *i.e.*, information was not provided "under circumstances in which it is reasonable to conclude that less than full cooperation has been shown." *Id.*

The record shows that TROFCO failed to cooperate to the best of its ability within the meaning of section 776(b) of the Act. As noted above, TROFCO failed to provide any response to the Department's requests for information. As a general matter, it is reasonable for the Department to assume that TROFCO possessed the records necessary to participate in this review. Thus, by not supplying the information the Department requested, TROFCO failed to cooperate to the best of its ability. As TROFCO failed to cooperate to the best of its ability, we are applying an adverse inference in determining its dumping margin pursuant to section 776(b) of the Act. As AFA, we have preliminarily assigned to TROFCO a dumping margin of 51.16 percent, the highest margin determined for any respondent during any segment of this proceeding, consistent with section 776(b)(2) of the Act. This rate was calculated for a respondent in the less than fair value investigation. *See Notice of Antidumping Duty Order and Amended Final Determination: Canned Pineapple Fruit From Thailand*, 60 FR 36775 (July 18, 1995).

Corroboration of Information

Section 776(c) of the Act requires the Department, to the extent practicable, to corroborate secondary information used as FA based on independent sources that are reasonably at its disposal. Secondary information is defined as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See* SAA at 870 and 19 CFR § 351.308(c).

The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value (*see* SAA at 870). The SAA also states that independent sources used to corroborate such information may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources to establish the reliability of calculated dumping margins. Thus, in an administrative review, if the Department chooses as total AFA a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period. With respect to the relevancy aspect of corroboration, however, the Department will consider information reasonably at its disposal as to whether there are circumstances that would render a dumping margin inappropriate. Where circumstances indicate that the selected dumping margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate dumping margin. *See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest dumping margin as AFA because the margin was based on another company's uncharacteristic business expense resulting in an unusually high dumping margin). We have preliminarily determined that the 51.16 percent rate is appropriate because it was calculated for another respondent in a prior segment of this proceeding, and it has not been judicially invalidated. Thus, we consider the calculated rate of 51.16 to be corroborated.

Comparison Methodology

In order to determine whether Vita sold CPF to the United States at prices less than NV, the Department compared

the export price (EP) of individual U.S. sales to the monthly weighted–average NV of sales of the foreign like product made in the ordinary course of trade (*see* section 777A(d)(2) of the Act; *see also* section 773(a)(1)(B)(i) of the Act). Section 771(16) of the Act defines foreign like product as merchandise that is identical or similar to subject merchandise and produced by the same person and in the same country as the subject merchandise. Thus, we considered all products covered by the scope of the order, that were produced by the same person and in the same country as the subject merchandise, and sold by Vita in the comparison market during the POR, to be foreign like products for the purpose of determining appropriate product comparisons to CPF sold in the United States. The Department compared U.S. sales to sales made in the comparison market within the contemporaneous window period, which extends from three months prior to the month in which the U.S. sale was made until two months after the month in which the U.S. sale was made. Where there were no sales of identical merchandise made in the comparison market in the ordinary course of trade, the Department compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. In making product comparisons, the Department selected identical and most similar foreign like products based on the physical characteristics reported by Vita in the following order of importance: weight, form, variety, and grade. Where there were no appropriate sales of foreign like product to compare to a U.S. sale, we compared the price of the U.S. sale to constructed value (CV), in accordance with section 773(a)(4) of the Act.

Export Price

The Department based the price of each of Vita's U.S. sales of subject merchandise on EP, as defined in section 772(a) of the Act, because the merchandise was sold, prior to importation, to unaffiliated purchasers in the United States, or to unaffiliated purchasers for exportation to the United States and the use of constructed export price was not otherwise warranted based on the facts on the record. In accordance with section 772 (a) and (c) of the Act, we calculated EP using the prices Vita charged for packed subject merchandise, from which we made deductions for movement expenses, including, where applicable, charges for transportation, terminal handling, container stuffing, bill of lading preparation, Customs clearance, and legal and port fees documentation. *See* Analysis Memorandum for Vita Food Factory (1989) Co., Ltd., (Vita Analysis Memorandum) dated concurrently with this notice. We did not calculate EP using the post–sale, post–POR price adjustments reported by Vita because Vita failed to demonstrate that it is entitled to these adjustments (the post–sale adjustments benefitted Vita, and thus Vita bore the burden to demonstrate that it is entitled to these adjustments). *See Corus Engineering Steels Ltd. v. United States*, Slip Op. 2003–110, 2003 CIT Lexis 110 at * 11 ("The burden of proof is upon the claimant to prove entitlement."). *See also* Vita's Post Sale Price Adjustment Memorandum, dated concurrently with this notice.

Normal Value

After testing home market viability and whether comparison market sales were at below–cost prices, we calculated NV for Vita as noted in the "Price–to-Price Comparisons" and "Price–to-CV Comparisons" sections of this notice.

A. Home Market Viability

In accordance with section 773(a)(1)(C) of the Act, in order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is greater than or equal to five percent of the aggregate volume of U.S. sales), we compared the aggregate volume of Vita's home market sales of the foreign like product to the aggregate volume of its U.S. sales of subject merchandise. Because the aggregate volume of Vita's home market sales of foreign like product is less than five percent of the aggregate volume of its U.S. sales of subject merchandise, we based NV on sales of the foreign like product in a country other than Vita's home market. *See* section 773(a)(1)(B)(ii) of the Act. Specifically, we based NV for Vita on sales of the foreign like product in the Netherlands, the third–country market with the greatest volume of foreign like product sales.

B. Cost of Production (COP) Analysis

In the most recently completed administrative review of the antidumping duty order on CPF from Thailand, the Department determined that Vita sold foreign like product at prices below the cost of producing the product and excluded such sales from the calculation of NV. As a result, in accordance with section 773(b)(2)(A)(ii) of the Act, the Department determined that there are reasonable grounds to believe or suspect that during the instant POR, Vita sold the foreign like product at prices below the cost of producing the product. Thus, the Department initiated a sales below cost inquiry with respect to Vita.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, for each unique foreign like product sold by Vita during the POR, we calculated a weighted–average COP based on the sum of the respondent's materials and fabrication costs, selling, general and administrative (SG&A) expenses, including interest expenses, and packing costs. Consistent with the position taken by the Department in prior segments of this proceeding, for reporting purposes, Vita allocated joint product costs between solid and juice products using the net realizable value of the products during the five-year period 1990 through 1994. We relied on the costs submitted by Vita without exception.

2. Test of Comparison Market Sales Prices

In order to determine whether sales were made at prices below the COP, on a product–specific basis we compared the respondent's weighted–average COPs to the prices of its comparison market sales of foreign like product, as required under section 773(b) of the Act. In accordance with sections 773(b)(1)(A) and (B) of the Act, in determining whether to disregard comparison market sales made at prices less than the COP, we examined whether such sales were made: (1) in substantial quantities within an extended period of time; and (2) at prices which permitted the recovery of all costs within a reasonable period of time. We compared the COP to comparison market sales prices, less any applicable movement charges.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of a respondent's sales of a given product were made at prices less than the COP, we did not disregard any below–cost sales of that product because the below–cost sales were not made in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product were made at prices less than the COP during the POR, we determined such sales to have been made in "substantial quantities" and within an extended period of time (i.e., one year) pursuant to sections 773(b)(2)(B) and (C) of the Act. Based on our comparison of POR average costs to reported prices, we also determined, in accordance with

section 773(b)(2)(D) of the Act, that these sales were not made at prices which would permit recovery of all costs within a reasonable period of time. As a result, we disregarded these below–cost sales.

Price–to-Price Comparisons

Where it was appropriate to base NV on prices, we used the prices at which the foreign like product was first sold for consumption in the comparison market, in the usual commercial quantities, in the ordinary course of trade, and, to the extent possible, at the same level of trade (LOT) as the comparison U.S. sale.

We based NV on the prices of Vita's sales to unaffiliated customers in the Netherlands. We made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act. In accordance with sections 773(a)(6)(A), (B), and (C) of the Act, where appropriate, we deducted from the starting price movement expenses, including, where applicable, charges for transportation, terminal handling, container stuffing, bill of lading preparation, customs clearance, and legal and port fees documentation. We also made circumstance of sale adjustments to account for differences in packing, credit and other direct selling expenses incurred in the comparison and U.S. markets. In addition, where applicable, pursuant to 19 CFR § 351.410 (e), we made a reasonable allowance for other selling expenses where commissions were paid in only one of the markets under consideration. *See* Vita Analysis Memorandum. In accordance with the Department's practice, where all contemporaneous matches to a U.S. sale resulted in difference–in-merchandise adjustments exceeding 20 percent of the cost of manufacturing the product sold in the United States, we based NV on CV.

Price–to-CV Comparisons

In accordance with section 773(a)(4) of the Act, we based NV on CV when we were unable to compare the U.S. sale to a comparison market sale of an identical or similar product. For each unique CPF product sold by Vita in the United States during the POR, we calculated a weighted–average CV based on the sum of the respondent's materials and fabrication costs, SG&A expenses, including interest expenses, packing costs, and profit. In accordance with section 773(e)(2)(A) of the Act, we based SG&A expenses and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the Netherlands. We based selling expenses on weighted–average actual comparison market direct and indirect selling expenses.

Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determined NV based on sales in the comparison market at the same LOT as the EP. The NV LOT is based on the starting price of the sales in the comparison market or, when NV is based on CV, the starting price of the sales from which we derive SG&A expenses and profit. For EP sales, the U.S. LOT is based on the starting price of the sales to the U.S. market.

To determine whether NV sales are at a different LOT than the EP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison–market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. In determining whether separate LOTs exist, we obtained information from Vita regarding the marketing stages for the reported U.S. and comparison market sales, including a description of the selling activities performed by Vita for each channel of distribution. Generally, if the reported LOTs are the same, the functions and activities of the seller at each level should be similar. Conversely, if a party reports that LOTs are different for different groups of sales, the selling functions and activities of the seller for each group should be dissimilar.

Vita reported that it sold the merchandise under review to two types of customers, sales agents and end users, in the United States and the Netherlands through one channel of distribution in each market. *See* Vita's September 22, 2005, and November 25, 2005, questionnaire responses at 18–24 and 11–13, respectively. In each channel of distribution, Vita engaged in the following selling activities for both types of customers: order processing, packing, freight and delivery, and paying sales commissions. Because the one sales channel in the United States involves the same functions for all sales, and the one sales channel in the Netherlands also involves the same functions for all sales, we have preliminarily determined that there is one LOT in the United States and one LOT in the Netherlands. Moreover, because Vita performed nearly identical selling functions for U.S. and Dutch sales (the only difference being that, at times, Vita arranged the international shipping for Dutch sales, whereas it did not provide this service for U.S. sales), we have preliminarily determined that, during the POR, Vita sold the foreign like product and subject merchandise at the same LOT. Therefore, we have determined that a LOT adjustment is not warranted.

Currency Conversion

Pursuant to section 773A(a) of the Act, we converted amounts expressed in foreign currencies into U.S. dollar amounts based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

As a result of this review, we preliminarily determined that the following weighted–average dumping margins exist for the period July 1, 2004, through June 30, 2005:

Manufacturer/Exporter	Margin (percent)
Vita Food Factory (1989) Ltd.	16.14
Tropical Food Industries Co., Ltd.	51.16

Public Comment

Within 10 days of publicly announcing the preliminary results of this review, we will disclose to interested parties, any calculations performed in connection with the preliminary results. *See* 19 CFR § 351.224(b). Any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. *See* 19 CFR § 351.310(c). If requested, a hearing will be held 44 days after the date of publication of this notice in the **Federal Register**, or the first workday thereafter. Interested parties are invited to comment on the preliminary results of this review. The Department will consider case briefs filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register**. Also, interested parties may file rebuttal briefs, limited to issues raised in the case briefs. The Department will consider rebuttal briefs filed not later than five days after the time limit for filing case briefs. Parties who submit arguments are requested to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument and (3) a table of authorities.

Further, we request that parties submitting written comments provide the Department with a diskette containing an electronic copy of the public version of such comments. Unless the deadline for issuing the final results of review is extended, the Department will issue the final results of this administrative review, including the results of its analysis of issues raised in the written comments, within 120 days of publication of the preliminary results in the **Federal Register**.

Assessment Rates

In accordance with 19 CFR § 351.212(b)(1), in these preliminary results of review, we calculated importer/customer–specific assessment rates for Vita's subject merchandise. Since Vita did not report the entered value for its sales, we calculated per–unit assessment rates for its merchandise by summing, on an importer or customer–specific basis, the dumping margins calculated for all U.S. sales to the importer or customer, and dividing this amount by the total quantity of those sales. If the importer/customer–specific assessment rate is above de minimis (i.e., 0.50 percent ad valorem or greater), we will instruct CBP to assess the importer/customer–specific rate uniformly, as appropriate, on all entries of subject merchandise during the POR that were entered by the importer or sold to the customer. To determine whether the per–unit duty assessment rates were *de minimis* (*i.e.*, less than 0.50 percent *ad valorem*), in accordance with the requirement set forth in 19 CFR § 351.106(c)(2), we calculated importer/customer–specific *ad valorem* ratios based on the estimated entered value. For TROFCO, the respondent receiving a dumping margin based upon AFA, we will instruct CBP to liquidate entries according to the AFA *ad valorem* rate. Within 15 days of publication of the final results of review, the Department will issue instructions to CBP directing it to assess the final importer/customer–specific assessment rates (if above *de minimis*) uniformly on all entries of subject merchandise made by the relevant importer during the POR. The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification applies to POR entries of subject merchandise produced by companies examined in this review (*i.e.*, companies for which a dumping margin was calculated) where the companies did not know that their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rate for the reviewed companies will be the rate established in the final results of this review (except that if the rate for a particular company is *de minimis, i.e.*, less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed companies not listed above, the cash deposit rate will continue to be the company–specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be the "all others" rate of 24.64 percent, which is the "all others" rate established in the LTFV investigation. These cash deposit rates, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: July 31, 2006.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E6–12654 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 072806B]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; South Atlantic Snapper Grouper Fishery Management Plan; Amendment 15

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

ACTION: Notice of intent to prepare a draft environmental impact statement; supplement; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) is preparing a Draft Environmental Impact Statement (DEIS) to assess the environmental impacts of a range of management actions proposed in its draft Amendment 15 to the Snapper Grouper Fishery Management Plan of the South Atlantic (FMP). This notice is intended to supplement notices published in January 2002, September 2003, and July 2005, announcing the preparations of DEISs for FMP Amendments 13, 13B, and 13C, respectively.

DATES: Comments on the scope of the DEIS will be accepted through September 5, 2006.

ADDRESSES: Comments should be sent to Jack McGovern, National Marine Fisheries Service, Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701; Phone: 727–824–5311; Fax: 727–824–5308; email: *John.McGovern@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, toll free 1–866–SAFMC–10 or 843–571–4366; *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The snapper grouper fishery operating in the South Atlantic exclusive economic zone is managed under the FMP. Following Council preparation, this FMP was approved and implemented by NMFS in March 1983, under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The actions proposed in FMP Amendment 15 originated from the

Council's work on Amendment 13, which contained a broad range of actions to define management reference points, end overfishing and rebuild overfished stocks, consider a multispecies approach to management, address bycatch, modify permit renewal and transferability requirements, and address the scheduled sunset of regulations protecting the Oculina Experimental Closed Area. NMFS published a notice of intent (NOI) to prepare an EIS in association with Amendment 13 in the **Federal Register** on January 31, 2002 (67 FR 4696), then later supplemented that notice on September 12, 2003 (68 FR 53706) and, again, on July 26, 2005 (70 FR 46126).

The first NOI supplement announced the Council's intent to transfer the Oculina Experimental Closed Area action from Amendment 13 to Snapper Grouper FMP Amendment 13A, and the remaining actions in Amendment 13 to Snapper Grouper FMP Amendment 13B. This decision was intended to ensure the Council adequate time to fully evaluate a range of actions to address overfishing, rebuilding, and other issues in the snapper grouper fishery without compromising the Council's ability to act on the Oculina Experimental Closed Area before its scheduled sunset date of June 27, 2004.

The second NOI supplement announced the Council's intent to address overfishing and a few other priority actions in a regulatory amendment, which later became Amendment 13C. This decision was intended to ensure extended debate about multispecies management and other actions in Amendment 13B did not delay Council action to effectively address overfishing of snowy grouper, golden tilefish, vermilion snapper, and black sea bass.

During its December 2005 meeting, the Council decided to transfer from Amendment 13B to Amendment 15 actions to define management reference points and rebuilding plans, as needed, for the select stocks addressed in Amendment 13C. This action is intended to ensure the timely implementation of biological reference points, status determination criteria, and rebuilding schedules and strategies for these stocks before the Southeast Data Assessment and Review assessments describing their status become outdated.

The Council also will consider in Amendment 15: establishing a strategy to ensure stock rebuilding stays on schedule should the total allowable catch levels specified in rebuilding plans be exceeded; adjusting the golden tilefish fishing year and trip limit strategy; eliminating the 12–inch (30.5–cm) total length minimum size limit regulation for the queen snapper and silk snapper; requiring a Federal commercial snapper grouper permit to sell snapper grouper species harvested in Federal waters of the South Atlantic and limiting sales to only those fish captured on commercial trips; establishing a deep-water grouper unit to further minimize bycatch of deep-water grouper species; implementing measures to minimize bycatch mortality of sea turtles and smalltooth sawfish; establishing a method to monitor and assess bycatch in the snapper grouper fishery; and modifying commercial snapper grouper permit renewal and transferability requirements. All other actions referenced above and not evaluated in Amendments 13A, 13B, 13C, or 15 continue to remain in Amendment 13B.

This NOI supplement announces the Council's intent to prepare a DEIS in association with Amendment 15. A **Federal Register** notice will announce the availability of the DEIS, as well as a 45–day public comment period, pursuant to regulations issued by the Council on Environmental Quality for implementing the National Environmental Policy Act and to NOAA's Administrative Order 216–6. The Council will consider public comments received on the DEIS in developing the Final Environmental Impact Statement (FEIS), and before voting to submit the final amendment to NMFS for Secretarial consideration. NMFS will announce in the **Federal Register** the availability of the final amendment and FEIS during the Secretarial review period, and will consider all public comments prior to agency action to approve, disapprove, or partially approve the final amendment.

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

Dated: July 31, 2006.

Alan D. Risenhoover,

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

[FR Doc. E6–12650 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 073106D]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting of the Ad Hoc Grouper Individual Fishing Quota (IFQ) Advisory Panel (AHGIFQAP).

DATES: The AHGIFQAP meeting will convene at 8:30 a.m. on Tuesday, August 22 and conclude no later than 3 p.m. on Thursday, August 24, 2006.

ADDRESSES: The meeting will be held at the Quorum Hotel Tampa, 700 North Westshore Boulevard, Tampa, FL 33609; telephone: (813) 289–8200.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Stu Kennedy, Fishery Biologist, telephone (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council has begun deliberation of a Dedicated Access Privilege System (DAP) for the Commercial grouper fishery. The Council has appointed an AHGIFQAP composed of commercial grouper fishermen and others knowledgeable about DAP systems to assist in the development of such a program. The Panel will discuss the scope and the general configuration of an IFQ program for the Gulf of Mexico commercial grouper fishery.

Although other non-emergency issues not on the agenda may come before the AHGIFQAP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the AHGIFQAP will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency. Copies of the agenda can be obtained by calling (813) 348–1630.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina Trezza at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: July 31, 2006.

James P. Burgess,

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

[FR Doc. E6–12578 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURE TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, August 11, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, 202–418–5100.

Eileen A. Donovan,

Acting Secretary of Commission.

[FR Doc. 06–6712 Filed 8–2–06; 10:33 am]

BILLING CODE 6151–01–M

COMMODITY FUTURE TRADING

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, August 18, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, 202–418–5100.

Eileen A. Donovan,

Acting Secretary of Commission.

[FR Doc. 06–6713 Filed 8–2–06; 10:33 am]

BILLING CODE 6151–01–M

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, August 25, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, 202–418–5100.

Eileen A. Donovan,

Acting Secretary of the Commission.

[FR Doc. 06–6714 Filed 8–2–06; 10:33 am]

BILLING CODE 6351–01–M

COMMODITY FUTURE TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11 a.m., Friday, August 4, 2006.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

FOR FURTHER INFORMATION CONTACT: Eileen A. Donovan, 202–418–5100.

Eileen A. Donovan,

Acting Secretary of Commission.

[FR Doc. 06–6711 Filed 8–2–06; 10:33 am]

BILLING CODE 6151–01–M

CONSUMER PRODUCT SAFETY COMMISSION

Collection of Information; Proposed Extension of Approval; Comment Request—Follow-Up Activities for Product-Related Injuries

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Consumer Product Safety Commission requests comments on a proposed extension of approval of a collection of information from persons who have been involved in or have witnessed incidents associated with consumer products. The Commission will consider all comments received in response to this notice before requesting an extension of approval of this collection of information from the Office of Management and Budget.

DATES: The Office of the Secretary must receive comments not later than October 3, 2006.

ADDRESSES: Written comments should be captioned "Product-Related Injuries" and e-mailed to the Office of the Secretary at *cpsc-os@cpsc.gov* or mailed to Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127.

FOR FURTHER INFORMATION CONTACT: For information about the proposed extension of approval of the collection of information, or to obtain a copy of any of the interview guides or forms used for this collection of information, contact Linda L. Glatz, Office of Planning and Evaluation, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7671; e-mail *lglatz@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

Section 5(a) of the Consumer Product Safety Act, 15 U.S.C. 2054(a), requires the Commission to collect information related to the causes and prevention of death, injury, and illness associated with consumer products. That legislation also requires the Commission to conduct continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products. The Commission uses this information to support development and improvement of voluntary standards, rulemaking proceedings, information and education campaigns, and administrative and judicial proceedings. These safety efforts are vitally important to help make consumer products safer and to remove unsafe products from the channels of distribution and from consumers' homes.

Persons who have sustained injuries or who have witnessed safety-related incidents associated with consumer products are an important source of safety information. From consumer complaints, newspaper accounts, death certificates, hospital emergency room reports, and other sources, the Commission investigates a limited number of incidents. These investigations may involve face-to-face or telephone interviews with accident victims or witnesses, as well as contact with state and local officials, including police, coroners, and fire investigators. The Commission also receives information about product-related injuries from persons who provide written information by using forms displayed on the Commission's Internet Web site or printed in the *Consumer Product Safety Review* and other Commission publications.

The Office of Management and Budget (OMB) approved the collection of information concerning product-related injuries under control number 3041–0029. OMB's most recent extension of

approval will expire on September 30, 2006. The Commission now proposes to request an extension of approval of this collection of information. As explained below, the current estimates that this collection of information will require approximately 7,030 hours on all respondents.

B. Estimated Burden

The Commission staff obtains information about incidents involving consumer products from approximately 14,851 persons annually. The staff conducts face-to-face interviews at incident sites with approximately 807 persons each year. On average, an on-site interview takes approximately 5 hours. The staff will also conduct approximately 2,544 in-depth investigations by telephone. Each in-depth telephone investigation requires approximately 20 minutes. Additionally, the Commission's hotline staff interviews approximately 4,600 persons each year about incidents involving selected consumer products. These interviews take an average of 10 minutes each. Each year, the Commission also receives information from about 6,900 persons who complete forms requesting information about product-related incidents or injuries. These forms appear on the Commission's Internet Web site, *http://www.cpsc.gov,* and are printed in the *Consumer Product Safety Review* and other Commission publications. The staff estimates that completion of a form takes about 12 minutes.

The Commission staff estimates that this collection of information imposes a total annual burden of 7,030 hours on all respondents: 4,035 hours for face-to-face interviews; 848 hours for in-depth telephone interviews; 1,380 hours for completion of written forms; and 767 hours for responses to Hotline telephone questionnaires.

The Commission staff estimates the value of the time of respondents to this collection of information at $28.75 an hour (June 2005, Bureau of Labor Statistics). At this valuation, the estimated annual cost to the public of this information collection will be about $202,000.

C. Request for Comments

The Commission solicits written comments from all interested persons about the proposed collection of information. The Commission specifically solicits information relevant to the following topics:

- Whether the collection of information described above is necessary for the proper performance of the Commission's functions, including whether the information would have practical utility;
- Whether the estimated burden of the proposed collection of information is accurate;
- Whether the quality, utility, and clarity of the information to be collected could be enhanced; and
- Whether the burden imposed by the collection of information could be minimized by use of automated, electronic or other technological collection techniques, or other forms of information technology.

Dated: July 31, 2006.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E6–12576 Filed 8–3–06; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Submission for OMB Review; Comment Request—Safety Standard for Automatic Residential Garage Door Operators

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: In the **Federal Register** of May 15, 2006 (71 FR 28017), the Consumer Product Safety Commission published a notice in accordance with provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) to announce the agency's intention to seek extension of approval of the collection of information in the Safety Standard for Automatic Residential Garage Door Operators (16 CFR part 1211). One comment was received in response to that notice stating that reporting of problems with garage door operations should be mandatory and posted on the internet. Section 15(b) of the Consumer Product Safety Act, 15 U.S.C. 2064(b), requires every manufacturer, importer, distributor and retailer of a consumer product distributed in commerce who obtains information which reasonably supports the conclusion that such product contains a defect which could create a substantial product hazard or creates an unreasonable risk of serious injury or death, to immediately inform the Commission. If a determination is made that a substantial hazard exists regarding garage doors or garage door operators, a recall of that product may be issued and posted on the CPSC Web site at *http://www.cpsc.gov.* In addition, product-related injuries treated in hospital emergency rooms are reported in the National Electronic Injury Surveillance System at *http://www.cpsc.gov/LIBRARY/neiss.html.*

Accordingly, the Commission now announces that it has submitted to the Office of Management and Budget a request for extension of approval of that collection of information without change for a period of three years from the date of approval.

The Consumer Product Safety Improvement Act of 1990 (Pub. L. 101–608, 104 Stat. 3110) requires all automatic residential garage door openers manufactured after January 1, 1993, to comply with the entrapment protection requirements of UL Standard 325 that were in effect on January 1, 1992. In 1992, the Commission codified the entrapment protection provisions of UL Standard 325 in effect on January 1, 1992, as the Safety Standard for Automatic Residential Garage Door Operators, 16 CFR part 1211, Subpart A. Certification regulations implementing the standard require manufacturers, importers and private labelers of garage door operators subject to the standard to test their products for compliance with the standard, and to maintain records of that testing. Those regulations are codified at 16 CFR part 1211, subparts B and C.

The Commission uses the records of testing and other information required by the certification regulations to determine that automatic residential garage door operators subject to the standard comply with its requirements. The Commission also uses this information to obtain corrective actions if garage door operators fail to comply with the standard in a manner which creates a substantial risk of injury to the public.

Additional Information About the Request for Extension of Approval of a Collection of Information

Agency address: Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814.

Title of information collection: Safety Standard for Automatic Residential Garage Door Operators, 16 CFR part 1211.

Type of request: Approval of a collection of information.

General description of respondents: Manufacturers, importers, and private labelers of automatic residential garage door operators.

Estimated number of respondents: 22.

Estimated average number of hours per respondent: 40 per year.

Estimated number of hours for all respondents: 880 per year.

Estimated cost of collection for all respondents: $37,700.

Comments: Comments on this request for extension of approval of information collection requirements should be submitted by September 5, 2006 to (1) the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for CPSC, Office of Management and Budget, Washington DC 20503; telephone: (202) 395–7340, and (2) the office of the Secretary, 4330 East West Highway, Bethesda, MD 20814 by e-mail at *cpsc-os@cpsc.gov* or sent to that address. Written comments may also be sent to the Office of the Secretary by facsimile at (301) 504–0127. Copies of this request for reinstatement of the information collection requirements and supporting documentation are available from Linda Glatz, Management and Program Analyst, Office of Planning and Evaluation, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7671.

Dated: August 1, 2006.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. E6–12667 Filed 8–3–06; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Invention for Licensing; Government-Owned Invention

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy and is available for licensing by the Department of the Navy. Navy Case No. 97,661: Method and Apparatus for Three Dimensional Blending and any continuations, continuations-in-part, divisionals or re-issues thereof.

ADDRESSES: Requests for copies of the invention cited should be directed to the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone 202–767–7230. Due to temporary U.S. Postal Service delays, please fax 202–404–7920, e-mail *techtran@utopia.nrl.navy.mil*, or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR part 404)

Dated: July 31, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–12601 Filed 8–3–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The CNO Executive Panel will report on the findings and recommendations of the Beyond Iraq Subcommittee to the Chief of Naval Operations. The meeting will consist of discussions of U.S. Navy's emerging missions beyond Iraq.

DATES: The meeting will be held on Friday, August 25, 2006, from 9 a.m. to 10:30 a.m.

ADDRESSES: The meeting will be held at the CNOs, Room 4E662, 2000 Navy Pentagon, Washington, DC 20350.

FOR FURTHER INFORMATION CONTACT: Commander James Gibson, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311, 703–681–4908.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Dated: July 27, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–12594 Filed 8–3–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Chief of Naval Operations (CNO) Executive Panel

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The CNO Executive Panel will report on the findings and recommendations of the Innovation and Technology Transition Subcommittee to the CNO. The meeting will consist of discussions of the U.S. Navy's Innovation and Technology Transition strategies and policies.

DATES: The meeting will be held on September 25, 2006, from 9 a.m. to 10 a.m.

ADDRESSES: The meeting will be held in the CNOs Room 4E662, 2000 Navy Pentagon, Washington, DC 20350.

FOR FURTHER INFORMATION CONTACT: Ms. Gia Harrigan, CNO Executive Panel, 4825 Mark Center Drive, Alexandria, VA 22311, 703–681–4907.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. 2), these matters constitute classified information that is specifically authorized by Executive Order to be kept secret in the interest of national defense and are, in fact, properly classified pursuant to such Executive Order. Accordingly, the Secretary of the Navy has determined in writing that the public interest requires that all sessions of this meeting be closed to the public because they will be concerned with matters listed in section 552b(c)(1) of title 5, United States Code.

Dated: July 27, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–12602 Filed 8–3–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Naval Research Advisory Committee

AGENCY: Department of the Navy, DoD.

ACTION: Notice of closed meeting.

SUMMARY: The Naval Research Advisory Committee (NRAC) will meet to discuss classified information from government organizations. All sessions of the meeting will be devoted to briefings, discussions, and technical examination

of issues related to maritime strategy and Department of the Navy plans, programs, and objectives. It is envisioned that these discussions will enable the NRAC to identify technology gaps where additional science and technology investment may be needed to satisfy current and projected Navy and Marine Corps requirements.

DATES: The meeting will be held on Wednesday, September 27, 2006, from 8 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Pentagon, Room 2C554, Conference #6, Arlington, VA 22201.

FOR FURTHER INFORMATION CONTACT: Dr. Sujata Millick, Program Director, 875 North Randolph Street, Arlington, VA 22203–1995, 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 meeting will be devoted to executive sessions that will include discussion and technical examination of information related to forthcoming NRAC studies. These briefings and discussions will contain classified information that is specifically authorized under criteria established by Executive Order to remain classified in the interest of national defense and are properly classified pursuant to such Executive Order. The classified and non-classified matters to be discussed are so inextricably intertwined as to preclude opening any session of the meeting. In accordance with 5 U.S.C. App. 2, section 10(d), 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 5 U.S.C. 552b(c)(1) and (4).

Dated: July 31, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–12597 Filed 8–3–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

[USN–2006–0044]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to amend systems of records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on September 5, 2006 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS–36), 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 31, 2006.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N01754–4

SYSTEM NAME:

Navy Disaster Accounting and Assessment System (DAAS) (May 5, 2006, 71 FR 26482).

CHANGES:

SYSTEM NAME:

Delete entry and replace with "Navy Family Accountability and Assessment System (NFAAS)."

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Navy personnel (military and civilian) and their families who are involved in a natural or other man made major disaster or catastrophic event."

* * * * *

N01754–4

SYSTEM NAME:

Navy Family Accountability and Assessment System (NFAAS)

SYSTEM LOCATION:

Space and Naval Warfare Systems Center, 53560 Hull Street, San Diego, CA 92152–5001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Navy personnel (military and civilian) and their families who are involved in a natural or other man made major disaster or catastrophic event.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name; home and duty station addresses; home, business, and cell telephone numbers; military/civilian status; Social Security Number; dates of birth; Unit Identification Code (UIC); date of last contact; insurance company; FEMA Number; email address; dependent information; travel orders/vouchers; assessment date; needs assessment information; type of event; category classification; and command information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy and E.O. 9397 (SSN).

PURPOSE(S):

To assess disaster-related needs (i.e., status of family members, housing, medical, financial assistance, employment, pay and benefits, transportation, child care, pastoral care/counseling, and general legal matters) of Navy personnel and their families who have been involved in a natural or other man-made major disaster or catastrophic event.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically by disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD "Blanket Routine Uses" set forth at the beginning of the Navy's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Web based tool.

RETRIEVABILITY:

Name, Social Security Number and date of birth.

SAFEGUARDS:

Password controlled system, file, and element access is based on predefined

need-to-know. Physical access to terminals, terminal rooms, buildings and activities' grounds are controlled by locked terminals and rooms, guards, personnel screening and visitor registers.

RETENTION AND DISPOSALS:

Records are destroyed two years after all actions are completed.

SYSTEM MANAGER(S) AND ADDRESS:

Commander, Navy Installations Command, 2713 Mitscher Road, SW., Ste. 300, Anacostia Annex, DC 20373–5882.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Commander, Navy Installations Command, 2713 Mitscher Road, SW., Ste. 300, Anacostia Annex, DC 20373–5882.

The request should include full name, Social Security Number, and address of the individual concerned and should be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Commander, Navy Installations Command, 2713 Mitscher Road, SW., Ste. 300, Anacostia Annex, DC 20373–5882.

The request should include full name, Social Security Number, date of birth and should be signed.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual; personnel files; Needs Assessment Survey; Defense Manpower Data Center; Defense Civilian Personnel Data System (DCPDS); and command personnel.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–6678 Filed 8–3–06; 8:45 am]
BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

[USN–2006–0045]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to amend systems of records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record systems subject to the privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on September 5, 2006 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DMS–36), 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 31, 2006.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N07220–1

SYSTEM NAME:

Navy Standard Integrated Personnel System (NSIPS) (July 6, 2006, 70 FR 38895).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Primary location: Naval Support Activity Midsouth, 5722 Integrity Drive, Bldg 456, Millington, TN 38054–5045 for records of all active duty and reserve members.

Secondary locations: Personnel Offices and Personnel Support Detachments providing administrative support for the local activity where the individual is assigned. Official mailing addresses are published in the Standard Navy distribution List Available at *http://doni.daps.dla.mil/sndl.aspx.*"

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Policy Official: Program Executive Office for Enterprise Information Systems (PEO–EIS), 1225 S. Clark Street, Suite 1000, Arlington, VA 22202–4371.

Record Holder: Personnel Office or Personnel Support Detachment that provides administrative support for the local activity where assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*"

NOTIFICATION PROCEDURES:

Delete first paragraph and replace with "Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Personnel Office or Personnel Support Detachment providing administrative support for the local activity where they are assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*"

RECORD ACCESS PROCEDURES:

Delete first paragraph and replace with "Individuals seeking access to records about themselves contained in this system of records contains information about themselves should address written inquiries to the Personnel Office or Personnel Support Detachment providing administrative support for the local activity where they are assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*"

* * * * *

N07220–1

SYSTEM NAME:

Navy Standard Integrated Personnel System (NSIPS).

SYSTEM LOCATION:

Primary location: Naval Support Activity Midsouth, 54722 Integrity Drive, Bldg 456, Millington, TN 38054–5045 for records of all active duty and reserve members.

Secondary locations: Personnel Offices and Personnel Support Detachments providing administrative

support for the local activity where the individual is assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Navy military members.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), date of birth, education, training and qualifications, professional history, assignments, performance, promotions, leave and pay entitlements and deductions.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy and E.O. 9397 (SSN).

PURPOSE(S):

The purpose of this system is to provide secure worldwide personnel and pay support for Navy members and their commands. To allow authorized navy personnel and pay specialists to collect, process, modify, transmit, and store unclassified personnel and pay data. To support management of leave and pay entitlements and deductions to that this information can be provided to the Defense Finance and Accounting Service (DFAS) for payroll processing and preparation of the Leave and Earnings Statements (LES).

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of system of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and automated records.

RETRIEVABILITY:

Records are retrieved by name and Social Security Number (SSN).

SAFEGUARDS:

Password controlled system, file, and element access based on predefined need-to-know. Physical access to terminals, terminal rooms, buildings and activities' grounds are controlled by locked terminals and rooms, guards, personnel screening and visitor registers.

RETENTION AND DISPOSAL:

Records shall be destroyed when no longer needed.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Official: Program Executive Office for Enterprise Information Systems (PEO–EIS), 1225 S. Clark Street, Suite 1000, Arlington, VA 22202–4371.

Record Holder: Personnel Office or Personnel Support Detachment that provides administrative support for the local activity where assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Personnel Office or Personnel Support Detachment providing administrative support for the local activity where they are assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.*

The request should include full name, Social Security Number, and address of the individual concerned and should be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves should address written inquiries to the Personnel Office or Personnel Support Detachment providing administrative support for the local activity where they are assigned. Official mailing addresses are published in the Standard Navy Distribution List available at *http://doni.daps.dla.mil/sndl.aspx.''*

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Enlisted Personnel Management Center; Navy Enlisted System; Navy Manpower and Personnel Distribution System; Navy Personnel Database; Reserve Headquarters System; Navy Training Reservation Systems; Officer Personnel Information System; Officer Promotion Administrative System; Total Force Manpower Management System; Reserve Automated Medical Interim System; Standard Training Administration Support System (STASS); Recruit Training Module; Defense Manpower Data Center; Defense Joint Military Pay System-Active Component; and, Defense Joint Military Pay System-Reserve Component.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–6679 Filed 8–3–06; 8:45 am]
BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

[USN–2006–0046]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to amend systems of records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on September 5, 2006 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS–36), 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record systems being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 31, 2006.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N05350–1

SYSTEM NAME:

Navy Drug and Alcohol Program (April 28, 1999, 64 FR 22840).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with: "Primary location: Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000. Decentralized locations: Navy Alcohol Rehabilitation Centers, Navy Alcohol Rehabilitation Departments in Naval Hospitals, Counseling and Assistance Centers, Personal Responsibility and Values Education and Training Program (Prevent) Offices, Navy Drug Screening Laboratories, and local activities to which an individual is assigned. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Navy personnel (officers and enlisted) who have been identified as drug or alcohol abusers and who are subsequently screened or referred for remedial education, outpatient counseling, or residential rehabilitation; counselors, counselor interns, and counselor applications; Navy personnel who attend the Prevent Program for preventive education; dependents and civilians where authorized, who participate in preventive and remedial education programs, outpatient counseling, and residential rehabilitation; and officer, enlisted, and civilian staff members of facilities providing drug and alcohol education, screening, counseling, rehabilitation, and drug testing."

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 1090, Identifying and treating drug and alcohol dependence; 10 U.S.C. 5013, Secretary of the Navy; 42 U.S.C. 290dd–2; and E.O. 9397 (SSN)."

PURPOSE(S):

Delete first paragraph and replace with "To train, educate, identify, screen, counsel, rehabilitate, and monitor the progress of individuals in drug and alcohol abuse programs."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In the third paragraph, delete "or drug abuse or obesity/compulsive overeating prevention,".

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete and replace with "Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000."

NOTIFICATION PROCEDURE:

Delete first paragraph and replace with "Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000 or to the Naval activity providing treatment. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000."

Delete the third paragraph.

RECORD ACCESS PROCEDURES:

Delete first paragraph and replace with "Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000 or to the navy activity providing treatment. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000."

Delete the third paragraph.

* * * * *

N05350–N

SYSTEM NAME:

Navy Drug and Alcohol Program System.

SYSTEM LOCATION:

Primary location: Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000.

Decentralized locations: Navy Alcohol Rehabilitation Centers, Navy Alcohol Rehabilitation Departments in Naval Hospitals, Counseling and Assistance Centers, Personal Responsibility and Values Education and Training Program (Prevent) Offices, Navy Drug Screening Laboratories, and local activities to which an individual is assigned. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000. Navy Personnel Command (Pers–602), 5720 Integrity Drive, Millington, TN 38055–6000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Navy personnel (officers and enlisted) who have been identified as drug or alcohol abusers and who are subsequently screened or referred for remedial education, outpatient counseling, or residential rehabilitation; counselors, counselor interns, and counselor applicants; Navy personnel who attend the Prevent Program for preventive education; dependents and civilians, where authorized, who participate in preventive and remedial education programs, outpatient counseling, and residential rehabilitation; and officer, enlisted, and civilian staff members of facilities providing drug and alcohol education, screening, counseling, rehabilitation, and drug testing.

CATEGORIES OF RECORDS IN THE SYSTEM:

Documentation containing demographic data, screening and assessment information, progress notes, medical and laboratory data, narrative summaries of treatment, aftercare plans, and other information pertaining to a member's participation in substance abuse education, counseling, and rehabilitation programs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 1090, Identifying and treating drug and alcohol dependence; 10 U.S.C. 5013, Secretary of the Navy; 42 U.S.C. 290dd–2; and E.O. 9397 (SSN).

PURPOSE(S):

To train, education, identify, screen, counsel, rehabilitate, and monitor the progress of individuals in drug and alcohol abuse programs.

Information is used to screen and evaluate the certified counselors, counselor interns, and counselor applicants throughout the course of their duties.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows: In order to comply with the provisions of 42 U.S.C. 290dd–2, the Navy's 'Blanket Routine

Uses' do not apply to this system of records.

Specifically, records of the identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be client/patient, maintained in connection with the performance of any alcohol or drug abuse, education, training, treatment, rehabilitation, or research which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized in 42 U.S.C. 290dd–2. This statute takes precedence over the Privacy Act of 1974 in regard to accessibility of such records, except to the individual to whom the record pertains.

The content of any record may be disclosed in accordance with prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under such prescribed regulations.

Information from records may be released without the member's consent in the following situations:

To medical personnel to the extent necessary to meet a bona fide medical emergency.

To qualified personnel for the purpose of conducting scientific research, management audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit or evaluation, or otherwise disclose patient identities in any manner.

If authorized by an appropriate order of a court of competent jurisdiction granted after applications showing good case therefore. In accessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of an record is necessary, shall impose appropriate safeguards against unauthorized disclosures.

The above prohibitions do not apply to any interchange of records within the Armed Forces or within those components of the Department of Veterans Affairs furnishing health care to veterans or between such components and the Armed Forces.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Automated records may be stored on computer disks (both hard drive and floppy), magnetic tapes, and drums.

Manual records may be stored in paper file folders, computer printouts, microfiche, or microfilm.

RETRIEVABILITY:

Name and Social Security Number.

SAFEGUARDS:

Computer facilities are located in restricted areas accessible only to authorized persons that are properly screened, cleared and trained.

Manual records and computer printouts are available only to authorized personnel having a need-to-know.

RETENTION AND DISPOSAL:

Manual records are maintained for two years (Level I/II) or three years (Level III) and then retired to the nearest Federal Records Center. Automated records are maintained indefinitely.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000 or to the naval activity providing treatment. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000.

The letter should contain full name, Social Security Number, rank/rate, military status, and signature of the requester.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000 or to the naval activity providing treatment. Addresses are contained in a directory which is available from the Director, Personnel Readiness and Community Support (N151), Navy Personnel Command, 5720 Integrity Drive, Millington, TN 38055–6000.

The letter should contain full name, Social Security Number, rank/rate, military status, and signature of the requester.

CONTESTING RECORD PRODUCER:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

DOD/DON officials; notes and documents from Service Jackets and Medical Records; and general correspondence concerning the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 06–6680 Filed 8–3–06; 8:45 am]
BILLING CODE 5001–06–M

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information; Technology and Media Services for Individuals With Disabilities—Steppingstones of Technology Innovation for Children With Disabilities; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2007

Catalog of Federal Domestic Assistance (CFDA) Number: 84.327A

Note: This notice includes one priority with two phases, and funding information for each phase of the competition.

Dates: Applications Available: August 8, 2006. Deadline for Transmittal of Applications: See the chart in section II. Award Information in this notice (Chart). Deadline for Intergovernmental Review: See Chart.

Eligible Applicants: State educational agencies (SEAs); local educational agencies (LEAs); public charter schools that are LEAs under State law; institutions of higher education (IHEs); other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

Estimated Available Funds: The Administration has requested $31,063,000 for the Technology and Media Services for Individuals with

Disabilities program for FY 2007, of which we intend to use an estimated $2,670,000 for the Steppingstones of Technology Innovation for Children with Disabilities competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Funding information regarding each phase of the priority is listed in the Chart.

Maximum Award: Phase 1: $200,000, per year and Phase 2: $300,000, per year. We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Estimated Range of Awards: See Chart.

Estimated Average Size of Awards: See Chart.

Estimated Number of Awards: See Chart.

Project Period: See Chart.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the Technology and Media Services for Individuals with Disabilities program is to: (1) Improve results for children with disabilities by promoting the development, demonstration, and use of technology, (2) support educational media services activities designed to be of educational value in the classroom setting to children with disabilities, and (3) provide support for captioning and video description that is appropriate for use in the classroom setting.

Priority: In accordance with 34 CFR 75.105(b)(2)(iv) and (v), this priority is from allowable activities specified in the statute, or otherwise authorized in the statute (see sections 674 and 681(d) of the Individuals with Disabilities Education Act (IDEA)).

Absolute Priority: For FY 2007 this priority is an absolute priority. Under 34 CFR 75.105(c)(3), we consider only applications that meet this priority.

This priority is:

Technology and Media Services for Individuals With Disabilities—Steppingstones of Technology Innovation for Children With Disabilities

Background

The Department has made Steppingstones of Technology Innovation for Children with Disabilities awards for several years under the Technology and Media Services for Individuals with Disabilities program. Starting in FY 2005, awards were limited to two phases, Development and Research on Effectiveness. Abstracts of projects funded under these two phases can be found at *http://www.nichcy.org/directories/4_volume2006.pdf.* (See projects funded under CFDA 84.327A with Beginning Dates of September 1, 2005 or later.)

Priority

Applicants must—

(a) Describe a technology-based approach for improving the results of early intervention, response-to-intervention assessment techniques, or preschool, elementary, middle school, or high school education for children with disabilities. The technology-based approach must be an innovative combination of new technology and additional materials and methodologies that enable the technology to improve educational, assessment, or early intervention results for children with disabilities;

(b) Present a justification, based on scientifically rigorous research or theory, that supports the potential effectiveness of the technology-based approach for improving the results of early intervention, response-to-intervention assessment techniques, or preschool, elementary, middle school, or high school education for children with disabilities. Results studied under this priority must focus on child outcomes, rather than on parent or professional outcomes. Child outcomes can include improved academic or pre-academic skills, improved behavioral or social functioning, and improved functional performance, provided that valid and reliable measurement instruments are employed to assess the outcomes. Technology-based approaches intended for use by professionals or parents are not appropriate for funding under this priority unless child-level benefits are clearly demonstrated. Technology-based approaches for professional development will not be funded under this priority;

(c) Provide a detailed plan for conducting work in one of the following two phases:

(1) *Phase 1—Development:* Projects funded under Phase 1 must develop and refine a technology-based approach, and test its feasibility for use with children with disabilities. Activities under Phase I of the priority may include development, adaptation, and refinement of technology, materials, or methodologies. Activities under Phase 1 of the priority must include formative evaluation of the technology-based approach's usability and feasibility for use with children with disabilities. Each project funded under Phase 1 must be designed to develop, as its primary product, a promising technology-based approach that is suitable for field-based evaluation of effectiveness in improving results for children with disabilities.

(2) *Phase 2—Research on Effectiveness:* Projects funded under Phase 2 must select a promising technology-based approach that has been developed and tested in a manner consistent with the criteria for activities funded under Phase 1, and subject the approach to rigorous field-based research to determine effectiveness in educational or early intervention settings. Approaches studied through projects funded under Phase 2 may have been developed with previous funding under Phase 1 of this priority or with funding from other sources. Phase 2 of this priority is primarily intended to produce sound research-based evidence that demonstrates that the technology-based approach can improve educational or early intervention results for children with disabilities in a defined range of real world contexts.

Projects funded under Phase 2 of this priority must conduct research that poses a causal question and must employ randomized assignment to treatment and comparison conditions, unless a strong justification is made for why a randomized trial is not possible. If a randomized trial is not possible, the applicant must employ alternatives that substantially minimize selection bias or allow it to be modeled. These alternatives include appropriately structured regression-discontinuity designs and natural experiments in which naturally occurring circumstances or institutions (perhaps unintentionally) divide people into treatment and comparison groups in a manner akin to purposeful random assignment. In their applications, applicants proposing to use an alternative system must (1) make a compelling case that randomization is not possible, and (2) describe in detail how the procedures will result in substantially minimizing the effects of selection bias on estimates of effect size. Choice of randomizing unit or units (e.g., students, classrooms, schools) must be grounded in a theoretical framework. Observational, survey, or qualitative methodologies may complement experimental methodologies to assist in the identification of factors that may

explain the effectiveness or ineffectiveness of the technology-based approach being evaluated. Applications must provide research designs that permit the identification and assessment of factors that may have an impact on the fidelity of implementation. Mediating and moderating variables that are both measured in the practice or model condition and are likely to affect outcomes in the comparison condition must be measured in the comparison condition (e.g., student time-on-task, teacher experience, and time in position).

Projects funded under Phase 2 of this priority must conduct comprehensive research in order to provide convincing evidence of the effectiveness or ineffectiveness of the technology-based approach under study, at least within a defined range of settings. Applicants must provide documentation that available sample sizes, methodologies, and treatment effects are likely to result in conclusive findings regarding the effectiveness of the technology-based approach;

(d) Provide a plan for forming collaborative relationships with vendors and/or other dissemination or marketing resources to ensure that the technology-based approach can become widely available if sufficient evidence of effectiveness has been obtained. Applicants should document the availability and/or participation of dissemination or marketing resources. Applicants are encouraged to plan these collaborative relationships early in their projects, even in Phase 1 (if applicable), but should refrain from widespread dissemination of the technology-based approach to practitioners until evidence of its effectiveness has been obtained;

(e) Budget for the project director to attend an annual two-day Project Directors' meeting in Washington, DC, and another annual two-day trip to Washington, DC to collaborate with the Federal project officer and the other projects funded under this priority to share information, and to discuss findings and methods of dissemination; and

(f) Budget five percent of the grant amount annually to support emerging needs as identified jointly through consultation with the OSEP project officer.

If the project maintains a Web site, include relevant information and documents in a format that meets a government or industry-recognized standard for accessibility. If the project produces instructional materials for dissemination, it must produce them in accessible formats, including complying with the National Instructional Materials Accessibility Standard (NIMAS) for textual materials.

Within this absolute priority, we intend to fund at least two projects led by a project director or principal investigator who is in the initial phase of his or her career. For purposes of this priority, the initial phase of an individual's career is considered to be the first three years after the individual completes and graduates from a doctoral program (i.e., for FY 2007 awards, projects may support individuals who completed and graduated from a doctoral program no earlier than the 2003–2004 academic year). To qualify for this consideration, the applicant must explicitly state and document that the project director or principal investigator is in the initial phase of his or her career. At least 50 percent of that individual's time must be devoted to the project.

Within this absolute priority, we also intend to fund at least two projects focusing on technology-based approaches for children with disabilities, ages birth to age three, and to fund at least two projects focusing on technology-based approaches to response-to-intervention assessment techniques.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities. However, section 681(d) of the IDEA makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1474 and 1481.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in 34 CFR part 86 apply to IHEs only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration has requested $31,063,000 for the Technology and Media Services for Individuals with Disabilities program for FY 2007, of which we intend to use an estimated $2,670,000 for the Steppingstones of Technology Innovation for Children with Disabilities competition. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process if Congress appropriates funds for this program.

Maximum Award: Phase 1: $200,000, per year and Phase 2: $300,000, per year. We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for the Office of Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

STEPPINGSTONES OF TECHNOLOGY INNOVATION FOR CHILDREN WITH DISABILITIES APPLICATION NOTICE FOR FISCAL YEAR 2007

CFDA number and name	Deadline for transmittal of applications	Deadline for intergovernmental review	Estimated available funds annually	Estimated range of awards annually	Estimated average size of awards annually	Estimated number of awards
84.327A—Steppingstones of Technology Innovation for Children with Disabilities:						
Phase 1—Development	October 3, 2006	December 4, 2006	$1,200,000	$100,000–$200,000	$200,000	6
Phase 2—Research on Effectiveness.	October 3, 2006	December 4, 2006	$1,800,000	$200,000–$300,000	$300,000	6

Project Period: Projects funded under Phase 1 will be funded for up to 24 months. Projects funded under Phase 2 will be funded for up to 24 months unless a compelling rationale is provided for funding up to 36 months.

Note: The Department of Education is not bound by any estimates in this notice.

III. Eligibility Information

1. *Eligible Applicants:* SEAs; LEAs; public charter schools that are LEAs under State law; IHEs; other public agencies; private nonprofit organizations; outlying areas; freely associated States; Indian tribes or tribal organizations; and for-profit organizations.

2. *Cost Sharing or Matching:* This competition does not involve cost sharing or matching.

3. *Other: General Requirements*—(a) The projects funded under this competition must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of the IDEA).

(b) Applicants and grant recipients funded under this competition must involve individuals with disabilities or parents of individuals with disabilities ages birth through 26 in planning, implementing, and evaluating the projects (see section 682(a)(1)(A) of the IDEA).

IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone (toll free): 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), you may call (toll free): 1–877–576–7734.

You may also contact ED Pubs at its Web site: *http://www.ed.gov/pubs/edpubs.html* or you may contact ED Pubs at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.327A.

Individuals with disabilities may obtain a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition. Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit Part III to the equivalent of no more than 50 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; the one-page abstract, the resumes, the bibliography, the references, or the letters of support. However, you must include all of the application narrative in Part III.

We will reject your application if—

- You apply these standards and exceed the page limit; or
- You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: August 8, 2006.

Deadline for Transmittal of Applications: See Chart.

Applications for grants under this competition may be submitted electronically using the *Grants.gov* Apply site (Grants.gov), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or by mail or hand delivery, please refer to section IV. 6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements. Deadline for Intergovernmental Review: See Chart.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

We have been accepting applications electronically through the Department's e-Application system since FY 2000. In order to expand on those efforts and comply with the President's Management Agenda, we are continuing to participate as a partner in the new government wide Grants.gov Apply site in FY 2007. Steppingstones of Technology Innovation for Children with Disabilities-CFDA Number 84.327A is one of the competitions included in this project. We request your participation in Grants.gov.

If you choose to submit your application electronically, you must use the *Grants.gov* Apply site at *http://www.Grants.gov* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Steppingstones of Technology Innovation for Children with Disabilities-CFDA Number 84.327A competition at: *http://www.grants.gov* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

- Your participation in Grants.gov 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.
- Applications received by Grants.gov are time and date stamped. Your application must be fully uploaded and submitted, and must be date/time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date/time stamped by the *Grants.gov* system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from *Grants.gov,* we will notify you if we are rejecting your application because it was date/time stamped by the *Grants.gov* system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary

depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process through *Grants.gov*.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to *Grants.gov* at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf*

• To submit your application via Grants.gov, you must complete all of the steps in the Grants.gov registration process *(http://www.grants.gov/applicants/get_registered.jsp)*. These steps include (1) registering your organization, (2) registering yourself as an Authorized Organization Representative (AOR), and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf*). You also must provide on your application the same D–U–N–S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to successfully submit an application via *Grants.gov*.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

• You may submit all documents electronically, including all information typically included on the Application for Federal Education Assistance (ED 424), Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. If you choose to submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text) or .PDF (Portable Document) format. If you upload a file type other than the three file types specified above or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• After you electronically submit your application, you will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The Department will retrieve your application from *Grants.gov* and send you a second confirmation by e-mail that will include a PR/Award number (an ED-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of System Unavailability

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice. If you submit an application after 4:30 p.m., Washington, DC time, on the deadline date, please contact the person listed elsewhere in this notice under *For Further Information Contact*, and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number (if available). We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: Extensions referred to in this section apply only to the unavailability of or technical problems with the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

b. *Submission of Paper Applications by Mail.*

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:
U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.327A), 400 Maryland Avenue, SW., Washington, DC 20202–4260.

or

By mail through a commercial carrier:
U.S. Department of Education, Application Control Center—Stop 4260, Attention: (CFDA Number 84.327A), 7100 Old Landover Road, Landover, MD 20785–1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you submit your application in paper format by hand delivery, you (or a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.327A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays and Federal holidays.

Note for Mail or Hand Delivery of Paper

Applications: If you mail or hand deliver your application to the Department:

(1) You must indicate on the envelope and—if not provided by the Department—in Item 4 of ED 424 the CFDA number—and suffix letter, if any—of the competition under which you are submitting your application.

(2) The Application Control Center will mail a grant application receipt

acknowledgment to you. If you do not receive the grant application receipt acknowledgment within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are listed in the application package.

2. *Treating a Priority as Two Separate Competitions:* In the past, there have been problems in finding peer reviewers without conflicts of interest for competitions in which many entities throughout the country submit applications. The Standing Panel requirements under IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary competitions, applications may be separated into two or more groups and ranked and selected for funding within the specific group. This procedure will ensure the availability of a much larger group of reviewers without conflicts of interest. It also will increase the quality, independence, and fairness of the review process and permit panel members to review applications under discretionary competitions for which they have also submitted applications. However, if the Department decides to select for funding an equal number of applications in each group, this may result in different cut-off points for fundable applications in each group.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed measures that will yield information on various aspects of the quality of the Technology and Media Services for Individuals with Disabilities program. These measures focus on the extent to which projects are of high quality, are relevant to the needs of children with disabilities, and contribute to improving the results for children with disabilities. Data on these measures will be collected from the projects funded under this competition.

Grantees also will be required to report information on their projects' performance in annual reports to the Department (34 CFR 75.590).

VII. Agency Contact

For Further Information Contact: Tom V. Hanley, U.S. Department of Education, 400 Maryland Avenue, SW., room 4066, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7369.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request by contacting the following office: The Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363.

VIII. Other Information

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 31, 2006.

John H. Hager,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E6–12652 Filed 8–3–06; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Extension of Comment Period on the Draft Environmental Assessment for the Proposed Infrastructure Improvements for the Yucca Mountain Project, NV

AGENCY: U.S. Department of Energy.

ACTION: Notice of comment period extension.

SUMMARY: On July 6, 2006, the U.S. Department of Energy (DOE) published a Notice of Availability of the Draft Environmental Assessment for the Proposed Infrastructure Improvements for the Yucca Mountain Project, Nevada, (71 FR 38391) and announced a 30-day public comment period ending August 7, 2006. Subsequently, the DOE has taken note that the distribution letter attached to copies of the draft Environmental Assessment (EA) identified a different end date for the public comment period. Consequently, DOE is extending the public comment period until August 31, 2006.

DATES: Comments should be submitted to DOE no later than August 31, 2006. DOE will consider comments submitted after this date to the extent practicable.

ADDRESSES: Comments, or requests for copies of the draft EA, should be sent to Dr. Jane Summerson, EA Document Manager, United States Department of Energy, 1551 Hillshire Drive, Las Vegas, NV 89134. Requests for copies of the draft EA may also be made by calling 1–800–225–6972. The draft EA and electronic comment forms are available at *http://www.ocrwm.doe.gov.* Comments may also be faxed to 1–800–967–0739.

FOR FURTHER INFORMATION CONTACT: Dr. Jane Summerson, EA Document Manager, at the above address or at 1–800–225–6972.

Issued in Washington, DC, on August 1, 2006.

Paul M. Golan,

Principal Deputy Director, Office of Civilian Radioactive Waste Management.

[FR Doc. E6–12644 Filed 8–3–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Public Scoping Meetings for the FutureGen Project Environmental Impact Statement

AGENCY: National Energy Technology Laboratory, Department of Energy.

ACTION: Notice of public scoping meetings and opportunity for comment.

SUMMARY: On Friday, July 28, 2006, the U.S. Department of Energy (DOE) issued a Notice of Intent to prepare an Environmental Impact Statement for the proposed action of providing up to $700 million of Federal funding for the FutureGen Project (71 FR 42840). The FutureGen Project would comprise the planning, design, construction and operation by a private sector organization of a coal-fired electric power and hydrogen gas production plant integrated with carbon dioxide capture and geologic sequestration of the captured gas. DOE's National Energy Technology Laboratory (NETL) is hosting public scoping meetings near each of the four proposed FutureGen Project sites. Dates, locations, and information about the public scoping meetings are contained under **SUPPLEMENTARY INFORMATION**, below.

DATES: DOE invites comments on the proposed scope and content of the EIS from all interested parties. Comments must be received by September 13, 2006, to ensure consideration. Late comments will be considered to the extent practicable. DOE also invites members of the public to participate in public scoping meetings (see **SUPPLEMENTARY INFORMATION**) to learn more about the proposed FutureGen Project and provide oral comments on the alternatives and environmental issues to be considered.

ADDRESSES: Comments on the proposed scope of the EIS and requests for copies of the Draft EIS may be submitted by fax (304–285–4403), e-mail (*FutureGen.EIS@netl.doe.gov*), or a letter addressed to the NEPA Document Manager for the FutureGen Project: Mr. Mark L. McKoy, National Energy Technology Laboratory, U.S. Department of Energy, P.O. Box 880, Morgantown, WV 26507–0880, Attn: FutureGen Project EIS.

FOR FURTHER INFORMATION CONTACT: Comments or requests to participate in the public scoping process also can be submitted by contacting Mr. Mark L. McKoy directly at telephone 304–285–4426; toll free number 1–800–432–8330 (extension 4426); fax 304–285–4403; or e-mail *FutureGen.EIS@netl.doe.gov*.

SUPPLEMENTARY INFORMATION: NETL is hosting four public scoping meetings to present an overview of the proposed project and to provide the public with an opportunity to comment and ask questions. An informal session of the public scoping meetings will begin at approximately 4 p.m., followed by a formal session beginning at approximately 7 p.m. Members of the public who wish to speak at a public scoping meeting should contact Mr. Mark L. McKoy, either by phone, fax, e-mail, or in writing (see **ADDRESSES** in this Notice). Those who do not arrange in advance to speak may register at a meeting (preferably at the beginning of the meeting) and may speak after previously scheduled speakers. Speakers will be given approximately five minutes to present their comments. Those speakers who want more than five minutes should indicate the length of time desired in their request. Depending on the number of speakers, DOE may need to limit all speakers to five minutes initially and provide second opportunities as time permits. Speakers may also provide written materials to supplement their presentations. Oral and written comments will be given equal consideration. State and local elected officials and tribal leaders may be given priority in the order of those making oral comments.

DOE will begin each meeting with an overview of the proposed FutureGen Project. The meeting will not be conducted as an evidentiary hearing, and speakers will not be cross-examined. However, speakers may be asked questions to help ensure that DOE fully understands the comments or suggestions. A presiding officer will establish the order of speakers and provide any additional procedures necessary to conduct the meeting.

Meeting Schedule

Texas—Jewett

Date: Tuesday, August 22, 2006.
Time: 4 p.m. to 9 p.m.
Place: City of Fairfield's Green Barn (Fairgrounds Exhibits Bldg.) 839 E. Commerce, Fairfield, Texas 75840. This site is 2.5 miles East of I–45 on Hwy 84 (aka Commerce Street).

Texas—Odessa

Date: Thursday, August 24, 2006.
Time: 4 p.m. to 9 p.m.
Place: The CEED (Center for Energy and Economic Diversification) Building is located at 1400 North FM 1788 in Midland, Texas 79707.

Illinois—Tuscola

Date: Thursday, August 29, 2006.
Time: 4 p.m. to 9 p.m.
Place: Tuscola Community Building, 122 W. Central Avenue, Tuscola, IL 61953. (From Interstate 57, take exit 212 to U.S. Highway 36. The Tuscola Community Building is at the intersection of North Central Avenue and South Main Street.)

Illinois—Mattoon

Date: Thursday, August 31, 2006.
Time: 4 p.m. to 9 p.m.
Place: Riddle Elementary School, 4201 Western Avenue, Mattoon, IL. (Located at the corner of Western Avenue and 43rd Street (CR 300E).)

All meetings are accessible to people with disabilities. Any individual with a disability who requires special assistance, such as a sign language interpreter, or a translator, please contact Mr. Mark McKoy, U.S. DOE–NETL, toll free (800) 432–8330 ext. 4426, fax (304) 285–4403, or via e-mail at *FutureGen.EIS@netl.doe.gov* at least 48 hours in advance of the meeting so that arrangements can be made.

Additional information about FutureGen can be found at these Web sites: *http://www.doe.gov; http://fossil.energy.gov/programs/powersystems/futuregen/; http://www.futuregenalliance.org.*

Dated: August 1, 2006.

Mark J. Matarrese,

Director, Office of Environment, Security, Safety and Health.

[FR Doc. E6–12742 Filed 8–3–06; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

State Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these teleconferences be announced in the **Federal Register**.

DATES: August 17, 2006, from 2 p.m. to 3 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Assistant Manager, Intergovernmental Projects & Outreach, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303/275–4801.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant

Secretary for Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Update members on routine business matters, discuss and finalize a resolution that will update and elaborate on the continued STEAB support for DOE's maintaining funding and oversight of the Weatherization Assistance Program, and adopt the resolution.

Public Participation: The teleconference is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the conference call; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the call in a fashion that will facilitate the orderly conduct of business. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Notes: The notes of the teleconference will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on August 1, 2006.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E6–12629 Filed 8–3–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

State Energy Advisory Board

AGENCY: Department of Energy; Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of open teleconference.

SUMMARY: This notice announces a teleconference of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these teleconferences be announced in the **Federal Register**.

DATES: August 31, 2006, from 2 p.m. to 3 p.m. EDT

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Assistant Manager, Intergovernmental Projects & Outreach, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone 303/275–4801.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Update members on routine business matters, discuss and finalize several Board resolutions, and adopt the same resolutions.

Public Participation: The teleconference is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received five days prior to the conference call; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the call in a fashion that will facilitate the orderly conduct of business.

Notes: The notes of the teleconference will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on August 1, 2006.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E6–12631 Filed 8–3–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Consideration of Certain Public Utility Regulatory Policies Act Standards Set Forth in the Energy Policy Act of 2005

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Public Hearing.

SUMMARY: As a nonregulated electric utility, the Western Area Power Administration (Western) must consider and determine whether to implement certain standards under the Energy Policy Act of 2005, which amended the Public Utility Regulatory Policies Act of 1978 (PURPA). Standards that Western intends to consider include net metering, fuel source diversity, fossil fuel generation efficiency, smart metering, and consumer interconnections. A brochure entitled "Preconsideration of Sections 1251, 1252, and 1254 of the Energy Policy Act of 2005" will be prepared and will be available for public review by September 25, 2006.

DATES: A public hearing will be held on October 26, 2006, beginning at 10 a.m., at Western's Corporate Service Office. Written comments on whether Western should adopt the standards must be received by November 10, 2006, to be assured of consideration.

ADDRESSES: The public hearing location is at 12155 West Alameda Parkway, Lakewood, CO. Western will post information about this process, including an electronic copy of the preconsideration brochure, at *http://www.wapa.gov/dsw/pwrmkt/PURPA/*. For further information concerning the public hearing or to request a hard copy of the brochure, contact Ms. Sylvia Macfarlane, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457; (602) 605–2575, e-mail *macfarl@wapa.gov*. Written comments may be submitted to this address, submitted electronically to *DSW_PURPA@wapa.gov* or faxed to (602) 605–2828, attention: Deborah Emler, Project Manager.

As access to Western facilities is controlled, any U.S. citizen wishing to attend any meeting held at Western must present an official form of picture identification, such as a U.S. driver's license, U.S. passport, U.S. Government ID, or U.S. Military ID, at the time of the meeting. Foreign nationals should contact Western at least 45 days in advance of the meeting to obtain the necessary form to be admitted to Western's offices.

SUPPLEMENTARY INFORMATION: Western, as a non-regulated electric utility, is subject to Title XII, Subtitle E of the Energy Policy Act of 2005—Amendments to PURPA and is required to consider the implementation of certain standards.

Western was established on December 21, 1977, under the Department of Energy Organization Act of 1977 (DOE Act). The DOE Act transferred to the Secretary of Energy all functions of the Secretary of the Interior with respect to, among other things, the power marketing functions of the Bureau of Reclamation (Reclamation), including the construction, operation, and maintenance of transmission lines and attendant activities. Western was established to administer those functions transferred from Reclamation.

Western sells power to approximately 680 customers consisting of cooperatives, municipalities, public utility districts, private utilities, Federal and State Agencies, Indian tribes, water systems and irrigation districts. Electric power marketed by Western is generated by the hydroelectric resources of Reclamation, the Corps of Engineers, and the International Boundary and Water Commission. Additionally, Western markets the United States' entitlement from the large Navajo coal-fired plant near Page, Arizona.

Western's transmission system, totaling approximately 17,000 line miles with over 258 substations, includes several project-specific systems, some of which are interconnected with one another. There are also numerous interconnections between Western's systems and other systems. Geographically, Western's transmission systems operate in 15 States that are generally west of the Mississippi River.

Western's obligations to its customers are contractually established. Western neither claims nor accepts any utility responsibility. Customer requirements in excess of the power and energy available to that customer from Western must be obtained by the customer from other sources.

The major projects from which Western markets power include the Boulder Canyon Project, Central Arizona Project, Central Valley Project, Colorado River Storage Project, Colorado River Basin Project, Falcon-Amistad Project, Parker-Davis Project, and the Pick-Sloan Missouri Basin Program. Each of these projects is a separate entity with its own geographic area, power marketing criteria, revenue requirements, and power and energy rates. Consideration of the PURPA standards will be on a Western-wide basis, as opposed to a project-by-project or system-by-system basis.

A brochure entitled "Preconsideration of Sections 1251, 1252, and 1254 of the Energy Policy Act of 2005" will be prepared and will be made available on-line from Western at *http://www.wapa.gov/dws/permkt/PURPA/* on September 25, 2006, and will be available at the public hearing.

After analyzing all comments received, Western will complete its consideration and will make a determination of the actions to be taken regarding the amended PURPA sections. Notice of Western's final action will be published in the **Federal Register** and will be made available to the public at *http://www.wapa.gov/dsw/pwrmkt/PURPA/*.

Regulatory Procedure Requirements

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601, *et seq.*) requires Federal agencies to perform a regulatory flexibility analysis if a final rule is likely to have a significant economic impact on a substantial number of small entities and there is a legal requirement to issue a general notice of proposed rulemaking. This action does not require a regulatory flexibility analysis since it is a rulemaking of particular applicability involving rates or services applicable to public property.

Environmental Compliance

In compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321, *et seq.*); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 128656; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Small Business Regulatory Enforcement Fairness Act

Western has determined that this rule is exempt from congressional notification requirements under 5 U.S.C. 801 because the action is a rulemaking of particular applicability relating to rates or services and involves matters of procedures.

Michael S. Hacskaylo,

Administrator.

[FR Doc. 06–6693 Filed 8–3–06; 8:45 am]

BILLING CODE 6450–01–M

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2006–0408; FRL–8205–8]

Agency Information Collection Activities; Proposed Collection; Comment Request; Reporting and Recordkeeping Requirements Under EPA's Water Efficiency Program; EPA ICR No. 2233.01, OMB Control No. New

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request for a new Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 3, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2006–0408 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *simbanin.cynthia@epa.gov.*
- Fax: 202–501–2396.
- Mail: EPA Docket Center, Water Docket, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: Water Docket, in the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2006–0408. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless

the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to make hand deliveries or visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket operations, locations and telephone numbers. The Docket Center's mailing address for U.S. mail and the procedure for submitting comments to *http://www.regulations.gov* are not affected by the flooding and will remain the same.

FOR FURTHER INFORMATION CONTACT: Cindy Simbanin, Office of Wastewater Management, Office of Water, 4204M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–3837, fax number: 202–501–2396; e-mail address: *simbanin.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2006–0408, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider when I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES.**

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are manufacturers, service providers, retailers, businesses, institutions, builders and others who voluntarily sign up to participate in EPA's Water Efficiency Program.

Title: Reporting and Recordkeeping Requirements Under EPA's Water Efficiency Program.

ICR numbers: EPA ICR No. 2236.01, OMB Control No. 2040–New.

ICR status: This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: EPA's Water Efficiency Program is a voluntary program designed to create self-sustaining markets for water efficient products and services via a common label. The program provides incentives for manufacturers to design, produce, and market water-efficient products. In addition, the program provides incentives for service providers (e.g. landscapers) to deliver water-efficient products. The program also encourages consumers and commercial and institutional purchasers of water-using products and systems to choose water-efficient products and engage in water-efficient practices.

EPA's Water Efficiency Program partners with manufacturers, retailers,

utilities, state and local governments, NGOs, plumbers, developers, contractors, architects, landscapers, irrigation professionals, and service certification programs to market and adopt the Water Efficiency Program, and provide labeled products and services. To participate in the program, organizations will complete a Partnership Agreement, which details the partner and EPA commitments under the program, and is signed by a senior official at both EPA and the partner organization. EPA asks manufacturers, certification programs, and builders to submit an EPA Water Efficiency Program Labeled Product or Service Application within 12 months of execution of the Partnership Agreement. This document provides EPA information to verify that the product or service meets EPA specifications based on independent testing. EPA will use this information to inform the public on water efficient products and services. In addition, EPA requests partners submit promotional plans and annual updates on progress implementing the program. EPA intends to use this information to identify partnership opportunities and assess progress meeting program goals.

In the third year of the program, EPA plans to initiate an awards program that will require interested partners to submit an awards application form. The purpose of this information collection is to document partner successes for further recognition. Partners may designate certain information submitted under this ICR as confidential business information. All information identified as confidential business information collected under this ICR will not be available to the public.

Burden Statement: The annual public reporting and recordkeeping burden for this information collection is estimated to average 8 hours per response for the Partnership Agreement, 13 hours per response for the Promotional Plan, 18 hours per response for the Annual Update, and 21 hours for the Awards Application Form. This results in an estimated annual partner respondent burden of 39 hours if not applying for an award and 60 hours if applying for an award. In addition, manufacturers and certification programs will incur an estimated 21 hours per labeled product or service to complete the Labeled Product or Service Application Form. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: EPA anticipates that 100 partners will participate in the program in the first year, 75 in the second year, and 125 in the third year for a total of 300 potential respondents.

Frequency of response: Partnership Agreements are a one-time submission; Promotional Plans, Annual Updates, and Award Application forms are annual submissions, and Labeled Product or Service Application forms are submitted occasionally.

Estimated total average number of responses for each respondent: The estimated number of respondents averages 100 per year for the Partnership Agreements; and 192 respondents for Promotional Plans and Annual Updates. EPA estimates receiving approximately 126 Labeled Product or Service Applications each year and 100 Award Application forms the third year.

Estimated total annual burden hours: 10,081.

Estimated total annual costs: $655,037. This includes an estimate of non-labor costs of $22/partner in fax, photocopies, and telephone costs (plus an additional $35 in copy and mailing costs for award applicants). Manufacturer partners will also incur one-time testing costs for each product tested as follows: ET controllers: $2,500 each; moisture sensors: $8,500 each; toilets: $2,000 each; faucets: $200 each; plus an additional $65/test in associated photocopying and faxing costs.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: July 31, 2006.

James Hanlon,

Director, Office of Wastewater Management.

[FR Doc. E6–12625 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8205–7]

Announcement of the Board of Trustees for the National Environmental Education and Training Foundation, Inc.

SUMMARY: The National Environmental Education and Training Foundation was created by Section 10 of Public Law 101–619, the National Environmental Education Act of 1990. It is a private 501(c)(3) non-profit organization established to promote and support education and training as necessary tools to further environmental protection and sustainable, environmentally sound development. It provides the common ground upon which leaders from business and industry, all levels of government, public interest groups, and others can work cooperatively to expand the reach of environmental education and training programs beyond the traditional classroom. The Foundation supports a grant program that promotes innovative environmental education and training programs; it also develops partnerships with government and other organizations to administer projects that promote the development of an environmentally literal public.

The Administrator of the U.S. Environmental Protection Agency, as required by the terms of the Act, announces the following appointment to the National Environmental Education and Training Foundation, Inc. Board of Trustees. The appointees are Kenneth Strassner, Vice President—Global Environment, Safety, Regulatory and Scientific Affairs, Kimberly-Clark Corporation and Dr. Bradley F. Smith, Dean of Huxley College of the Environment at Western Washington University. The appointees will join the current Board members which include:

- J.L. Armstrong, National Manager, Diversity Development, Toyota Motor Sales, USA
- Braden Allenby, Vice President, Environment, Health and Safety, AT&T

- Raymond Ban, Executive Vice President, Meteorology Science and Strategy, The Weather Channel, Inc.
- Richard Bartlett, (NEETF Chairman) Vice Chairman, Mary Kay Holding Corporation
- Holly Cannon, Principal of the Law Firm Beveridge&Diamond
- Arthur Gibson, Vice President, Environment, Health&Safety, The Home Depot, Inc.
- Dorothy Jacobson, Consultant
- Karen Bates Kress, President, KBK Consulting, Inc.
- Dorothy McSweeny, (NEETF Vice Chair), Chair, DC Commission on the Arts and Humanities
- Honorable William Sessions, former Director of the Federal Bureau of Investigation.

Additional Considerations: Great care has been taken to assure that these new appointees not only have the highest degree of expertise and commitment, but also brings to the Board diverse points of view relating to environmental education and training. These appointments shall be for four year terms.

FOR FURTHER INFORMATION CONTACT: C. Michael Baker, Acting Director, Environmental Education Division, Office of Children's Health Protection and Environmental Education (1704A) U.S. EPA 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Dated: July 27, 2006, BIOS of New Member.

Stephen L. Johnson,

Administrator.

Kenneth A. Strassner, Vice President, Global Environment, Safety, Regulatory and Scientific Affairs, Kimberly-Clark Corporation.

Mr. Strassner is an honors graduate (magna cum laude) of Yale College (1968 and of Yale Law School (1974). Prior to joining Kimberly-Clark in 1976, Mr. Strassner served as an officer in the U.S. Navy, practiced with a Washington, DC law firm and served as Executive Assistant to the Assistant Secretary of Labor for Occupational Safety and Health. Mr. Strassner's legal specialties include U.S. and international environmental and energy law, product safety matters and occupational safety and health requirements. In 1988, Mr. Stassner was appointed Vice President-Environment and Energy, Kimberly-Clark Corporation, responsible for formulation of corporate policies and management of the Corporation's technical support staffs in both areas. His areas of responsibility were expanded in November 2004, and he now serves as Vice President-Global Environment, Safety, Regulatory and Scientific Affairs for Kimberly-Clark. In addition, Mr. Strassner is a member of various professional associations and is the current Chairman of the Corporate Environmental, Health and Safety Management Roundtable.

Bradley F. Smith, Vice President Dean of Huxley College of The Environment, Western Washington University.

Bradley F. Smith was named Dean of Huxley College of the Environment at Western Washington University in September of 1994. Prior to his appointment, Dr. Smith had served for three years as the first Director of the Office of Environmental Education for the U.S. Environmental Protection Agency. He also served as a Special Assistant to the administrator of the EPA and as Acting Associate Administrator for the EPA. Dr. Smith was appointed to the U.S. Senior Executive Service in 1992. Dr. Smith received his Ph.D. from the University of Michigan School of Natural Resources and the Environment. His BA and MA are in economics and political science.

From 1975 to 1990, Dr. Smith was a professor of political science and biology, and concurrently was executive director of Michigan's Tobico Marsh National Refuge from 1982 to 1990. During this time, he also served as adjunct faculty at the Air Force Institute of Technology and the University of Michigan's School of Natural Resources and the Environment. Dr. Smith has been a Fulbright Scholar to England and a NATO Fellow. He holds adjunct faculty positions, in Russia, China, Holland and Japan. Concurrently, he serves as a senior advisor to General Motors Corporation VP Environment, Energy and Public Policy and the GM Foundation. He also is an external evaluator for the U.S. Department of Energy and is the President of the U.S. Council of Environmental Deans and Directors and President of the World Conservation Learning Network (an organization of some 400 universities based in Geneva, Switzerland). Formerly Dr. Smith served as an appointed member of President Clinton's Council for Sustainable Development (Education Task Force). His most recent publications include co-author of Environmental Science: A Study of Interrelationships, 10th edition 2004, and Environmental Science Field Guide and Laboratory Manual, 10th edition 2004, McGraw-Hill.

[FR Doc. E6–12627 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[Docket No. ER–FRL–6677–8]

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 07/24/2006 through 07/28/2006

Pursuant to 40 CFR 1506.9.

EIS No. 20060314, Final EIS, SFW, CA, Bair Island Restoration and Management Plan, Tidal Action Restoration, Don Edwards San Francisco Bay National Wildlife Refuge, Bair Island State Ecological Reserve, South San Francisco Bay, San Mateo County, CA, Wait Period Ends: 09/04/2006, Contact: Clyde Morris 510–792–0222.

EIS No. 20060315, Draft EIS, AFS, CA, Antelope-Pardee 500kV Transmission Project, Construct, Operate and Maintain a New 25.6 mile 500kV Transmission Line, Right-of-Way Permit and Special Use Authorization, Angeles National Forest, Los Angeles County, CA, Comment Period Ends: 09/18/2006, Contact: Marian Kadota 805–961–5732.

EIS No. 20060316, Draft EIS, GSA, ME, Madawaska Border Station Project, Replacement of Existing Border Station in Madawaska, International Border between United States and Canada, Aroostook County, ME, Comment Period Ends: 09/22/2006, Contact: David M. Drevinsky 617–565–6596.

EIS No. 20060317, Draft EIS, FHW, NY, NY Route 347 Safety and Mobility Improvement Project, from Northern State Parkway to NY Route 25A, Funding, Towns of Smithtown, Islip and Brookhaven, Suffolk County, NY, Comment Period Ends: 09/18/2006, Contact Robert Arnold 518–431–4127.

EIS No. 20060318, Draft EIS, FHW, NY, Greenville Southwest Bypass Study, Transportation Improvements to NC 11 and U.S. 264 Business, U.S. Army COE Section 404 Permit, Pitt County, NY, Comment Period Ends: 09/18/2006, Contact: John F. Sullivan, III 919–856–4346.

EIS No. 20060319, Final EIS, NPS, AR, Pea Ridge National Military Park General Management Plan, Implementation, AR, Wait Period Ends: 09/04/2006, Contact: John Scott 479–451–8122 Ext 224.

EIS No. 20060320, Final EIS, NRC, IL, Early Site Permit (ESP) at the Exelon

ESP Site, Application for ESP on One Additional Nuclear Unit, within the Clinton Power Station (CPS), NUREG–1815, DeWitt County, IL, Wait Period Ends: 09/04/2006, Contact: Thomas Kenyon 301–415–1120.

EIS No. 20060321, Draft EIS, AFS, CA, Diamond Vegetation Management Project, To Shift Existing Conditions Towards Desired Future Conditions, MT. Hough Ranger District, Plumas National Forest, Plumas County, CA, Comment Period Ends: 09/18/2006, Contact: Merri Carol Martens 530–283–7689.

EIS No. 20060322, Final EIS, BLM/AFS, CO, Northern San Juan Basin Coal Bed Methane Project, Proposal to Drill 300 Wells to Produce National Gas from Coal Beds on Federal, State and Private Owned Lands, Special-Use-Permit, Application for Permit to Drill and US Army COE Section 404 Permit, LaPlata and Archuleta Counties, CO, Wait Period Ends: 09/04/2006, Contact: Walt Brown 970–385–1372.

The Department of the Interior's Bureau of Land Management and the U.S. Department of Agriculture's Forest Service are Joint Lead Agencies for the above project.

EIS No. 20060323, Draft EIS, AFS, AK, Scratchings Timber Sale Project, Timber Harvest up to Approximately 42 Million Board Feet, Suemez Island, Craig Ranger District, Tongass National Forest, AK, Comment Period Ends: 09/18/2006, Contact: Dennis Sylvia 907–828–3226.

EIS No. 20060324, Draft EIS, AFS, MT, Cabin Gulch Vegetation Treatment Project, Restore Fire-Adapted Ecosystems, Reduce Hazardous Fuels, and Water Quality Tributaries to Deep Creek, Helena National Forest, Townsend Ranger District, Broadwater County, MT, Comment Period Ends: 09/18/2006, Contact: Sharon Scott 406–449–5490.

EIS No. 20060325, Draft EIS, FRC, ID, Hells Canyon Hydroelectric Project, Application for Relicensing to Authorize the Continued Operation of Hydroelectric Project, Snake River, Washington and Adams Counties, ID and Wallowa and Baker Counties, OR, Comment Period Ends: 10/02/2006, Contact: Todd Sedmak 1–866–208–FERC.

Amended Notices

EIS No. 200600122, Draft EIS, BIA, WA, Cowlitz Indian Tribe Trust Acquisition and Casino Project, Take 151.87 Acres into Federal Trust and Issuing of Reservation Proclamation, and Approving the Gaming Development and Management Contact, Clack County, WA, Comment Period Ends: 08/25/2006, Contact: Gerald Henrickson 503–231–6927.

Revision of FR Notice Published on 04/14/2006: Comment Period Officially Reopened by Preparing Agency—Comment Period ends 8/25/2006.

EIS No. 20060195, Draft EIS, CGD, MA, -VOID-Northeast Gateway Deepwater Port License Application, Construct, Own and Operate a Deepwater Port to Import Liquefied Natural Gas (LNG) in Massachusetts Bay, City of Gloucester, MA, Comment Period Ends: 07/03/2006, Contact: Mark Prescott 202–267–0225.

Revision of FR Notice Published 05/19/2006: The above DEIS was inadvertently published in 05/19/2006. The Official Filing was Published in FR on 05/26/2006 CEQ#20060213.

EIS No. 20060221, Draft EIS, CGD, MA, -VOID-Neptune Liquefied Natural Gas Deepwater Port License Application, Proposes to Construct, Own and Operate a Deepwater Port, northeast of Boston and south-southeast of Gloucester, MA, Comment Period Ends: 07/17/2006, Contact: M.A. Prescott 202–372–1451.

Revision of FR Notice Published 06/02/2006: The above DEIS was inadvertently published in 06/02/2006. The Official Filing was Published in FR on 06/09/2006 CEQ#20060235.

EIS No. 20060253, Draft EIS, AFS, NV, Jarbidge Ranger District Rangeland Management Project, Authorize Continued Livestock Grazing, Humboldt-Toiyabe National Forest, Columbia River, NV, Comment Period Ends: 08/21/2006, Contact: James Winfrey 775–778–6129.

Revision of FR Notice Published on 06/23/2006: Extending Comment Period from 08/07/2006 to 08/21/2006.

EIS No. 20060266, Draft EIS, FTA, TX, North Corridor Fixed Guideway Project, Propose Transit Improvements from University of Houston (UH)-Downtown Station to Northline Mall, Harris County, TX, Comment Period Ends: 08/17/2006, Contact: John Sweek 817–978–0550.

Revision to FR Notice Published 07/03/2006: Correction to Agency Code from DOT to FTA.

EIS No. 20060313, Draft EIS, BIA, MT, Kerr Hydroelectric Project, Proposed Drought Management Plan, Implementation, Flathead Lake, MT, Comment Period Ends: 09/29/2006, Contact: Jeffery Loman 202–208–7373.

Revision of FR Notice Published on 07/28/2006: Correction to Comment Period from 09/11/2006 to 09/29/2006.

Dated: August 1, 2006.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 06–6715 Filed 8–3–06; 8:45 am]

BILLING CODE 6650–50–U

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6677–9]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at 202–564–7167. An explanation of the ratings assigned to draft Environmental Impact Statements (EISs) was published in FR dated April 7, 2006 (71 FR 17845).

Draft EISs

EIS No. 20060177, ERP No. D–I.–K28021–CA, Contra Costa Water District Alternative Intake Project, To Protect and Improve the Quality of Water Delivery to Untreated and Treated-Water Customers, Contra Costa County, CA.

Summary: While EPA has no objection to the proposed action, EPA did request clarification of fisheries benefits and feasibility of implementing Alternative 3. Rating LO.

EIS No. 20060212, ERP No. D–AFS–K65310–CA, Freeman Project, Reduce Hazardous Fuel and Improving Forest Health, Implementation, Lake Recreation Area, Beckworth Ranger District, Plumas National Forest, Plumas County, CA.

Summary: EPA expressed environmental concerns about impacts to water quality, soil, and habitat for the California spotted owl, great gray owl, and northern goshawk. Rating EC2.

EIS No. 20060248, ERP No. D–NRS–E36186–KY, Rockhouse Creek Watershed Plan, To Protect Residential and Non-residential Structures from Recurrent Flood Problem, Leslie County, KY.

Summary: EPA does not object the proposed action. Rating LO.

EIS No. 20060249, ERP No. DA–FRC–C05146–00, Northeast (NE)–07 Project, Construction and Operation a Natural Gas Pipeline Facilities, Millennium Pipeline Project—Phase I, U.S. Army COE Section 10 and 404

Permits, several counties, NY, Morris County, NJ and Fairfield and New Haven Counties, CT.

Summary: EPA does not object to the proposed action. Rating LO.

EIS No. 20060294, ERP No. DS–AFS–K65184–CA, Rock Creek Recreational Trails Project, Updated Information on Habitat Status and Population Trend for the Pacific Deer Herd, Implementation, Eldorado National Forest, Eldorado County, CA.

Summary: No formal comment letter was sent to the preparing agency. Rating LO.

Final EISs

EIS No. 20060142, ERP No. F–AFS–L65401–ID, Sixshooter Project, To Reduce the Threats of Insect Infestation and Wildfire, Sixmile and West Fork Creek, Boise National Forest, Emmett Ranger District, Gem County, ID.

Summary: While EPA has no objections to the proposed action, EPA did request that measures to reduce the spread of noxious weeds and monitoring to assess effectiveness of project design, mitigation measures, and BMPs, be referenced in the Record of Decision.

EIS No. 20060252, ERP No. F–AFS–K65281–CA, Brown Project, Proposal to Improve Forest Health by Reducing Overcrowded Forest Stand Conditions, Trinity River Management Unit, Shasta-Trinity National Forest, Weaverville Ranger District, Trinity County, CA.

Summary: EPA continues to have environmental concerns about impacts to air quality, old growth, and watersheds.

EIS No. 20060186, ERP No. FS–TPT–K61154–CA, Presidio Trust Public Health Service Hospital (PUSH or Building 1801) at the Presidio of San Francisco (Area B) of Presidio Trust Management Plan, Rehabilitation and Reuse of Buildings, Gold Gate National Recreation Area, San Francisco Bay, Marin County, CA.

Summary: No formal comment letter was sent to the preparing agency.

EIS No. 20060243, ERP No. FS–FHW–F40309–00, MN–36/WI–64 St. Croix River Crossing Project, Construction of a new Crossing between the Cities of Stillwater and Oak Park Heights, Washington County, MN and the town of St. Joseph in St. Croix County, WI.

Summary: EPA does not object to the preferred alternative.

EIS No. 20060279, ERP No. FS–AFS–K65164–00, Southwestern Region Amendment of Forest Plans, Implementation, Updated Information, Standards and Guidelines for Northen Goshawk and Mexican Spotted Owl, AZ and NM.

Summary: No formal comment letter was sent to the preparing agency.

Dated: August 1, 2006.

Robert W. Hargrove,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E6–12632 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8206–1]

Clean Air Act Advisory Committee (CAAAC) Notice of Meeting; Request for Nominations for 2006 Clean Air Excellence Awards Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that the Clean Air Act Advisory Committee will hold its next open meeting on Thursday, September 14, 2006. The meeting is open to the public to attend and will begin at approximately 8:30 a.m. to 4 p.m. at the Marriott Crystal City at Reagan National Airport, 1999 Jefferson Davis Highway Arlington, VA 22202. The Subcommittee meetings will be held on September 12 and 13 starting approximately at 8:30 a.m to 4:30 p.m. at the same location as the full Committee. Seating will be available on a first come, first served basis. The Mobile Source Technical Review subcommittee will not meet at this time. The agenda for the full committee meeting will be posted on the CAAAC Web site: *http://www.epa.gov/oar/caaac/*. EPA established the Clean Air Excellence Awards Program in February, 2000. This is an annual awards program to recognize outstanding and innovative efforts that support progress in achieving clean air. This notice announces the competition for the Year 2006 program.

DATES: Clean Air Act Advisory Committee will hold its next open meeting on Thursday September 14, 2006, from approximately 8:30 a.m. to 3:30 p.m. Subcommittees will meet on Tuesday and Wednesday, September 12 and 13 at the same location. All submission of entries for the Clean Air Excellence Awards program must be postmarked by September 13, 2006.

ADDRESSES: CAAAC and its subcommittee meetings will be held at the Marriott Crystal City Hotel, 1999 Jefferson Davis Highway Arlington, VA 22202. Clean Air Excellence Awards submissions should be sent to Clean Air Excellence Awards, Attn. Mr. Pat Childers, U.S. EPA, Office of Air and Radiation (6102A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Concerning the CAAAC, please contact Pat Childers, Office of Air and Radiation, U.S. EPA (202) 564–1082, FAX (202) 564–1352 or by mail at U.S. EPA, Office of Air and Radiation (Mail code 6102 A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004. For information on the Subcommittee meetings, please contact the following individuals: (1) Permits/NSR/Toxics Integration—Debbie Stackhouse, 919–541–5354; (2) Air Quality Management—Jeff Whitlow, 919–541–5523; and (3) Economic Incentives and Regulatory Innovations— Carey Fitzmaurice, 202–564–1667. Additional Information on these meetings, CAAAC and its Subcommittees can be found on the CAAAC Web site: *http://www.epa.gov/oar/caaac/*.

Concerning the Clean Air Excellence Awards program please use the CAAAC Web site and click on awards program or contact Mr. Pat Childers, U.S. EPA at 202–564–1082 or 202–564–1352 (Fax), mailing address: Office of Air and Radiation (6102A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

Meeting Access: For information on access or services for individuals with disabilities, please contact Mr. Pat Childers at (202) 564–1082 or *childers.pat@epa.gov*. To request accommodation of a disability, please contact Mr. Childers, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

SUPPLEMENTARY INFORMATION: Awards Program Notice: Pursuant to 42 U.S.C. 7403(a)(1) and (2) and sections 103(a)(1) and (2) of the Clean Air Act (CAA), notice is hereby given that the EPA's Office of Air and Radiation (OAR) announces the opening of competition for the Year 2006 "Clean Air Excellence Awards Program" (CAEAP). The intent of the program is to recognize and honor outstanding, innovative efforts that help to make progress in achieving cleaner air. The CAEAP is open to both public and private entities. Entries are limited to the United States. There are five general award categories: (1) Clean Air Technology; (2) Community Action; (3) Education/Outreach; (4) Regulatory/Policy Innovations; (5) Transportation

Efficiency Innovations; and two special awards categories: (1) Outstanding Individual Achievement Award. (2) Cross-Category Award. Awards are given on an annual basis and are for recognition only.

Entry Requirements: All applicants are asked to submit their entry on a CAEAP entry form, contained in the CAEAP Entry Package, which may be obtained from the Clean Air Act Advisory Committee (CAAAC) Web site at *http://www.epa.gov/oar/caaac* by clicking on Awards Program or by contacting Mr. Pat Childers, U.S. EPA at 202–564–1082 or 202–564–1352 (Fax), mailing address: Office of Air and Radiation (6102A), 1200 Pennsylvania Avenue, NW., Washington, DC 20004. The entry form is a simple, three-part form asking for general information on the applicant and the proposed entry; asking for a description of why the entry is deserving of an award; and requiring information from three (3) independent references for the proposed entry. Applicants should also submit additional supporting documentation as necessary. Specific directions and information on filing an entry form are included in the Entry Package.

Judging and Award Criteria: Judging will be accomplished through a screening process conducted by EPA staff, with input from outside subject experts, as needed. Members of the CAAAC will provide advice to EPA on the entries. The final award decisions will be made by the EPA Assistant Administrator for Air and Radiation. Entries will be judged using both general criteria and criteria specific to each individual category. There are four (4) general criteria: (1) The entry directly or indirectly (*i.e.*, by encouraging actions) reduces emissions of criteria pollutants or hazardous/toxic air pollutants; (2) The entry demonstrates innovation and uniqueness; (3) The entry provides a model for others to follow (*i.e.*, it is replicable); and (4) The positive outcomes from the entry are continuing/sustainable. Although not required to win an award, the following general criteria will also be considered in the judging process: (1) The entry has positive effects on other environmental media in addition to air; (2) The entry Demonstrates effective collaboration and partnerships; and (3) The individual or organization submitting the entry has effectively measured/evaluated the outcomes of the project, program, technology, *etc.* As previously mentioned, additional criteria will be used for each individual award category. These criteria are listed in the 2006 Entry Package.

Inspection of Committee Documents: The Committee agenda and any documents prepared for the meeting will be publicly available at the meeting. Thereafter, these documents, together with CAAAC meeting minutes, will be available by contacting the Office of Air and Radiation Docket and requesting information under docket OAR–2004–0075. The Docket office can be reached by telephoning 202–260–7548; FAX 202–260–4400.

Dated: August 2, 2006.

Patrick Childers,

Designated Federal Official for Clean Air Act Advisory Committee.

[FR Doc. E6–12637 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2004–0076; FRL–8205–6]

Notice of Data Availability for EGU NO_X Annual and NO_X Ozone Season Allocations for the Clean Air Interstate Rule Federal Implementation Plan Trading Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: On March 15, 2006, EPA promulgated Federal Implementation Plans (FIPs) for all States covered by the Clean Air Interstate Rule (CAIR). The FIPs will regulate electric generating units (EGUs) in the affected States and achieve the emission reductions required by CAIR until each affected State has an approved CAIR State Implementation Plan (SIP) to achieve the reductions. The Agency promulgated FIPs to provide a federal backstop for CAIR. EPA will withdraw a State's FIP in coordination with approval of a SIP implementing the requirements of CAIR.

Today's action relates to the CAIR FIP regulatory text, which indicates that the Administrator will determine by order the CAIR NO_X allowance allocations. In the CAIR FIP preamble, EPA also indicated its intention to publish a NODA with NO_X allowance allocations for 2009 through 2014, provide the public with the opportunity to object to the data, and then publish a final NODA (adjusted if necessary).

In today's NODA, the EPA is making available to the public data relating to NO_X annual and NO_X ozone season allocations under the CAIR FIP that EPA will allocate to individual existing units covered by the CAIR FIP NO_X annual and NO_X ozone season trading programs for 2009–2014. These allocations use data from the U.S. Environmental Protection Agency's Clean Air Markets Division's (CAMD) database (which contains data reported under the Acid Rain Program), U.S. Energy Information Administration (EIA) database, and data previously provided to EPA by sources. The NODA references, or presents in tables, all these data and the NO_X annual and NO_X ozone season allowance allocations calculated using the data and the allocation formulas finalized in the CAIR FIP, for existing units for 2009 through 2014.

DATES: Objections must be received on or before September 5, 2006.

ADDRESSES: Submit your objections, identified by Docket Number OAR–2004–0076 by one of the following methods:

A. *Federal Rulemaking Portal: http://www.regulations.gov.* Today's action is not a rulemaking, but you may use the Federal Rulemaking Portal to submit objections to the NODA. To submit objections, follow the online instructions for submitting comments.

B. *Mail:* Air Docket, ATTN: Docket Number OAR–2004–0076, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

C. *E-mail: A-AND-R-Docket@epa.gov.*

D. *Hand Delivery:* EPA Docket Center, 1301 Constitution Avenue, NW., Room B102, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to make hand deliveries or visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket operations, locations and telephone numbers. The Docket Center's mailing address for U.S. mail and the procedure for submitting comments to www.regulations.gov are not affected by the flooding and will remain the same.

Instructions: Direct your objections to Docket ID No. OAR–2004–0076. The EPA's policy is that all objections received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket*, including any personal information provided, unless the objection includes information

claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your objection. If you send an e-mail objection directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the objection that is placed in the public docket and made available on the Internet. If you submit an electronic objection, EPA recommends that you include your name and other contact information in the body of your objection and with any disk or CD–ROM you submit. If EPA is unable to read your objection and contact you for clarification due to technical difficulties, EPA may not be able to consider your objection. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *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 *www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: General questions concerning today's action and technical questions concerning heat input or fuel data should be addressed to Brian Fisher, USEPA Headquarters, Ariel Rios Building, 1200 Pennsylvania Ave., Mail Code 6204 J, Washington, DC 20460. Telephone at (202) 343–9633, e-mail at *fisher.brian@epa.gov*. If mailing by courier, address package to Brian Fisher, 1310 L St., NW, RM #713G, Washington, DC 20005.

SUPPLEMENTARY INFORMATION:

Outline

1. General Information

This action relates to §§ 97.141 and 97.341 of the CAIR FIP. These sections indicate that the Administrator will determine by order the CAIR NO_X allowance allocations. In the CAIR FIP preamble, EPA stated its intention to publish a NODA with NO_X allowance allocations for 2009 through 2014 (71 FR 25352).

Does This Action Apply to Me?

Categories and entities potentially regulated by this action include the following:

Category	NAICS code	Examples of potentially regulated entities
Industry	221112	Fossil fuel-fired electric utility steam generating units.
Federal Government	221122	Fossil fuel-fired electric utility steam generating units.
State/local/Tribal government	221122	Fossil fuel-fired electric utility steam generating units owned by municipalities.
	921150	Fossil fuel-fired electric utility steam generating units in Indian Country.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section under **FOR FURTHER INFORMATION CONTACT.**

The NO_X allowance allocations in today's NODA are for existing units. Existing units are units that commenced operation before January 1, 2001. New units, which commence operation on or after January 1, 2001, will initially receive allowances through the new unit set aside. Once new units have established a five year baseline, they will be incorporated into the calculation for allowances for existing units.

The CAIR FIP rule states units will be subject to the CAIR FIP trading programs (i.e, to the CAIR FIP SO_2, NO_X annual, or NO_X ozone season programs, as appropriate) if they are a stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine serving at any time on or after November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe producing electricity for sale. Certain cogeneration units or solid waste incineration units are exempt from the CAIR FIP and are described below.

Cogeneration Unit Exemption

Certain cogeneration units are exempt from the CAIR FIP trading programs. Cogeneration units are units having equipment used to produce electricity and useful thermal energy for industrial, commercial, heating, or cooling purposes through sequential use of energy and meeting certain operating and efficiency standards. The program has different applicability provisions for non-cogeneration units and cogeneration units. Any cogeneration unit serving (since the later of November 15, 1990 or the start-up of the unit) a generator with a nameplate capacity greater than 25 MWe, supplying more than 1/3 potential electric output capacity, and more than 219,000 Mw-hrs, annually to any utility power distribution system for sale will be subject to the requirements of the CAIR FIP trading rules. Otherwise, a cogeneration unit will qualify for an exemption.

Solid Waste Incinerator Exemption

A solid waste incineration unit commencing operation before January 1, 1985, for which the average annual fuel consumption of non-fossil fuels during 1985–1987 exceeded 80 percent and the

average annual fuel consumption of non-fossil fuels during any 3 consecutive calendar years after 1990 exceeds 80 percent, is not subject to the CAIR FIP cap-and-trade program. Further, a solid waste incineration unit commencing operation on or after January 1, 1985, for which the average annual fuel consumption of non-fossil fuels for the first 3 calendar years of operation exceeds 80 percent and the average annual fuel consumption of non-fossil fuels during any 3 consecutive calendar years after 1990 exceeds 80%, is not subject to the CAIR FIP cap- and trade program.

What Should I Consider as I Prepare My Objections for EPA?

To expedite review of your objections by Agency staff, you are encouraged to send a separate copy of your objections, in addition to the copy you submit to the official docket, to Brian Fisher U.S. EPA, Ariel Rios Building, Mail Code 6204J, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Telephone (202) 343–9633, e-mail *fisher.brian@epa.gov*. If you e-mail the copy of your objections to Mr. Fisher, put "objection for Docket Number OAR–2004–0076" in the subject line to alert Mr. Fisher that an objection is included. If mailing by courier, address package to Brian Fisher, 1310 L St., NW., RM #713G, Washington, DC 20005.

Do not submit CBI to EPA through *http://www.regulations.gov* or e-mail. Clearly mark any portion of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the objection that includes information claimed as CBI, a copy of the objection that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Brian Fisher, U.S. EPA, Office of Air and Radiation, Mail Code 6204J, 1200 Pennsylvania Avenue, NW, Washington DC 20460.

When submitting objections, remember to:

(1) Identify the NODA by docket number and other identifying information (subject heading, **Federal Register** date and page number).

(2) Follow directions—The Agency may ask you to respond to specific questions or organize objections in a specific manner.

(3) Make sure to submit your objections by the deadline identified.

2. What is Today's Action?

In the March 15, 2006 final action on the CAIR FIP, the EPA finalized NO_X annual and ozone season trading programs for EGUs as the federal implementation remedy for CAIR. The EPA decided to adopt, as the FIP for each State in the CAIR region, the model cap-and-trade programs in the final CAIR, modified slightly to allow for federal instead of State implementation (as revised March 15, 2006).

These programs include a NO_X annual trading program and NO_X ozone season trading program. As explained in the CAIR FIP Notice of Final Rulemaking (NFR), the FIP NO_X annual and NO_X ozone season trading programs require CAIR sources to hold allowances sufficient to cover their emissions for each control period. A NO_X annual allowance will authorize the emission of a ton of NO_X during a calendar year, and a NO_X ozone season allowance will authorize the emission of a ton of NO_X during an ozone season (May 1 through September 30).

In the CAIR FIP NFR, EPA adopted the State NO_X annual and NO_X ozone season emission budgets for each State covered by a CAIR FIP (see Tables V–1 and V–2 in the CAIR FIP NFR); these are the same State emission budgets as finalized in the CAIR. For each State covered by the CAIR FIP NO_X trading programs, the State NO_X budgets are the total amount of allowances that EPA will allocate to sources in that State for use in the FIP NO_X trading programs.

EPA determined the method for allocating NO_X annual and NO_X ozone season allowances under the FIP through a process that included extensive public participation. Today's action does not reopen for public comment the CAIR FIP NO_X allocation method, the state budgets, or any other aspects of the CAIR or CAIR FIP rulemakings.

Today, we are making available the inventory of existing units that currently are potential CAIR units, the data on which the inventory is based, the data used to calculate the allocation of NO_X allowances to individual existing potential CAIR units under the CAIR FIP, and the resulting allowance allocations themselves. Today's action explains what the data are, where they came from, and what issues are open to objection. The purpose of making the data available for objection is to ensure that we base the NO_X FIP allocations on the best available data. Under the CAIR FIP trading rules (40 CFR 97.142(a)(3) and 97.342(a)(3)), we will determine what data are the best available by "weighing the likelihood that data are accurate and reliable and giving greater weight to data submitted to a governmental entity in compliance with legal requirements or substantiated by an independent entity." EPA is providing unit owners, unit operators, and the public an opportunity to make objections to any of the data made available in this NODA and used to develop the above-described inventory and allocations. Any person objecting to any of the data should explain the basis for his or her objection and should provide alternative data and explain why they comprise the best available data. EPA intends to publish a NODA with the final FIP NO_X allocations for 2009 through 2014 (adjusted if necessary in light of any objections) by fall of 2006.

The Agency's preference is for States to make decisions about NO_X allocations for their sources. Although in today's action EPA is determining NO_X allocations for the CAIR FIP trading programs, we intend to record EPA-determined allocations in allowance accounts only for sources located in a State without a timely, approved CAIR SIP revision or a timely, approved abbreviated CAIR SIP revision providing for State-determined allocations.

Deadlines for States to submit CAIR SIP revisions and associated NO_X allocations and for EPA to record NO_X allocations in source accounts are as finalized in the CAIR (*see* 70 FR 25162, 25323 and 25326) and CAIR FIP (*see* 71 FR 25328, 25352–55). EPA discusses these deadlines herein for information only; EPA is not reopening for public comment those final deadlines. As finalized in the CAIR and CAIR FIP NFRs, SIP submission deadlines are as follows:

- Full CAIR SIP revision: submit SIP revision by September 11, 2006 and initial set of NO_X allocations (covering at least 2009 through 2011) by October 31, 2006;
- Abbreviated SIP revision: [1] submit SIP revision by March 31, 2007 and initial set of NO_X allocations (covering at least 2009 through 2011) by April 30, 2007.

In today's action EPA determines CAIR NO_X allocations covering 2009 through 2014 under the FIP. As finalized in the CAIR FIP NFR, the Agency will record EPA-determined CAIR NO_X allocations in source

[1] *See* CAIR FIP NFR (71 FR 25352) for further discussion of abbreviated CAIR SIP revisions.

accounts one year at a time for 2009 and 2010 in order to provide flexibility to States to determine allocations for their sources. The final schedule for recording CAIR NO_X allocations under the FIP in source accounts is shown in Table VI–2 in the CAIR FIP NFR preamble and reproduced here for informational purposes:

TABLE I.—RECORDATION DEADLINES FOR CAIR FIP NO_X ALLOCATIONS

CAIR control period	Deadline by which FIP NO_X allocations are recorded (EPA-determined allocations or State-determined allocations using abbreviated SIP revision)
2009	September 30, 2007.
2010	September 30, 2008.
2011	September 30, 2009.
2012	September 30, 2009.
2013	September 30, 2009.
2014	December 1, 2010.
2015	December 1, 2011.
2016	December 1, 2012.

3. How Are the Data in This NODA Related to the CAIR FIP NO_X Allowance Allocations?

In the CAIR FIP NFR, EPA finalized the schedule for determining and recording NO_X allocations. EPA also finalized a methodology for calculating unit level NO_X allowances. Today's NODA provides the unit level NO_X allocations for existing potential CAIR units for 2009–2014 calculated using this methodology, as well as the data used in determining the inventory of existing potential CAIR units and in making the allowance calculations.

As provided in the CAIR FIP NO_X annual and ozone season trading rules (*see* 40 CFR 97.141 and 97.341), EPA is publishing this NODA with CAIR FIP NO_X allocations for existing potential CAIR units for 2009–2014 and providing the public with the opportunity to submit objections addressing whether any individual unit is treated as an existing potential CAIR unit eligible for allowance allocations in accordance with the applicability provisions in these trading rules (*see* 40 CFR 97.104 and 97.305) and whether any unit allocation is determined in accordance with the allocation provisions in these trading rules (*see* 40 CFR 97.142 and 97.342). For example, objections may be submitted concerning any of the data used in developing the inventory or in calculating any of the allocations. EPA intends to publish a subsequent NODA with final NO_X allocations for 2009 through 2014 (adjusted if necessary in response to objections) in the fall of 2006.

In the CAIR FIP NFR, EPA finalized an allocation approach for NO_X annual and ozone season allowances for existing units (i.e, units commencing operation before January 1, 2001) and new units (i.e, units commencing operation on or after January 1, 2001) that is consistent with the example methodology in the CAIR SIP model trading rules. EPA used the NO_X allocation method finalized in the FIP NFR to calculate the existing unit NO_X allocations in today's NODA. Today's action does not address new unit allocations. New unit allocation provisions under the CAIR FIP may be found in §§ 97.141, 97.341, 97.153 and 97.353. *See* 71 FR 25356–58 for detailed description of the allocation method.

The NO_X allocation method in the CAIR FIP NFR was finalized through a process that involved significant public participation. EPA is not reopening the allocation method for public comment. EPA provides a summary of the NO_X allocation method herein for informational purposes only.

Allocations in today's NODA are for existing units for the first 6 control periods (2009 through 2014) of the CAIR NO_X annual and NO_X ozone season trading programs. The NO_X allocation method finalized in the CAIR FIP NFR allocates by using annual heat input data from the years 2000 through 2004 to develop baseline heat inputs. These heat input values are adjusted using fuel adjustment factors (1.0 for coal-fired units, 0.6 for oil-fired units, and 0.4 for units fired with all other fuels (*e.g.*, natural gas)). The 3 highest annual heat input values for the unit are averaged to determine the unit's adjusted baseline heat input. Finally, the total amount of allowances available for allocation each year to existing units in a given state (i.e, 95% of the state trading budget) is allocated to each individual unit in proportion to the unit's share of the total adjusted baseline heat input for all existing units in the State. The same methodology applies for ozone season allowances, only ozone season heat input is used in place of annual heat input.

Today's NODA provides unit NO_X allocations calculated according to the method finalized in the CAIR FIP NFR. Section 8 of this NODA describes where to locate the allocation tables. The heat input and fuel use data used to determine these allocations are described in section 4 of this NODA.

4. What Are The Sources of EPA's Data?

A. Development of the Inventory of Existing Potential CAIR Units

Diagram 1 in the Technical Support Document (TSD) provides a general overview of how the inventory of existing potential CAIR units was developed. Any existing unit currently reporting monitoring data under the Acid Rain Program (referred to in this NODA as "Acid Rain units") in a CAIR FIP State, except for an Acid Rain Program opt-in unit, was included as an existing potential CAIR unit. The list of Acid Rain units in the States was generated from EPA's Acid Rain Program database. Units not reporting monitoring data under the Acid Rain Program (referred to in this NODA as "non-Acid Rain units") that are existing potential CAIR units were identified using data reported by owners of generators to the Energy Information Administration (EIA) on forms 860 and 767.

From the EIA form 860 database, we identified, for non-Acid Rain units, all generators with a nameplate capacity greater than 25 MWe served by a boiler or turbine with a fossil fuel energy source. In determining whether a unit has a fossil fuel energy source, we applied the definition of "fossil fuel" in the CAIR FIP (40 CFR 97.102). From that list we then excluded generators as follows:

- We excluded generators which did not sell electricity to a utility based on EIA form 860b data from 1999 and 2000. EIA form 860b sales data were not available after 2000 due to changes in the EIA form 860b. Consequently, our exclusion of generators for purposes of allocating allowances does not necessarily mean that these generators are excluded for purposes of determining whether boilers or turbines serving them are CAIR units. EPA believes that many of these units are likely not subject to CAIR. However, if, on or after November 15, 1990, any of these generators produced electricity that was sold, the units serving that generator are likely subject to CAIR. If, since November 15, 1990, any of these generators produced electricity that was sold, the owners and operators of the units serving the generator should provide EPA, in objections in response to this NODA, information on the amounts and timing of the sales, the purchasing parties, the effect of such sales on appropriate treatment of the units as covered or not covered by CAIR, and (if any of the units should be treated as potential CAIR units) the necessary data for allocation of allowances.

• From EIA form 860, we excluded generators at municipal waste combustors. The CAIR rule provides an exemption for solid waste incineration units similar to the Acid Rain Program exemption in 40 CFR Part 72.

If any of the units serving the excluded generators do not meet the requirements of the CAIR exemption for solid waste incineration units, the owners and operators of the units should provide EPA, in response to this NODA, the information showing that these exemption requirements are not met, and the necessary data for allocation of allowances.

• From EIA form 860b (1999 and 2000), we excluded all generators at facilities that were certified (in accordance with Federal Energy Regulatory Commission (FERC) regulations) as qualifying cogeneration facilities and that had annual, plant-wide sales of one third or less of the potential generating capacity, or had annual sales less than 219,000 MW-hrs, to an electric utility. This information was only available at the plant level. Since electricity sales data were not available at the unit level for other years and a unit must meet these criteria annually to qualify for the cogeneration exemption, exclusion of generators for allocating allowances in this notice does not necessarily mean that boilers and combustion turbines serving the generators are not CAIR units. Moreover, FERC regulations require, as part of the criteria for qualifying cogeneration facilities, that facilities meet certain efficiency requirements to the extent natural gas or oil is combusted. Under CAIR, a unit must meet the efficiency requirements with regard to all fuel types combusted. Consequently, exclusion of generators for allocating allowances in this notice does not necessarily mean that boilers and combustion turbines serving the generators are not CAIR units. If any of the units serving the excluded generators do not meet the requirements of the CAIR exemption for cogeneration units, the owners and operators of the units should provide EPA, in response to this NODA, the information showing that these exemption requirements are not met and the necessary data for allocation of allowances for the units. For example, the owners and operators of a unit that was not included in the list of potential CAIR units based on 1999 and 2000 sales data and cogeneration status, should verify that the criteria for the cogeneration exemption are met (including years after 2000). If the unit served a generator producing electricity for sale, to a utility distribution system, exceeding ⅓ of the unit's potential electrical output capacity and more than 219,000 MW-hrs in any year, or if the unit did not meet the efficiency requirements under CAIR in any year, the unit would not appear to qualify for the cogeneration exemption and the owners and operators of the unit should provide EPA the information showing that these exemption requirements are not met and the necessary allowance allocation data.

From the EIA form 767 database, we identified as potential CAIR units all boilers located at non-Acid Rain plants (commencing operation before January 1, 2001) serving the generators remaining on the generator list after the above-described exclusions. Simple and combined cycle combustion turbines were identified based directly on the generator ID and prime mover type in EIA form 860.

From EIA form 860 we also identified all simple combustion turbines, at Acid Rain plants, with a nameplate capacity greater than 25 MWe, a fossil fuel energy source, and an online date prior to January 1991. These simple combustion turbines are potential CAIR units even though they may be non-Acid Rain units since they have reported to EIA that they sell electricity to a utility based on EIA form 860b data from 1999 and 2000 and serve a generator greater than 25 MWe.

The resulting list of non-Acid Rain units was also checked against EPA's National Electric Energy Data System (NEEDS) database. The NEEDS database contains a list of electric generating units used to construct the "model" plants that represent existing and planned/committed units in EPA modeling applications of the Integrated Planning Model (IPM). The NEEDs check resulted in the addition of a number of non-Acid Rain pre-1991 combined cycle combustion turbines at Acid Rain plants and biomass-fired boilers that burn a small amount of fossil fuel.

EPA also included specific units in the list of existing potential CAIR units based on previous comments and supporting data submitted to the EPA by the owners or operators of the units involved.

EPA notes that inclusion of a unit in, or exclusion of a unit from, the inventory of existing potential CAIR units reflects only a preliminary application of the applicability of CAIR and does not constitute a final determination concerning the applicability of CAIR to the unit. As discussed above, the inventory is being developed in order to enable EPA to calculate allowance allocations for existing units, and the data that EPA used in developing the inventory are not complete and have certain limitations. While allocations are to be based on the best available data provided to EPA when allocations are being calculated, applicability must be determined based on the relevant, actual data, whether or not the actual data are provided at the time allocations are made. In fact, because an inventory developed for purposes of allowance allocation may not be entirely consistent with final applicability determinations, §§ 97.142(e) and 97.342(e) establish procedures to be applied when the Administrator determines that a unit that has been allocated allowances turns out not to actually be a CAIR unit. For example, if this determination is made after the allowance allocation is recorded but before deductions for compliance with the allowance-holding requirement are made under §§ 97.154(b) and 97.354(b), the Administrator will deduct the allowances and transfer them to a new unit set-aside for the appropriate State.

Owners and operators of units that should be, but are not, included in the inventory of existing potential CAIR units should submit objections, in response to this NODA, informing EPA that the units should be added to the inventory and allocated allowances, consistent with the applicability criteria in the CAIR FIP (in §§ 97.104 and 97.304). The data necessary for allowance allocations should also be provided. A unit that is not allocated allowances because of its exclusion from the inventory may ultimately be determined to be a CAIR unit. Each CAIR unit is subject to the allowance-holding requirements of CAIR regardless of whether the unit is allocated any allowances.

B. Annual and Ozone Season Fuel Heat Input Data for Acid Rain Units

EPA used CAMD heat input data reported by units under the Acid Rain Program for 2000 through 2004 in order to develop annual and ozone season baseline heat input. Fuel-adjusted heat input was calculated based on the reported heat input and the primary fuel type (by year) that was reported to EPA in the unit's Acid Rain Program monitoring plan. For units that reported coal as their primary fuel for the year, EPA did not adjust their heat input. For units reporting oil as their primary fuel, EPA multiplied their heat input by 0.6. If the primary fuel was not coal or oil, the heat input for the year was multiplied by 0.4.

For some units, the use of the primary fuel type to identify the appropriate CAIR fuel adjustment factor may not

yield the same result as using the CAIR FIP definition of "coal-fired" or "oil-fired" to identify the appropriate factor. Under the CAIR FIP, a coal-fired unit is a unit which burns any amount of coal in a year, and an oil-fired unit is a unit which had more than 15% of its yearly heat input from oil. The use of primary fuel type will not match the CAIR FIP definition in cases where coal was burned in a year but was not listed as the primary fuel, or when more than 15 percent of a year's heat input was from oil, but oil was not listed as the primary fuel. EPA used the primary fuel type as a surrogate for the data necessary to apply the terms "coal fired" and "oil fired", because under the Acid Rain Program, more detailed fuel use data are reported only for units using non-continuous emission monitoring methods. Because of this limitation on the data used by EPA, the fuel-adjusted heat input calculated for some units may be lower than if the calculation were based on more precise data. Owners and operators should provide, in response to this NODA, any available, more precise data on fuel use.

C. Annual and Ozone Season Fuel Heat Input Data for Non-Acid Rain Units

EIA data, as well as Federal Energy Regulatory Commission (FERC) form 423 data, were used to calculate annual and ozone season fuel-adjusted baseline heat input for non-Acid Rain units.[2]

The data sources and calculation methods vary by the type of unit and data year. The EIA and FERC databases that were used were downloaded in October 2005 and are available on EIA's Web site at *http://www.eia.doe.gov/cneaf/electricity/page/data.html.*

We replaced the calculated ozone season heat input data with data reported to EPA under the OTC NO_X Budget Program and the NO_X SIP Call NO_X Budget Trading Program, if available. The reported heat input was used in conjunction with information regarding the primary fuel for the year (reported in the monitoring plan) to calculate the fuel-adjusted heat input.

In addition, EPA also utilized information provided as part of the CAIR rulemaking process. More specifically, EPA used annual heat input data submitted in response to EPA's CAIR Notice of Data Availability published in the **Federal Register** on April 6, 2004.

Boilers

For 2000, fuel-adjusted annual and ozone season heat input was calculated for each utility boiler based on EIA form 767 monthly fuel use and heat content data. The fuel-adjusted 2000 annual heat input was calculated at the plant level for non-utility boilers based on EIA form 860b data. The fuel usage and heat content information in EIA form 860b is reported at the plant level, so the fuel-adjusted heat input was first calculated for the plant and then apportioned equally to each boiler (at the plant) that is a potential CAIR unit. The ozone season heat input for non-utility boilers was based on multiplying the annual heat input by the fraction of the five ozone-season months to 12 annual months (5/12).[3]

Beginning in 2001, both utility and non-utility boilers reported using EIA form 767, so fuel-adjusted heat input was calculated for each boiler based on monthly fuel usage and heat content data from that EIA form for the 2001 through 2004 period.

Although data for 2000 was developed as described above, EPA decided not to use the 2000 data in certain cases, i.e., where a plant included both existing potential CAIR units and existing units that are not treated as potential CAIR units. Since in those cases the 2000 unit level heat input could not be determined for existing potential CAIR units alone without attributing to them heat input that actually was for units that are not potential CAIR units and this additional heat input could be significant, EPA decided, in those cases, to exclude the 2000 heat input data and use the average of the three highest annual heat input values during 2001–2004 in calculating NO_X allowance allocations. In any case where the use of unit level data (for 2000 or for any other relevant period) will affect the calculation of the baseline heat input of a unit, the owners and operators of the unit should provide EPA, in response to this NODA, the unit level data.

Simple Combustion Turbines and Combined Cycle Units at Non-Acid Rain Plants

The following procedures were used for simple combustion turbines and combined cycle units at non-Acid Rain plants, which include certain utility and non-utility plants.[4] For 2000, data from the EIA form 860b was used to calculate simple combustion turbine and combined cycle unit fuel-adjusted heat input for the non-utility plants in a similar manner as the 2000 non-utility boiler calculation. Annual fuel-adjusted heat input was calculated at the plant level. Data from the EIA form 759 and FERC form 423 were used to calculate simple combustion turbine and combined cycle heat input for the utility plants. The EIA form 759 provided monthly fuel usage at the prime mover level (simple combustion turbine, combined cycle combustion turbine, and combined cycle steam turbine), and the FERC form 423 provided gaseous and liquid fuel heat content for the plants. The prime mover fuel-adjusted heat input for the plant was apportioned equally to each potential CAIR unit at the plant by prime mover type (with combined cycle combustion turbine and steam turbine heat inputs combined to provide a single combined cycle heat input). To the extent the plant includes both potential CAIR units and units that are not treated as potential CAIR units, this approach may have resulted in calculated heat input values exceeding the actual heat input for the potential CAIR units. Unlike the boiler data, that required apportioning plant level data only for 2000, combustion turbine EIA data are only available at the plant level for all of the years. Therefore the approach taken for boilers, excluding one year of plant level data when that data may be impacted by units not subject to CAIR, was not available. In any case where the use of unit level data (for 2000 or for any other relevant period) will affect calculation of the baseline heat input of a unit, the owners and operators of the unit should provide EPA, in response to this NODA, the unit level data. Ozone-season heat input was calculated based on the 5/12 fraction of ozone-season months to annual months.

In 2001 the EIA form 759 was renamed as form 906, with separate similar versions for non-utility and utility plant prime mover level fuel usage. Data for the non-utility and utility plants from these forms were combined with the FERC form 423 heat content data to calculate prime mover level fuel-adjusted heat input. This prime mover level annual and ozone season heat input was then apportioned equally to each simple combustion turbine or combined cycle turbine (at the plant) that is a potential CAIR unit by prime mover type as described earlier for the 2000 utility units.

[2] In some cases, heat input information was not available for all or a portion of the baseline period. It was not clear whether this was the result of a unit not operating or a unit failing to report its operations. A zero value was applied for heat input in these cases. This may have resulted in an incorrect baseline heat input for the unit involved.

[3] Plants that were sold in 2000 and changed status from utility to non-utility sometimes reported using both the utility and non-utility forms for that year. To avoid double counting of heat input in these cases, EPA used only the data from utility form or the data from the non-utility form for the plant, whichever set of data resulted in the higher heat input for the plant.

[4] *See* note 2.

EIA combined the utility and non-utility reporting forms in 2002 and changed the format. The EIA form 906 for 2002 through 2004 provided both fuel usage and fuel heat input on a monthly basis. The annual and ozone season fuel-adjusted heat input was totaled for each of the non-utility and utility plants at the prime mover level and then apportioned equally to each potential CAIR unit at the plant, as described above for the 2000 and 2001 EIA form 759 and 906 data.

Non-Acid Rain Simple Combustion Turbines at Acid Rain Plants

The fuel-adjusted heat inputs for non-Acid Rain simple combustion turbines located at Acid Rain plants with no Acid Rain combustion turbines were calculated and apportioned in a similar manner as described above for simple combustion turbines and combined cycle units at non-Acid Rain plants.

Heat inputs, however, for non-Acid Rain combustion turbines located at plants with Acid Rain combustion turbines had to be calculated in a different manner in order to not double count heat input. At these plants the plant or prime mover level heat input, calculated with EIA data as described above, included heat input from both the non-Acid Rain and Acid Rain turbines. Since the baseline heat input for the Acid Rain turbines at the plant was taken from data reported to EPA under the Acid Rain Program, the Acid Rain data was subtracted from the total EIA-based combustion turbine and combined cycle heat input. The remaining fuel-adjusted heat input was then apportioned equally to each of the non-Acid Rain turbines. In some cases the difference between EIA and Acid Rain heat input was zero or even negative resulting in zero heat input for the non-Acid Rain units.

5. How Do I Interpret the Data Tables Presented in Today's NODA?

This section provides a brief description of the types of data included in each table of today's NODA. A more detailed description of the data tables may be found in the TSD titled "Data Field Description for the CAIR FIP NO_X Annual and NO_X Ozone-season Allocation Tables" which is available in the docket and on the Web site mentioned in section 8. In general, the CAIR Annual and Ozone Season NO_X Allocation tables were created primarily using data reported to CAMD (under the Acid Rain Program) and the EIA. For a small number of non-Acid Rain units, annual allocations incorporated heat input information provided by the sources in response to a previous NODA.

For Acid Rain units, EPA used heat input data reported as required under the program. For non-Acid Rain Program units, the EIA data was used to determine heat input and primary fuel. Tables 1 and 2 contain the annual and ozone season unit NO_X allowance allocations. Tables 3, 4, and 5 contain the EIA data, CAMD data, and source provided data regarding heat input and primary fuel used to calculate the annual allocations. Tables 6 and 7 contain additional EIA and CAMD data used to calculate ozone season allocations.

Some units (i.e., units not reporting under the Acid Rain Program, OTC NO_X Budget Program, or NO_X SIP Call NO_X Budget Trading Program during a portion of the baseline period) use heat input data available from both EIA and CAMD to compile the baseline heat input. For these units the EIA annual heat input data are used until the first full year of Acid Rain Program data are available. Ozone season heat inputs used for the ozone season allocation are from the data reported under the Acid Rain Program, OTC NO_X Budget Program, and NO_X SIP Call NO_X Budget Trading Program, if available, in Table 7. For a small number of non-Acid Rain Units, source-reported annual heat input data in Table 5 for 2000–2002 data years were used in place of EIA data.

Table 8 contains a list of units that have not received allocations because of their possible exclusion from the CAIR FIP trading program based on sales data, or qualifying cogeneration facility status. The owners and operators of each such unit should review the unit's data to ensure that the unit is not a potential CAIR unit. As discussed above, if the owners or operators determine that the unit should be included in the inventory and allocated allowances, they should submit objections to the exclusion of the unit and provide the relevant data supporting the inclusion of the unit and the necessary data for allocating allowances.

Table 9 contains a list of units that have not received NO_X allowance allocations because of their possible CAIR exemption due to being a solid waste incinerator. As mentioned in section 4, the units qualifying for this exemption were identified based on EIA form 860 response for plant type and their primary energy source. The owners and operators of each such unit should review the unit's data to ensure that the unit is not a potential CAIR unit. As discussed above, if the owners or operators determine that the unit should be included in the inventory and allocated allowances, they should submit objections to the exclusion of the unit and provide the relevant data supporting the inclusion of the unit and the necessary data for allocating allowances.

6. Why Is the EPA Providing Opportunity To Object to These Data and the Calculations Using the Data in the Allocation Formula?

Through today's NODA, EPA is providing owners, operators, states, and the public the opportunity to object to the data used to determine what units are existing potential CAIR units, which qualify for allowance allocations for 2009–2014, and to calculate NO_X allocations in order to ensure that we use the best available data in the FIP allocation process. For example, the heat input and primary fuel data used to calculate allocations came from data reported to EPA and EIA, and a source owner or operator (or other member of the public) should submit an objection if he or she sees any discrepancy between the data reported for the source regarding heat input and fuel type and the data used in calculating the NO_X FIP allocations. Such objection should include the data that the person submitting the objection believes EPA should use. EPA is also providing an opportunity to object to the calculations using the allocation formula and the data in order to ensure the accuracy of the calculations.

Today's NODA is based upon the list of potential CAIR units developed using currently available data. As discussed above, this inventory does not constitute a definitive list of existing CAIR units, but rather reflects EPA's preliminary application of the applicability criteria in the CAIR FIP NFR (i.e., the criteria providing that a unit is subject to CAIR if it is a stationary fossil-fuel-fired boiler or combustion turbine serving at any time on or after November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity more than 25 MWe producing electricity for sale, except for cogeneration units and solid waste incineration units that meet certain requirements). The EPA is providing this opportunity for source owners and operators, states, and the public to (1) Object to the inclusion of units in, or exclusion of units from, the allocation tables in the NODA and the data on which the inclusion or exclusion is based, (2) object to the heat input and fuel data used to calculate the allocations and the resulting calculations themselves reflected in the tables, and (3) submit, as part of the

objection, corrections of the data or supplementary data.

EPA requests that a source owner or operator, State, or other members of the public who believes that a unit has been incorrectly included in or excluded from the allocation tables submit an objection (including supporting data) in order to clarify the unit's status under CAIR, consistent with the CAIR FIP applicability provisions (in §§ 97.104 and 97.304). (Any objections to the applicability provisions themselves will not be considered.) If an existing unit is not allocated allowances for 2009–2014 in today's NODA, nor in the follow up NODA issued in response to objections to today's NODA, and is later found to be subject to CAIR, that unit will not receive allowance allocations for 2009–2014 under the CAIR FIP. However, the unit will be subject to the requirement to hold allowances.

The addition or removal of existing units to or from a State's inventory will not impact the size of the State's emission budget. Revisions, in a follow-up notice issued in response to objections to the inventory provided in today's NODA, may result in the individual units receiving different shares of the applicable State budget.

7. What Data Are the EPA Making Available for Review and Objection?

EPA has used the best available data to develop an inventory of existing units that currently are potentially covered by the CAIR FIP and to calculate each existing unit's allowance allocations for 2009–2014. However, through the NODA, EPA is giving unit owners, unit operators, and the public the opportunity to offer objections regarding individual units' treatment as potentially covered or not covered by CAIR and, for units treated as potential CAIR units, the data used in the allocation calculations and the allocations resulting from such calculations.

Specifically, this document is a notice of data availability and provides an opportunity for objection regarding the treatment of individual units as existing units potentially covered or not covered by CAIR and the data used as the basis for this treatment (such as sales data obtained from EIA databases for 1999–2000 and qualifying facility status). This document also provides an opportunity for objections regarding the data used in calculating CAIR FIP NO_X allocations for individual existing units: CAMD heat input and fuel data under the Acid Rain Program for the years 2000–2004, under the NO_X Budget Program (NBP) for 2000–2002 for Ozone Transport Commission (OTC) units, and under the NO_X Budget Trading Program for years 2003–2004 for units under the NO_X SIP Call; and heat input and fuel data obtained in EIA databases for units that are not under these programs. This document also provides an opportunity for objection regarding EPA's calculations using the data in the CAIR FIP allocation formulas.

In summary, the EPA is providing an opportunity for public objections to—and will consider only objections to—the inclusion of units in or exclusion of units from the inventory of potential existing CAIR units, the data on which such inclusion or exclusion is based, the allocation calculations using the CAIR FIP allocation formulas, and the data used in these calculations. Readers should note that we are not soliciting, and will not consider, objections on other topics (such as the allocation formulas and State budgets).

Today's action makes available for review and objection: NO_X annual and NO_X ozone season allocations for individual units in CAIR States for the FIP; the adjusted heat input values for each unit for 2000–2004; the baseline heat input used to calculate the allocations; and the other data used to include units in, or exclude units from, the list of existing potential CAIR units for which allocations are calculated.

In particular, EPA is making the following data available for review:

- EIA Annual Heat Input (EIA data were used to obtain heat input and fuel type data for those units that are subject to the CAIR rule, but are not reporting under the Acid Rain Program).
- EIA Ozone Season Heat Input
- CAMD Acid Rain Program Annual Heat Input
- CAMD Acid Rain Program, OTC NO_X Budget Program, and NO_X SIP Call NO_X Budget Trading Program Ozone Season Heat Input
- Unit NO_X Annual Allowance Allocation Table
- Unit NO_X Ozone Season Allocation Table

In addition to accepting objections to the data listed above and the calculations made by EPA in using the data to determine allocations, EPA will also accept objections to the inclusion of a unit in, or exclusion of a unit from, the inventory of existing potential CAIR units for which allocations are determined for the CAIR FIP and the data on which such inclusion or exclusion is based. Any objection should include corrections of the data relevant to the objection or should include relevant, supplementary data.

8. Where Can I Get the Data?

Tables 1 through 9, which include the allowance allocations, heat input, and fuel data, are available in an excel file titled "Data for EGU NO_X Annual and NO_X Ozone Season Allocations for the Clean Air Interstate Rule Federal Implementation Plan Trading Programs" on the CAMD Web site at *http://www.epa.gov/airmarkets/cair/NODA*. The "NODA" link will open a Web page which contains this excel file, along with the NODA and Technical Support Document in PDF format. The NODA is titled "Notice of Data Availability for EGU NO_X Annual and NO_X Ozone Season Allocations for the Clean Air Interstate Rule Federal Implementation Plan Trading Program", and the TSD is titled "Data Field Description for the CAIR FIP NO_X Annual and NO_X Ozone Season Allocation Tables". In addition, these files are in the CAIR FIP Docket (Docket ID No. OAR–2004–0076).

Other data used in developing the inventory of potential existing CAIR units can be found on the EIA Web site through the link given in section 4 of this NODA.

9. On What Topics Is EPA Not Requesting Objections?

Consistent with sections 4 through 8 of today's NODA, EPA is soliciting objections only on the matters, data, and calculations discussed or referenced in those sections of the NODA. EPA is not requesting objection on any other matter. For example, the NO_X allocations for existing CAIR units are determined using the allowance allocation methodology in the CAIR FIP, which takes each unit's three highest control-period adjusted heat input values for 2000 through 2004, averages them, and allocates to each unit based on its proportionate share of the total adjusted heat input for existing CAIR units in the state. This methodology for calculating unit allowance allocations, as well as the CAIR applicability provisions, were finalized in the CAIR FIP rule, and are not open for objection.

10. What Supporting Documentation Do I Need To Provide With my Objections?

While we will consider all objections we receive within the scope of this NODA, these objections must be supported with appropriate documentation. Supporting documentation can include, but is not limited to, spreadsheets, explanations of why you believe the data on such spreadsheets are more accurate (e.g., the quality assurance of the data), and information on the data source.

In general, we do not anticipate revisions to unit heat input data and

other unit data reported to EPA under the Acid Rain Program since, in submitting the data under the program, a source's Designated Representative has already certified the accuracy of the data. However, we will consider any objections. For example, a source's Designated Representative may provide evidence that we improperly calculated heat input at the unit level, where the heat input was actually measured at another location (such as a common stack). As a further example, a source's Designated Representative may demonstrate that the data provided in today's NODA are not consistent with the data reported to EPA for compliance with the Acid Rain Program. In that case, the objector should explain why the data values in EPA's data files are incorrect and should document and explain the new data values.

Similarly, in general, we do not anticipate revisions to data reported to EIA since such data were submitted to meet regulatory reporting requirements. However, we will consider any objections to the data as reported, as well as any calculation in which we used the data for purposes of today's NODA.

Dated: July 27, 2006.

Brian McLean,

Director, Office of Atmospheric Programs.

[FR Doc. E6–12628 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8205–9]

Proposed CERCLA Administrative Cost Recovery Settlement; Industrial Chrome Plating, Incorporated

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of past response costs concerning the Industrial Chrome Plating Time-Critical Removal Site in Portland, Oregon with the following settling party: Industrial Chrome Plating, Incorporated (ICP). The settlement requires the settling party to pay $66,000.00 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling party pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the U.S. EPA Region 10 offices, located at 1200 Sixth Avenue, Seattle, Washington 98101.

DATES: Comments must be submitted on or before September 5, 2006.

ADDRESSES: The proposed settlement is available for public inspection at the U.S. EPA Region 10 offices, located at 1200 Sixth Avenue, Seattle, Washington 98101. A copy of the proposed settlement may be obtained from Carol Kennedy, Regional Hearing Clerk, U.S. EPA Region 10, 1200 Sixth Avenue, Mail Stop ORC–158, Seattle, Washington 98101; (206) 553–0242. Comments should reference the Industrial Chrome Plating Time-Critical Removal Site in Portland, Oregon and EPA Docket No. CERCLA–10–2006–0035 and should be addressed to Dean Ingemansen, Assistant Regional Counsel, U.S. EPA Region 10, Mail Stop ORC–158, 1200 Sixth Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Dean Ingemansen, Assistant Regional Counsel, U.S. EPA Region 10, Mail Stop ORC–158, 1200 Sixth Avenue, Seattle, Washington 98101; (206) 553–1744.

SUPPLEMENTARY INFORMATION: The ICP Site, a former chrome plating facility, is located in a predominantly residential neighborhood on the southeast corner of NE 62nd Avenue and NE Hassalo Street in Portland, Oregon. In July 2001, EPA was requested by the Oregon Department of Environmental Quality (ODEQ) to conduct a time-critical removal action at the Site due to evidence of chrome plating wastes having leaked onto the ground and into the subsurface at the Site. When EPA began the removal action on August 27, 2001, there were chromium and lead-contaminated soils, plating wastes, and other hazardous substances at the Site. In order to get at the subsurface contamination, the buildings at the Site had to be torn down. Removal of the ICP building, liquid wastes, and soils was completed at the end of November 2001. Soils were excavated to a maximum depth of 20 feet below grade. Approximately 4,000 gallons of chromic acid was pumped from on-site dip tanks and holding tanks to a tanker truck and delivered to Burlington Environmental in Kent, Washington, for proper disposal. Another 100 gallons and 500 pounds of hazardous substances including paint wastes, corrosive liquids, mercury, and PCB wastes were packed and transported to Philip Services, Incorporated, in Washington state. The excavation resulted in 4,718 tons of hazardous wastes shipped to U.S. Ecology in Grand View, Idaho, and 1,098 tons of special waste delivered to the Waste Management Hillsboro, Oregon, landfill. A protective asphalt cap was placed over the entire Site to prevent surface water infiltration. The settlement requires payment of $66,000.00, an amount equal to the fair market value of the real property owned by ICP, which is the only asset of ICP, a defunct Oregon corporation. ICP has proposed to sell this property in order to pay the settlement amount. In addition, the settlement requires (and ICP has already placed) a deed notice on the title to the Site property. This deed notice notifies all owners of this property of the need to maintain the integrity of the asphalt cap, and of the need to contact the ODEQ if the property owner decides to build on the Site or otherwise puncture or destroy the asphalt cap. ODEQ has issued a conditional "No Further Action" letter for the Site conditioned upon, among other things, the property owner maintaining the integrity of the cap.

Dated: July 28, 2006.

Ron Kreizenbeck,

Acting Regional Administrator, Region 10.

[FR Doc. E6–12624 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8204–7]

Water Pollution Control; State Program Requirements; Program Modification Application by Michigan To Administer a Partial Sewage Sludge Management Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of application and public comment period.

SUMMARY: Pursuant to 40 CFR 123.62 and 40 CFR part 501, the State of Michigan has submitted a program modification application to EPA, Region 5 to administer and enforce a sewage sludge (biosolids) management program. Specifically, the state is seeking

approval of a biosolids management program which addresses the land application of biosolids. Michigan is not seeking approval of the land application of domestic septage, surface disposal of biosolids, incineration of biosolids, or the landfilling of biosolids. Further, the state is not seeking program approval for, and the state's biosolids management program will not extend to "Indian Country" as defined in 18 U.S.C. 1151 and applicable case law. According to the state's application, this program would be administered by the Michigan Department of Environmental Quality (MDEQ).

The application from Michigan is complete and is available for inspection and copying. Public comments are requested and encouraged.

DATES: The public comment period on the state's request for approval to administer the proposed Michigan NPDES biosolids management program will be from the date of publication until September 18, 2006. Comments postmarked after this date may not be considered.

ADDRESSES: *Viewing/Obtaining Copies of Documents.* You can view Michigan's application for modification from 8 a.m. until 4 p.m. (Eastern time zone) Monday through Friday, excluding holidays, at the MDEQ, Constitution Hall, Water Bureau, 525 W. Allegan St., South Tower—2nd Floor, Lansing, Michigan 48913, contact James Johnson (517) 241–8716; MDEQ Cadillac/Saginaw Bay Districts, 503 N. Euclid Ave., Ste 1, Bay City, Michigan 48706–2965, contact Mike Person (989) 686–8025; MDEQ Grand Rapids/Kalamazoo Districts, 4460 44th St., SE., Ste. E, Kentwood, Michigan 49512, contact David Schipper (616) 356–0276; MDEQ Jackson District, 301 Louis Glick Highway, Jackson, Michigan 49201, contact Greg Merricle (517) 780–7841; MDEQ S.E. Michigan District, 27700 Donald CT, Warren, Michigan 48092–2793, contact Todd Jaranowski (586) 753–3798; and, MDEQ Upper Peninsula District, K.I. Sawyer International Airport, 420 Fifth St., Gwinn, Michigan 49841, contact Ben Thierry (906) 346–8528. A copy of Michigan's application for modification is also available for viewing from 9 am to 4 pm, Monday through Friday, excluding legal holidays, at EPA Region 5, 16th floor, NPDES Programs Branch, 77 West Jackson Blvd., Chicago, IL 60604. Part or all of the state's application may be copied, for a minimal cost per page, at MDEQ's offices or EPA's office in Chicago.

Comments. Electronic comments are encouraged and should be submitted to. *colletti.john@epa.gov.* Please send a copy to *johnsoj1@michigan.gov.* Written comments may be sent to John Colletti (WN–16J), EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604. Please send an additional copy to MDEQ, Attn: James Johnson, Constitution Hall, Water Bureau, 525 W. Allegan St., South Tower—2nd Floor, Lansing, Michigan 48913. Public comments may be sent in either electronic or paper format. EPA requests that electronic comments include the commentor's postal mailing address. No Confidential Business Information (CBI) should be submitted through e-mail. Comments and data will also be accepted on disks in Microsoft Word format. If submitting comments in paper format, please submit the original and three copies of your comments and enclosures. Commentors who want EPA to acknowledge receipt of their comments should enclose a self-addressed stamped envelope.

FOR FURTHER INFORMATION CONTACT: John Colletti at the above address by phone at (312) 886–6106, or by e-mail at *colletti.john@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we", "us", or "our" means EPA.

Table of Contents

I. Background

Under section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342, EPA may issue permits allowing discharges of pollutants from point sources into waters of the United States, subject to various requirements of the CWA. These permits are known as National Pollutant Discharge Elimination System (NPDES) permits. Section 402(b) of the CWA, 33 U.S.C. 1342(b), allows states to apply to EPA for authorization to administer their own NPDES permit programs.

Section 405 of the Clean Water Act (CWA), 33 U.S.C. 1345, created the Federal biosolids management program, requiring EPA to set standards for the use and disposal of biosolids and requiring EPA to include biosolids conditions in some of the NPDES permits which it issues. The rules developed under section 405(d) are also self-implementing, and the standards are enforceable whether or not a permit has been issued. Section 405(c) of the CWA provides that a state may submit an application to EPA for administering its own biosolids program within its jurisdiction. EPA is required to approve each such submitted state program unless EPA determines that the program does not meet the requirements of sections 304(i) and/or 402(b) and 405 of the CWA or the EPA regulations implementing those sections. To obtain such approval, the state must show, among other things, it has authority to issue permits which comply with the Act, authority to impose civil and criminal penalties for permit violations, and authority to ensure that the public is given notice and opportunity for a hearing on each proposed permit. The requirements for state biosolids management program approval are listed in 40 CFR part 501.

The Michigan NPDES program was approved by EPA on October 17, 1973. EPA received the biosolids management program application from Michigan on April 4, 2002. Michigan's application for the biosolids management program approval contains a letter from the Director of MDEQ requesting program approval, an Attorney General's Statement, copies of pertinent State statutes and regulations, a Program Description, and a Memorandum of Agreement (MOA) to be executed by the Regional Administrator of EPA, Region 5 and the Director of MDEQ. The state, based on comments from EPA, submitted revisions to its application on April 21, 2005, and March 17, 2006.

The Director's letters of March 28, 2002 and March 17, 2006, requested that EPA approve the state's biosolids management program as a modification of its NPDES program. On April 21, 2005, the Director clarified that "the MDEQ is not seeking approval of federal authority of its Biosolids Application Program in Indian country at this time."

The Attorney General's Statement includes citations to specific statutes, administrative rules, and judicial decisions which demonstrate adequate authority to carry out the state's biosolids management program. State statutes and regulations cited in the Attorney General's Statement are also included in the application. The Attorney General's Statement states that the state is not seeking approval of the biosolids program over "Indian lands" which it defines separately from the term "Indian Country." This statement has been superseded by the state's letter of April 21, 2005 which states that the application is not seeking approval in Indian country at this time, but reserves the right to do so in the future. It is EPA's long-standing position that the term "Indian lands" is synonymous

with the term "Indian country". *Washington Dep't of Ecology* v. *U.S. EPA*, 752 F.2d 1465, 1467, n.1 (9th Cir. 1985). See 40 CFR 144.3 and 258.2.

The Program Description includes a description of the scope and organizational structure of the biosolids management program, including a description of the general duties and the total number of state staff carrying out the program, a description of applicable state procedures, including permitting procedures, and administrative and judicial review procedures, and a description of the state's compliance tracking and enforcement program. It also includes an inventory of the facilities that are subject to regulations promulgated pursuant to 40 CFR part 503 and subject to the state's biosolids management program.

The proposed amendments to the MDEQ/EPA MOA include provisions for permit administration, enforcement and compliance monitoring, and annual reporting. The MOA was signed by the Director of MDEQ on May 17, 2006, and will become effective upon the signature of the Regional Administrator of EPA, Region 5. The MOA does not limit the authority of EPA to take actions pursuant to its powers under the CWA, nor does it limit EPA's oversight responsibilities with respect to biosolids management program administration.

II. Biosolids and the State Biosolids Management Program

Biosolids are the solids separated from liquids during treatment at a municipal wastewater treatment plant and treated to stabilize and reduce pathogens. EPA in 1993 adopted standards for management of biosolids generated during the process of treating municipal wastewater. 40 CFR part 503. The part 503 rules establish standards under which biosolids may be land applied as a soil amendment, disposed in a surface disposal site, or incinerated, and requirements for compliance with 40 CFR part 258 if placed in a municipal landfill. The standards, designed to protect public health and the environment, include pollutant limits, pathogen reduction requirements, vector attraction reduction requirements, and management practices specific to the use or disposal option selected.

The Michigan biosolids management program imposes requirements on wastewater treatment plants and biosolids appliers. It also provides for the issuance of permits under certain conditions, enforcing the standards as necessary, and providing guidance and technical assistance to members of the regulated community. The program also includes a state-specific feature requiring permittees to develop a Residuals Management Program.

III. Indian Country

Michigan is not authorized to carry out its biosolids management program in "Indian Country," as defined in 18 U.S.C. 1151 and applicable case law. Indian Country includes:

1. All lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

2. Any land held in trust by the U.S. for an Indian tribe; and

3. Any other land, whether on or off an Indian reservation that qualifies as Indian Country.

Therefore, if EPA approves the state's biosolids management program, it will have no effect in Indian Country. EPA retains the authority to implement and administer the NPDES and biosolids program in Indian Country.

IV. Public Notice and Comment Procedures

Copies of all submitted statements and documents shall become a part of the record submitted to EPA. All comments or objections presented in writing to EPA, Region 5 and postmarked within 45 days of this document will be considered by EPA before it takes final action on Michigan's request for program modification approval. All written comments and questions regarding the biosolids management program should be addressed to John Colletti at the above address. The public is also encouraged to notify anyone who may be interested in this matter.

V. Public Hearing Procedures

At the time of this notice, a decision has not been made as to whether a public hearing will be held on Michigan's request for program modification. During the comment period, any interested person may request a public hearing by filing a written request which must state the issues to be raised to EPA, Region 5. The last day for filing a request for a public hearing is 45 days from the date of this notice; the request should be submitted to John Colletti at the above address. In appropriate cases, including those where there is significant public interest, EPA may hold a public hearing. Public notice of such a hearing will occur in the **Federal Register** and in enough of the largest newspapers in Michigan to provide statewide coverage and will be mailed to interested persons at least 30 days prior to the hearing.

VI. EPA's Decision

EPA has determined that Michigan has submitted a complete application. EPA sent a letter to the Director of the MDEQ on April 28, 2006, stating that the state's application to modify the Michigan NPDES program to include a biosolids management program was substantially complete, needing only to submit signed copies of the MOA. EPA received the signed copies on May 25, 2006, and now has 90 days from that date to approve or disapprove Michigan's biosolids management program unless a public hearing is held. After the close of the public comment period, EPA will consider and respond to all significant comments received before taking final action on Michigan's request for biosolids management program approval. The decision will be based on the requirements of sections 405, 402 and 304(i) of the CWA and EPA regulations promulgated thereunder. If the Michigan biosolids management program is approved, EPA will so notify the state. Notice will be published in the **Federal Register** and, as of the date of program approval, EPA will no longer serve as the primary program and enforcement authority for land application of biosolids within Michigan. EPA, within Michigan, will remain the authority for biosolids use and disposal in Indian Country, for the incineration of biosolids, for the surface disposal of biosolids, for the landfilling of biosolids, and for the land application of domestic septage. The state's program will operate in lieu of the EPA-administered program. However, EPA will retain the right, among other things, to object to NPDES permits proposed by Michigan and to take enforcement actions for violations, as allowed by the CWA. If EPA disapproves Michigan's biosolids management program, EPA will notify Michigan of the reasons for disapproval and of any revisions or modifications to the state program that are necessary to obtain approval.

VII. Other Federal Statutes

A. National Historic Preservation Act

Section 106 of the National Historic Preservation Act, 16 U.S.C. 470(f), requires federal agencies to take into account the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) an opportunity to comment on such undertakings. Under the ACHP's regulations (36 CFR part 800), agencies consult with the

appropriate State Historic Preservation Officer (SHPO) on federal undertakings that have the potential to affect historic properties listed or eligible for listing in the National Register of Historic Places. EPA, Region 5 is currently in discussions with the Michigan SHPO regarding its determination that approval of the state biosolids management program would have no adverse effect on historic properties within the State of Michigan.

B. Regulatory Flexibility Act

Based on General Counsel Opinion 78–7 (April 18, 1978), EPA has long considered a determination to approve or deny a State Clean Water Act (CWA) program submission to constitute an adjudication because an "approval," within the meaning of the Administrative Procedure Act (APA), constitutes a "license," which, in turn, is the product of an "adjudication." For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq. Under the RFA, whenever a Federal agency proposes or promulgates a rule under section 553 of the APA, after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule. Even if the CWA program approval were a rule subject to the RFA, the Agency would certify that approval of the State proposed CWA program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve a CWA program merely recognizes that the necessary elements of the program have already been enacted as a matter of state law; it would, therefore, impose no additional obligation upon those subject to the state's program. Accordingly, the Regional Administrator would certify that this Michigan biosolids management program, even if a rule, would not have significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or lease burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements. Today's decision includes no Federal mandates for state, local or tribal governments or the private sector. The Act excludes from the definition of a "Federal mandate" duties that arise from participation in a voluntary Federal program, except in certain cases where a "Federal intergovernmental mandate" affects an annual Federal entitlement program of $500 million or more which are not applicable here. Michigan's request for approval of its biosolids management program is voluntary and imposes no Federal mandate within the meaning of the Act. Rather, by having its biosolids management program approved, the state will gain the authority to implement the program within its jurisdiction, in lieu of EPA, thereby eliminating duplicative state and federal requirements. If a state chooses not to seek authorization for administration of a biosolids management program, regulation is left to EPA. EPA's approval of state programs generally may reduce compliance costs for the private sector, since the state, by virtue of the approval, may now administer the program in lieu of EPA and exercise primary enforcement. Hence, owners and operators of biosolids management facilities or businesses generally no longer face dual federal and state compliance requirements, thereby reducing overall compliance costs. Thus, today's decision is not subject to the requirements of sections 202 and 205 of the UMRA. The Agency recognizes that small governments may own and/or operate biosolids management facilities that will become subject to the requirements of an approved state biosolids management program. However, small governments that own and/or operate biosolids management facilities are already subject to the requirements in 40 CFR parts 123 and 503 and are not subject to any additional significant or unique requirements by virtue of this program approval. Once EPA authorizes a state to administer its own biosolids management program and any revisions to that program, these same small governments will be able to own and operate their biosolids management facilities or businesses under the approved state program, in lieu of the federal program. Therefore, EPA has determined that this document contains no regulatory requirements that might significantly or uniquely affect small governments.

List of Subjects

Environmental protection, Administrative practice and procedures, Indian Country, Intergovernmental relations, Waste treatment and disposal, Water pollution control.

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

Dated: July 5, 2006.

Norman Niedergang,

Acting Regional Administrator, Region 5.

[FR Doc. E6–12359 Filed 8–3–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of New Exposure Draft; Interpretation: Items Held for Remanufacture

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in April, 2004,

notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has issued an exposure draft, *Interpretation: Items Held for Remanufacture.*

The proposed Interpretation would clarify the principles governing the classification, valuation and reporting of items that are in the process of major overhaul or remanufacture for sale or for internal use. The Exposure Draft is available on the FASAB home page *http://www.fasab.gov/exposure.html.* Copies can be obtained by contacting FASAB at (202) 512–7350. Respondents are encouraged to comment on any party of the exposure draft.

Written comments are requested by October 16, 2006, and should be sent to: Wendy M. Comes, Executive Director, Federal Accounting Standards Advisory Board. 441 G Street, NW., Suite 6814, Mail Stop 6K17V, Washington, DC 20548.

FOR FURTHER INFORMATION CONTACT: Wendy Comes, Executive Director, 441 G Street, NW., Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act, Pub. L. 92–463.

Dated: August 1, 2006.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 06–6677 Filed 8–3–06; 8:45 am]

BILLING CODE 1610–01–M

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 August 31, 2006.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Piedmont Community Bank Group, Inc., Gray, Georgia; to become a bank holding company by acquiring 100 percent of the voting shares of Piedmont Community Bank, Gray, Georgia.

Board of Governors of the Federal Reserve System, August 1, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–12608 Filed 8–3–06; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Availability: Secretarial Recognition of Certain Certification Commission for Healthcare Information Technology (CCHIT) Functionality, Interoperability, Security and Reliability Criteria for Ambulatory Electronic Health Records

AGENCY: Office of the Secretary, HHS.

Authority: EO 13335 ("Incentives for the Use of Health Information Technology and Establishing the Position of the National Health Information Technology Coordinator") and Pub. L. 109–149 ("Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006").

SUMMARY: By this document we are informing the public of the Secretary's recognition of certain Certification Commission for Healthcare Information Technology (CCHIT) criteria for ambulatory EHR functionality, interoperability, security and reliability standards. This list of recognized criteria is available by clicking the applicable link at *http://www.hhs.gov/healthit.*

The CCHIT was created in 2004 by an industry coalition of the American Health Information Management Association (AHIMA), the Health Information and Management Systems Society (HIMSS) and the National Alliance for Health Information Technology. CCHIT's mission is to accelerate the adoption of HIT by creating an efficient, credible and sustainable product certification program.

During the three comment cycles that generated the ambulatory EHR criteria that the Secretary has recognized, CCHIT received over 1500 comments from a wide range of stakeholders. Further outreach was achieved through the establishment of several large Town Hall presentations with attendances in the range of 500–1000 at Healthcare Information Management Systems Society (HIMSS) conferences as well as at more than thirty smaller presentations to a variety of associations, organizations and the press gatherings.

CCHIT grouped its ambulatory EHR certification criteria recommendations into three groups, "functionality," "interoperability" and "security/reliability." For ease of understanding, the Secretary broke the security and reliability recommendations into separate categories. Definitions of these categories, and an example that illuminates the various functions of each category are as follows:

1. Functionality criteria identify minimum required and provisional product features for documenting and managing a typical patient encounter. For example, a physician needs to be able to access his/her patient's laboratory test results, so an example of a functional requirement is that an EHR would need to provide the capability of displaying laboratory test results.

2. Interoperability criteria establish standards for how products interact with other products within and across care settings. For example, to ensure interoperability, the physician EHR noted above would need to be able to receive laboratory test results from another physician's (within care settings) as well as from laboratory systems (across care settings).

3. Security and reliability criteria are designed to help the security inspector assess a product's ability to protect, manage and audit access to sensitive patient data. For clarity, we have broken these criteria into the two separate categories, security and reliability.

a. Security [1] addresses the appropriate access to data by appropriate parties and the protection of data from improper manipulation. For example, laboratory test results should be accessible to a

[1] HHS notes that the requirements of the HIPAA Security Rule continue to be applicable.

treating physician, but inaccessible to a clerical employee who does not need such access to accomplish their job. Security also involves ensuring that data have not been altered or tampered with.

b. Reliability goes to the accessibility and consistency with which data is retrieved and displayed. For example, the physician should be able to easily and consistently access laboratory test results through some consistent display mechanism that can be counted on to be available whenever it is needed.

At HHS' request, the CCHIT-recommended ambulatory EHR certification criteria were presented to the American Health Information Community (AHIC) on May 16, 2006. After consideration, the AHIC recommended that the Secretary recognize CCHIT identified ambulatory EHR certification criteria that CCHIT recommended for use in 2006. This recommendation informed the Secretary's decision to recognize these criteria.

The Secretary also based his decision to recognize these criteria on the need for such criteria in the Departments recently published final rules for exceptions to the physician self-referral law and safe harbors to the Anti-kickback statute for electronic prescribing and EHR arrangements (RIN #0938–AN69 and 0991–AB36 respectively). These rules are premised on:

1. HHS having recognized one or more EHR certifying bodies, and

2. HHS having recognized criteria for the certification of EHRs.

A separate notice of availability has been published in the **Federal Register** to notify the public about the availability of a certification Guidance Document that provides interim guidance on the recognition of certification bodies. This document is also available at *http://www.hhs.gov/healthit.* The CCHIT criteria that the Secretary has recognized serve to establish the initial EHR certification criteria that are referenced in the final physician self-referral law and Anti-kickback statute rules.

The Secretary also based his decision to recognize the CCHIT criteria on a belief that providers will be more willing to invest in health IT if there is a way of ensuring that the products would perform as advertised. Stories abound about providers making large investments in EHRs only to discover that they do not meet their functionality, interoperability security and/or reliability needs. Certification could respond to investment fears generated by stories about failed investments. A reduction of such fears could further the Department's goal of higher rates of sustained health IT adoption and interoperability.

Finally, the Secretary's decision to recognize these criteria was informed by the fact that the criteria have been validated through prototype testing. Any criteria not fully validated by the Pilot Test (fewer than 10% fell in this category) were not considered for recognition.

In light of the consensus basis, HHS reliance, industry impact and demonstrated utility of the CCHIT criteria for functionality, interoperability, security and reliability, the Secretary has recognized these criteria. He has delegated authority to ONC to coordinate and oversee the incorporation of these criteria in relevant activities among Federal agencies and other partner organizations, as appropriate.

FOR FURTHER INFORMATION CONTACT: John W. Loonsk, M.D. at (202) 205–0242.

Dated: August 1, 2006.

Karen Bell,

Acting Deputy National Coordinator for Health IT.

[FR Doc. 06–6690 Filed 8–1–06; 1:25 p.m.]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Availability: Office of the National Coordinator for Health Information Technology (ONC) Interim Guidance Regarding the Recognition of Certification Bodies

AGENCY: Office of the Secretary, HHS.

Authority: EO 13335 ("Incentives for the Use of Health Information Technology and Establishing the Position of the National Health Information Technology Coordinator") and Pub. L. 109–149 ("Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006).

SUMMARY: This notice provides the public with information about the availability of a Certification Guidance Document (CGD) at *http://www.hhs.gov/healthit.* The CGD explains the factors that ONC will use to determine whether or not to recommend to the Secretary of the Department of Health and Human Services (the Secretary) that he recognize a body for certification. Once recognized, that body will have Recognized Certification Body (RCB) status. The CGD will serve as guide for ONC as it evaluates applications for RCB status and seeks to provide all of the information a body would need to apply for and obtain such status. By publishing the CGD, HHS will ensure a transparent and open process as a basis for these recommendations.

To encourage a more widespread adoption of interoperable health information technology, the Department of Health and Human Services (HHS) published two final rules in August 2006 regarding certain arrangements involving the donation of interoperable electronic health records (EHR) technology to physicians and other health care practitioners or entities. The first, published by the Centers for Medicare & Medicaid Services (CMS), promulgated an exception to the physician self-referral prohibition. The second, published by the Office of Inspector General (OIG), established a safe harbor under the anti-kickback statute. In order for the donation of EHR technology to be protected under the exception and safe harbor provisions of these rules, the technology must be interoperable. The exception and safe harbor provide that EHR software will be "deemed to be interoperable if a certifying body recognized by the Secretary has certified the software no more than 12 months prior to the date it is provided to the [physician/recipient]." Both rules become effective 60 days after publication.

The Department will utilize notice and comment rulemaking to formalize and finalize the policies and procedures that will govern whether ONC will recommend to the Secretary a body for RCB status. In the meantime, this guidance document identifies the factors to be considered by the Secretary in granting such recognition. In addition, the guidance sets forth an interim procedure that certifying bodies should follow in obtaining recognition by the Secretary. Until such time as the Department formalizes the procedure, a certifying body will be considered "recognized by the Secretary" if it has become an RCB in accordance with the interim guidance. The guidance document seeks to reduce uncertainty about key aspects of the certification body recognition process.

DATES: Public comment may be submitted on or before October 3, 2006. Comments may be submitted via e-mail to *RCB-comments@hhs.gov* or in written form to the address below.

ADDRESSES: Steven Posnack, Program Analyst, Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, 330 C Street, SW., Switzer Building, Room 4090, Washington, DC 20201.

Please refer to this guidance document when submitting comments.

FOR FURTHER INFORMATION CONTACT: Steven Posnack at 202–690–7151.

Dated: July 31, 2006.

Karen Bell,

Acting Deputy National Coordinator for Health IT.

[FR Doc. 06–6689 Filed 8–1–06; 1:25 pm]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Toxic Substances and Disease Registry

Statement of Organization, Functions, and Delegations of Authority

PART J (Agency for Toxic Substances and Disease Registry) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (50 FR 25129–25130, dated June 17, 1985, as amended most recently at 70 FR 72839–72840, dated December 7, 2005) is amended to reflect the reorganization of the Agency for Toxic Substances and Disease Registry (ATSDR).

Section T–B, Organization and Functions, is hereby amended as follows:

Delete item (11) of the functional statement for the *Office of Communications (JAA4), Office of the Director (JAA), Office of the Administrator (JA),* and insert the following: (11) provides publications-related activities including preparing articles and drafting news releases, distributing publications, and bibliographic services, and.

Delete item (8) of the functional statement for the *Office of Communications (JAA4),* and renumber the remaining items accordingly.

Dated: July 21, 2006.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 06–6676 Filed 8–3–06; 8:45 am]

BILLING CODE 4160–70–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Pacific Proving Grounds, Enewetak Atoll, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On June 26, 2006, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked at the Pacific Proving Grounds (PPG) from 1946 through 1962 for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored.

This designation became effective on July 26, 2006, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on July 26, 2006, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

Dated: August 1, 2006.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 06–6681 Filed 8–3–06; 8:45 am]

BILLING CODE 4163–19–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Decision To Evaluate a Petition To Designate a Class of Employees at General Atomics (Also Known as GA, and/or Division of General Dynamics, and/or John Jay Hopkins Laboratory for Pure and Applied Science), La Jolla, Laboratory for Pure and Applied Science), La Jolla, California, To Be Included in the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at General Atomics (also known as GA, and/or Division of General Dynamics, and/or John Jay Hopkins Laboratory for Pure and Applied Science), to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: General Atomics.

Location: La Jolla, California.

Job Titles and/or Job Duties: Potentially worked in the locations:

- Building 2 (Science laboratories A, B, and C).
- Building 9 (Experimental Building).
- Building 10 (Maintenance).
- Building 11 (Service Building).
- Building 21.
- Building 22.
- Building 23 (Hot Cell Facility).
- Building 25.
- Building 26.
- Building 27 (Experimental Area Building #1).
- Building 27–1 (Experimental Area Building #1).
- Building 30 (LINAC Complex).
- Building 31 (HTGR–TCF).
- Building 33 (Fusion Building).
- Building 34 (Fusion Doublet III).
- Building 37 (SV–A).
- Building 39 (SV–B).
- SV–D.

Period of Employment: January 1, 1960 through December 31, 1969.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support,

National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: August 1, 2006.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 06–6682 Filed 8–3–06; 8:45 am]

BILLING CODE 4163–19–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Decision To Evaluate and Petition To Designate a Class of Employees at Harshaw Chemical Company (Also Known as Uranium Refinery and/or Harshaw Filtrol Partners), Cleveland, OH, To Be Included in the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees at Harshaw Chemical Company (also known as Uranium Refinery and/or Harshaw Filtrol Partners), to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Harshaw Chemical Company.

Location: Cleveland, Ohio.

Job Titles and/or Job Duties: All workers at Harshaw Chemical Company plant and the laboratories of the separate facility located at 1945 East 97th Street.

Period of Employment: January 1, 1942 through November 30, 1949.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: August 1, 2006.

John Howard,

Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.

[FR Doc. 06–6683 Filed 8–3–06; 8:45 am]

BILLING CODE 4163–19–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Nevada Test Site (NTS), Mercury, Nevada, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On June 26, 2006, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

Department of Energy (DOE) employees or DOE contractor or subcontractor employees who worked at the Nevada Test Site from January 27, 1951 through December 31, 1962 for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters (excluding aggregate work day requirements) established for other classes of employees included in the SEC, and who were monitored or should have been monitored.

This designation became effective on July 26, 2006, as provided for under 42 U.S.C. 7384*l*(14)(C). Hence, beginning on July 26, 2006, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health, 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV*.

Dated: August 1, 2006.

John Howard,

Director, National Institute for Occupational Safety and Health Centers for Disease Control and Prevention.

[FR Doc. 06–6684 Filed 8–3–06; 8:45 am]

BILLING CODE 4163–19–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 56 FR 69296, October 20, 1980, as amended most recently at 71 FR 37080, dated June 29, 2006) is amended to reflect the establishment of the Writer-Editor Services Branch within the Division of Creative Services, National Center for Health Marketing, Coordinating Center for Health Information and Service.

Section C–B, Organization and Functions, is hereby amended as follows:

Following the title and functional statement for the *Broadcast Production and Distribution Branch (CPBHD), Division of Creative Services (CPBH), National Center for Health Marketing (CPB), Coordinating Center for Health Information and Service (CP)*, insert the following:

Writer-Editor Services Branch (CPBHE). (1) Provides production editing services for CDC's information products; (2) provides production editing services for *MMWR* publications, *Emerging Infectious Diseases* (EID) journal, and *Preventing Chronic Disease (PCD)* journal; (3) provides substantive editing services for CDC-authored written material; (4) provides copyediting services; (5) provides proofreading services; (6) provides Web editing services; (7) provides writing services, including relevant research; and (8) provides editorial consulting services and training in writing and editing.

Delete item (1) of the functional statement for the *Scientific Publications Branch (CPBGH), Division of Scientific Communications (CPBG)*, and insert the following: (1) Develops, plans, coordinates, and produces the MMWR series, including the MMWR

Recommendations and Reports, CDC Surveillance Summaries, and Annual Summary of Notifiable Diseases.

Delete item (4) of the financial statement for the *Division of Creative Services (CPBH)*, and insert the following: (4) provides CDC-wide services including writing and editing, umbrella contracting and other "common carrier" mechanisms to reach primary channels (e.g. broadcast and video production, message design), resources for development of materials and products (e.g. graphic arts and related services outlined in business services consolidation, and collects and/or facilities distribution of graphic resources (e.g. to engineering design and expertise to support broadcast production).

Delete item (2) of the functional statement for the *Presentation Graphics and Multilingual Services Branch (CPBHC), Division of Creative Services (CPBH)*, and insert the following: (2) Develops and/or provides design and graphic elements for exhibits and presentations, desktop publishing, publications, and multi-language translation services, and.

Delete items (7) and (12) of the functional statement of the *Information Design and Publishing Staff (CPC153), Office on Information Services (CPC15), Office of the Director (CPC1), National Center for Health Statistics (CPC)*, and insert the following: (7) provides design and production support for all NCHS published products, including the NCHS Web site, * * * . (12) establishes, administers, and monitors contracts to provide graphics support and printing services for NCHS; and

Delete item (11) of the functional statement for the *Office of Communications (CTB12), Office of the Director (CTB1), National Center for Environmental Health (CTB), Coordinating Center for Environmental Health and Injury Prevention (CT)*, and insert the following: (11) provides publications-related activities including preparing articles and drafting news releases, distributing publications, and bibliographic services, and.

Delete item (8) of the functional statement for the *Office of Communications (CTB12), Office of the Director (CTB1)*, and renumber the remaining items accordingly.

Delete item (8) of the functional statement for the *Office of Communications (CTC14), Office of the Director (CTC1), National Center for Injury Prevention and Control (CTC)*, and insert the following: (8) manages the clearance and production of NCIPC publications.

Delete item (6) of the functional statement for the *Office of the Director (CTCC1), Division of Violence Prevention (CTCC)*, and insert the following: (6) prepares and monitors clearance of manuscripts for publication in scientific and technical journals and publications, including articles and guidelines published in the *MMWR*, and other publications for the public.

Delete the title and functional statement of the *Technical Information and Editiorial Services Branch (CUC12), Office of the Director (CUC1), National Center for Chronic Disease Prevention and Health Promotion (CUC), Coordinating Center for Health Promotion (CU)*, and insert the following: Technical Information and Services Branch (CUC12). The Technical Information and Services Branch (TISB)(1) plans, coordinates, develops, and provides NCCDPHP technical information, resources and services; (2) provides technical information acquisition, tracking, manual and electronic search services, retrieval, and reference collection services; (3) plans, coordinates, advises, and provides information management support and technical assistance to NCCDPHP divisions and their constituents to develop technical information systems and resources to meet division goals and programmatic directions; (4) develops and coordinates NCCDPHP technical information resources into computerized information databases and special bibliographics or publications; (5) works closely with state and federal agencies and NCCDPHP constituents to develop health information networks and to promote information sharing; (6) manages and coordinates NCCDPHP's scientific and editorial clearance process and DHHS clearance, as appropriate, for all print and nonprint materials, and ensures adherence to and consistency with CDC's scientific and editorial clearance process; (7) designs, develops, and coordinates the publication of communication material, including journal articles, books, reports, fact sheets, newsletters, and other forms of communication with the public health community and the general public; (8) provides leadership in the production of quality print and nonprint materials by planning and presenting seminars, by providing consultation in developing written and visual materials, and by otherwise promoting good communications practices; (9) establishes standards and coordinates the design and layout of print and nonprint materials, including tabular and graphic materials, advises NCCDPHP staff on desktop publishing, and provides desktop publishing services; (10) coordinates other publications services, such as preparing indexes, verifying reference lists, testing for readability, and translating materials from English to non-English language; (11) develops, manages, and maintains the NCCDPHP manuscript tracking system, providing an up-to-date reporting system, bibliographies of NCCDPHP publications, and input into NCCDPHP, CDC and online locator and database systems; (12) coordinates NCCDPHP's technical information and other communication activities with other CDC programs and offices; (13) represents NCCDPHP on committees, workgroups, and at conferences relating to technical information, publication activities, and other communication activities.

Delete item (8) of the functional statement for the *Communications Office (CVB13), Office of the Director (CVB1), National Center for HIV, STD, and TB Prevention (CVB), Coordinating Center for Infectious Diseases (CV)*, and insert the following: (8) provides graphics and publishing services for NCHSTP staff.

Delete item (8) of the functional statement for the *Technical Information and Communications Branch (CVBBG), Division of HIV/AIDS Prevention-Intervention Research and Support (CVBB)*, and insert the following: (8) prepares and monitors clearance of manuscripts for publication in scientific and technical journals and publications, including articles and guidelines in the *MMWR*.

Delete item (23) of the functional statement for the *Communications, Education, and Behavioral Studies Branch (CVBDB), Division of Tuberculosis Elimination (CVBD)*, and insert the following: (23) coordinates and tracks materials for purposes of clearance and approval for publications and presentations.

Delete item (8) of the functional statement for the *Office of Health Communication (CVC13), Office of the Director (CVC1), National Center for Infectious Diseases (CVC)*, and insert the following: (8) provides clearance assistance in the preparation of scientific articles and other documents and products for electronic and hard copy publication or presentation.

Delete item (8) of the functional statement for the *Office of the Director (CVCL1), Division of Viral Hepatitis (CVCL)*, and insert the following: (8) provides support to DVH components in preparation of graphics and other visual arts, and conference and exhibit planning, management, and execution.

Delete item (2) of the functional statement for the *CDC Connects (CAU12), Office of the Director (CAU1), Office of Enterprise Communication (CAU), Office of the Director (CA),* and insert the following: (2) plans and develops articles about employees and their work.

Delete item (6) of the functional statement for the *Document Development Branch (CCED), Education and Information Division (CCE), National Institute for Occupational Safety and Health (CC),* and renumber the remaining items accordingly.

Dated: July 21, 2006.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 06–6675 Filed 8–3–06; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–10206]

Emergency Clearance: Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Centers for Medicare and 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), 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.

We are, however, requesting an emergency review of the information collection referenced below. In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. We are requesting an emergency review because the collection of this information is needed before the expiration of the normal time limits under OMB's regulations at 5 CFR part 1320(a)(2)(ii). This is necessary to ensure compliance with an initiative of the Administration. We cannot reasonably comply with the normal clearance procedures because of an unanticipated event, as stated in 5 CFR 1320.13(a)(2)(iii).

Approval of this notice is essential in order to comply with Section 302(a)(1) of the MMA that requires the Secretary to establish and implement quality standards for suppliers of certain items to be applied by recognized independent accreditation organizations. Suppliers of Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) must comply with the quality standards (and thus be accredited) to furnish any item for which payment is made under Medicare Part B. The DMEPOS providers and suppliers must be accredited and obtain a National Supplier Clearinghouse billing number in order to participate in the Competitive Acquisition Program for DMEPOS. The competitive bidding process final rule will be published October 1, 2006. However, there are over 90,000 providers and suppliers that need to be accredited before the implementation of this program by 2009, regardless of whether they submit bids or do not submit bids. Emergency clearance is required, given the complexity of this new requirement and the fact that the industry cannot proceed until CMS publishes both the quality standards along with the approved requirements for independent accreditation organizations. Otherwise, the program is in jeopardy of not meeting the statutory deadline of full implementation by 2009.

1. *Type of Information Collection Request:* New collection; *Title of Information Collection:* Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Supplier Accreditation Proposals from Independent Accrediting Bodies; *Use:* Under Section 302 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), the DMEPOS providers and suppliers must be accredited and obtain a National Supplier Clearinghouse billing number in order to competitively bid. Section 302(a)(1) of the MMA added section 1834(a)(20) to the Act, which requires the Secretary to establish and implement quality standards for suppliers of certain items, including consumer service standards, to be applied by recognized independent accreditation organizations. Suppliers of DMEPOS must comply with the quality standards in order to furnish any item for which payment is made under Part B, and to receive and retain a provider or supplier billing number used to submit claims for reimbursement for any such item for which payment may be made under Medicare. Section 1834(a)(20)(B) of the Act requires the Secretary, notwithstanding section 1865(b) of the Act, to designate and approve one or more independent accreditation organizations to apply the quality standards to suppliers of DMEPOS and other items. Independent accreditation organizations must furnish the specified information to CMS to allow themselves the opportunity to submit proposals to implement and operate the DMEPOS accreditation program. The information supplied by the Independent Accreditation Organizations will be used to evaluate the accreditation organization's ability to meet CMS' regulations. *Form Number:* CMS–10206 (OMB#: 0938–NEW); *Frequency:* Reporting—One-time; *Affected Public:* Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 10; *Total Annual Responses:* 10; *Total Annual Hours:* 200.

CMS is requesting OMB review and approval of this collection by August 9, 2006, with a 180-day approval period. Written comments and recommendations will be considered from the public if received by the individuals designated below by August 7, 2006.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/regulations/pra* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*, or call the Reports Clearance Office on (410) 786–1326.

Interested persons are invited to send comments regarding the burden or any other aspect of these collections of information requirements. However, as noted above, comments on these information collection and recordkeeping requirements must be mailed and/or faxed to the designees referenced below by August 7, 2006:

CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development—B, Attn: William N. Parham, III, Room C4–26–

05, 7500 Security Boulevard, Baltimore, MD 21244–1850; and,
OMB Human Resources and Housing Branch, Attention: Carolyn Lovett, New Executive Office Building, Room 10235, Washington, DC 20503, Fax Number: (202) 395–6974.

Dated: July 26, 2006.

Michelle Shortt,

Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 06–6658 Filed 7–31–06; 2:20 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

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.

Proposed Project: Grants for Hospital Construction and Modernization—Federal Right of Recovery and Waiver of Recovery (42 CFR Part 124, Subpart H) (OMB No. 0915–0099 Extension)

The regulation known as "Federal Right of Recovery and Waiver of Recovery," provides a means for the Federal Government to recover grant funds and a method of calculating interest when a grant-assisted facility under Titles VI and XVI of the Public Health Service Act is sold or leased, or there is a change in use of the facility. It also allows for a waiver of the right of recovery under certain circumstances. Facilities are required to provide written notice to the Federal Government when such a change occurs: and to provide copies of sales contacts, lease agreements, estimates of current assets and liabilities, value of equipment, expected value of land on the new owner's books and remaining depreciation for all fixed assets involved in the transactions, and other information and documents pertinent to the change of status.

Estimates of annualized burden are as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Reporting requirements 124,704(b) and 707	10	1	10	1.25	12.5

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 27, 2006.

Caroline Lewis,

Acting Associate Administrator for Administration and Financial Management.

[FR Doc. E6–12607 Filed 8–3–06; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2006–25484]

Commercial Fishing Industry Vessel Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The Commercial Fishing Industry Vessel Safety Advisory Committee (CFIVSAC) will meet to discuss various issues relating to vessel safety in the commercial fishing industry. The meeting is open to the public.

DATES: The CFIVSAC will meet on September 12 thru 14, 2006, from 8 a.m. to 5 p.m. The meeting may close early if all business has been completed. Requests to make oral presentations should reach the Coast Guard on or before August 11, 2006. Written material for distribution at the meeting should reach the Coast Guard on or before September 1, 2006. Requests to have a copy of any material distributed to each member of the committee should reach the Coast Guard on or before August 25, 2006.

ADDRESSES: The CFIVSAC will meet in conference room 2230–32 of the U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590. The World Wide Web site can be found at: *http://www.dot.gov/.*

FOR FURTHER INFORMATION CONTACT: Lieutenant Roberto Trevino, by telephone at 202–372–1248, fax 202–372–1917, or e-mail: *RTrevino@comdt.uscg.mil.*

SUPPLEMENTARY INFORMATION: Information about the CFIVSAC, up to date meeting information, and past meeting minutes are available at the following World Wide Web site: *http://www.FishSafe.info.*

The CFIVSAC will meet to discuss various issues relating to vessel safety in the commercial fishing industry. The meeting is open to the public. Notice of the meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Meeting

Items to be discussed and business to be conducted include:

(1) Approval of July 2005 meeting minutes.

(2) Brief by the Executive Secretary on membership status and term limits.

(3) Brief by the Executive Secretary on the Coast Guard Authorization Act of 2006, Legislative Change Proposals, and Aleutian Trade Act Notice to Proposed Rulemaking update.

(4) Discussion of member responsibilities and expected support from the Coast Guard.

(5) Discussion on Risk Identification procedures, Prevention Through People

initiatives & PTP and Offshore Communications improvements.

(6) Discussion and working group sessions by subcommittees on current program strategies and future plans.

(7) Discussion on Fishing Vessel Casualty Analysis.

(8) Discussion of areas to be addressed and status of Fishing Vessel Notice of Proposed Rulemaking.

Procedural

The meeting is open to the public. Please note the meeting may close early if all necessary business has been completed. At the Chair's discretion, members of the public may make presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify the Executive Secretary no later than August 11, 2006. Written material for distribution at the meeting should reach the Coast Guard no later than September 1, 2006. If you would like a copy of any material distributed to each member of the committee in advance of the meeting, please submit 25 copies to Lieutenant Roberto Trevino no later than August 25, 2006.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Lieutenant Roberto Trevino, by telephone at 202–372–1248, fax 202–372–1917, or e-mail: *RTrevino@comdt.uscg.mil* as soon as possible. The mailing address is Commandant (G–PCV–3), U.S. Coast Guard, 2100 Second Street, SW., Room 1116, Washington, DC 20593–0001.

Dated: July 28, 2006.

J.G. Lantz,

Director of National and International Standards, Assistant Commandant for Prevention.

[FR Doc. E6–12584 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Notice of Issuance of Final Determination Concerning Chairs

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the Bureau of Customs and Border Protection (Customs) has issued a final determination concerning the country of origin of certain office chairs to be offered to the United States Government under an undesignated government procurement contract. The final determination found that based upon the facts presented, the country of origin of the subject chair is the United States.

DATES: The final determination was issued on July 31, 2006. A copy of the final determination is attached. Any party-at-interest as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Fernando Peña, Esq., Valuation and Special Programs Branch, Office of Regulations and Rulings; telephone (202) 572–8740.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on July 31, 2006, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), Customs issued a final determination concerning the country of origin of certain office chairs to be offered to the United States Government under an undesignated government procurement contract. The Customs ruling number is HQ 563456. This final determination was issued at the request of Herman Miller, Inc. under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

The final determination concluded that, based upon the facts presented, the assembly in the United States of over 70 U.S.-origin and foreign components to create the subject office chair substantially transformed the foreign components into a product of the U.S.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, Customs Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: July 31, 2006.

Sandra L. Bell,

Acting Assistant Commissioner, Office of Regulations and Rulings.

Attachment

MAR–2–05 RR:CTF:VS 563456 FRP

July 31, 2006

CATEGORY: Marking

Ms. Lisa A. Crosby
Sidley Austin LLP
1501 K Street, NW., Washington, DC 20005

RE: U.S. Government Procurement; Final Determination; country of origin of office chairs; substantial transformation; 19 CFR Part 177

Dear Ms. Crosby:

This is in response to your letter dated February 22, 2006, on behalf of Herman Miller, Inc. (hereinafter "HM"), in which you seek a final determination pursuant to subpart B of Part 177, Customs Regulations, 19 CFR 177.21 *et seq.* Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended, (19 U.S.C. 2411 *et seq.*), U.S. Customs and Border Protection ("Customs") issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated foreign country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of certain office chairs, which HM is considering selling to the U.S. Government. We note that HM is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

FACTS:

HM is a manufacturer of office furniture. It imports components which the company assembles with domestic components into finished furniture goods.

We are told that HM assembles the subject chair in the U.S. from over 70 U.S.-origin and foreign components. HM provided a copy of a costed bill of materials for a typical chair that was recently sold to another Government agency. The features of the chair allow the height of the chair to be adjusted and to be tilted to allow the body to naturally pivot at the ankles, knees and hips. Two back support options are available to improve posture and lower back comfort. Three arm choices are available: Fixed, height-adjustable and fully adjustable, which allows the arms to pivot sideways.

According to that bill of materials, 87.6 percent of the cost of the materials is attributable to materials of U.S. origin. Some of the materials used are as follows: Base, tilt assembly, pneumatic activator assembly, seat frame assembly, arm adjustment kit, back assembly (all of U.S. origin); telescoping cylinder, casters, armpad and lumbar pad (all of which are of non-U.S. origin).

You state that all components, whether purchased locally or imported, are received at HM's production facility in Holland, Michigan. Assembly begins by attaching a telescoping cylinder to a chair base. This telescoping cylinder is what permits the height of the chair to be adjusted. The casters selected by the ultimate purchaser are then added to the chair legs. The swing arms, seat, arm rests, back, and lumbar support are then added in that order.

After final assembly, each chair is quality tested by a worker who adjusts the height of the seat, reclines the chair, and adjusts the armrests to determine that all are working correctly. The chair is then boxed or blanket-wrapped for delivery to the purchaser.

Additionally, you state that significant resources are expended on the chair's design and that development research continues in HM's U.S. design studios to ensure that it remains the benchmark when compared to other available work chairs.

ISSUE:

Whether the assembled HM chairs are considered to be products of the United States for purposes of U.S. Government procurement.

LAW AND ANALYSIS:

Under subpart B of part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States*, 573 F. Supp. 1149 (CIT 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984). In *Carlson Furniture Industries et al.* v. *United States*, 65 Cust. Ct. 474 (1970), the court ruled that U.S. operations on imported chair parts constituted a substantial transformation and thus conferred U.S. origin on the finished chair. The court stated:

The imported articles are not chairs in unassembled or knocked-down condition. They are at best the wooden parts which go into the making of chairs. [I]t is not contemplated that these imported chair parts are to be sold [* * *] in the condition in which they are imported.

[A]dditional work would have to be performed on them and materials added to them to create with them a functional article of commerce.

We regard these operations as being substantial in nature, and more than the mere assembly of parts together. And the end result of the activities performed on the imported articles by the plaintiff Carlson Furniture is the transformation of parts into a functional whole—giving rise to a new and different article* * *

Customs has also previously considered, in a number of cases, whether components imported into a country for assembly have been substantially transformed as a result of such processing. Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 85–118, C.S.D. 90–51, and C.S.D. 90–97. In C.S.D. 85–25, 19 Cust. Bull. 844 (1985), we held that for purposes of the Generalized System of Preferences, the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled.

In Headquarters Ruling Letter ("HRL") 563110, dated October 20, 2004, Customs addressed whether assembly of fishing fly reels in the U.S. of imported and U.S.-origin components resulted in a substantial transformation. The reels comprised over 20 separate parts and the U.S.-origin components accounted for over 50 percent of the total cost of each assembled reel. In addition, some of the imported components were further processed in the U.S. before final assembly into fishing fly reels. Based on the totality of the circumstances, Customs held that the imported reel components were substantially transformed as a result of the assembly operations in the U.S.

In HRL 561734, dated March 22, 2001, 66 FR 17222, Customs ruled that Sharp multifunctional machines (printer, copier and fax machines) assembled in Japan were a product of Japan for purposes of government procurement. The machines in that case were comprised of 227 parts (108 parts obtained from Japan, 92 from Thailand, 3 from China, and 24 from "other" countries) and eight subassemblies, each of which was assembled in Japan. It was further noted that the scanner unit (one of the eight subassemblies assembled in Japan) was characterized as "the heart of the machine." *See also*, HRL 561568 dated March 22, 2001, 66 FR 17222.

As the cases set forth above demonstrate, in order to determine whether a substantial transformation occurs when components of various origins are assembled to form completed articles, Customs considers the totality of the circumstances and makes such decisions on a case-by-case basis. The country of origin of the article's components, extent of the processing that occurs within a given country, and whether such processing renders a product with a new name, character, or use are primary considerations in such cases. Additionally, facts such as resources expended on product design and development, extent and nature of post-assembly inspection procedures, and worker skill required during the actual manufacturing process will be considered when analyzing whether a substantial transformation has occurred; however, no one such factor is determinative.

Like the importer in *Carlson Furniture*, you inform us that HM does not import chairs in knock-down condition. You claim that the imported components alone are insufficient to create a finished chair and that substantial additional work and materials are added to the imported components in the U.S. to produce a finished chair. Additionally, we are advised that the assembly operation in the U.S. involves a large number of parts and the addition of high-value U.S. subassemblies. We find that the assembly processing that occurs in the U.S. is complex and meaningful, requires the assembly of a large number of components, and renders a new and distinct article of commerce that possesses a new name, character, and use. We further note that the U.S.-origin seat and back frame assemblies, which are made with your trademark fabric, together with the tilt assembly, are of U.S. origin and give the chair its unique design profile and essential character.

Therefore, we find that the imported components lose their individual identities and become an integral part of the chair as a result of the U.S. assembly operations and combination with U.S. components; and that the components acquire a different name, character, and use as a result of the assembly operations performed in the U.S. Accordingly, the assembled chair will be considered a product of the United States for purposes of U.S. Government procurement in making this determination.

HOLDING:

On the basis of the information provided, we find that the assembly in the U.S. substantially transforms the components of foreign origin. Therefore, the country of origin of the chair is the United States for purposes of U.S. Government procurement.

Notice of this final determination will be given in the **Federal Register** as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that Customs reexamine the matter anew and issue a new final determination. Any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Acting Assistant Commissioner, Office of Regulations and Rulings

[FR Doc. E6–12575 Filed 8–3–06; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1652–DR]

Maryland; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Maryland (FEMA–1652-DR),

dated July 2, 2006, and related determinations.

DATES: Effective Date: July 26, 2006.

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 Maryland 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 July 2, 2006:

Montgomery 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, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6–12589 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3267-EM]

Missouri; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Missouri (FEMA–3267-EM), dated July 21, 2006, and related determinations.

DATES: Effective Date: July 21, 2006.

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 the incident period for this emergency is closed effective July 21, 2006.

(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, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6–12586 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3267–EM]

Missouri; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Missouri (FEMA–3267–EM), dated July 21, 2006, and related determinations.

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

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 July 21, 2006, 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 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Missouri resulting from severe storms beginning on July 19, 2006, and continuing, are 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). Therefore, I declare that such an emergency exists in the State of Missouri.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives, to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance under the Public Assistance program. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

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.

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.

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 Director, Department of Homeland Security, under Executive Order 12148, as amended, Thomas J. Costello, 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 Missouri to have been affected adversely by this declared emergency:

The independent City of St. Louis and the counties of Dent, Iron, Jefferson, St. Charles, St. Louis, and Washington for debris removal and emergency protective measures (Categories A and B), including direct Federal assistance under the Public Assistance program.

(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, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6–12587 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1649–DR]

Pennsylvania; Amendment No. 8 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Pennsylvania (FEMA–1649–DR), dated June 30, 2006, and related determinations.

DATES: *Effective Date:* July 26, 2006.

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 Commonwealth of Pennsylvania 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 June 30, 2006:

Pike County for Public Assistance (already designated for Individual 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, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6–12590 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1655–DR]

Virginia; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Virginia (FEMA–1655–DR), dated July 13, 2006, and related determinations.

DATES: *Effective Date:* July 26, 2006.

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 Commonwealth of Virginia is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 13, 2006:

Botetourt, Craig, Floyd, and Henry Counties 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, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6–12588 Filed 8–3–06; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-day notice of information collection under review: Registration for Classification as Refugee; Form I–590, OMB Control Number 1615–0068.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until October 3, 2006.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via email at *rfs.regs@dhs.gov*. When submitting comments by e-mail add the OMB Control Number 1615–0068 in the subject box.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and forms of information technology, *e.g.*,

permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Registration for Classification as Refugee.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–590. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This information collection provides a uniform method for applicants to apply for refugee status and contains the information needed in order to adjudicate such applications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 140,000 responses at 35 (.583) minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 81,620 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at *http://uscis.gov/graphics/formfee/forms/pra/index.htm.* We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529, Telephone number 202–272–8377.

Dated: August 1, 2006.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E6–12595 Filed 8–3–06; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request.

ACTION: 60-day notice of information collection under review: Nonimmigrant Petition Based on Blanket L Petition, Form I–129S, OMB Control No.1615–0010.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until October 3, 2006.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Director, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by email add the OMB Control Number 1615–0010 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques and forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Nonimmigrant Petition Based on Blanket L Petition.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–129S. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for profit. This form is used by an employer to classify employees as L–1 nonimmigrant intracompany transferees under a blanket L petition approval. USCIS will use the data on this form to determine eligibility for the requested immigration benefit.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 250,000 responses at 35 minutes (.583) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 145,750 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at *http://uscis.gov/graphics/formfee/forms/pra/index.htm.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: August 1, 2006.

Richard A. Sloan,

Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E6–12596 Filed 8–3–06; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5045–N–31]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

DATES: August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Kathy Ezzell, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing-and speech-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 the December 12, 1998 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: July 27, 2006.

Mark R. Johnston,

Acting Deputy Assistant Secretary for Special Needs.

[FR Doc. 06–6617 Filed 8–3–06; 8:45 am]

BILLING CODE 4210–67–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4665–N–32]

Conference Call Meeting of the Manufactured Housing Consensus Committee

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of upcoming meeting via conference call.

SUMMARY: This notice sets forth the schedule and proposed agenda of the upcoming meetings of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. The meetings are open to the general public, which may participate by following the instructions below.

DATES: The conference call meetings will be held on Monday, August 14, 2006, from 11 a.m. to 2 p.m. eastern daylight time, and Friday, August 18, 2006, from 11 a.m. to 2 p.m. eastern daylight time.

ADDRESSES: Information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can link onto the NFPA's Web site for instructions concerning how to participate, and for contact information for the conference call from a HUD Web site, in the section marked "Business" "Manufactured Housing Consensus Committee Information". The link can be found at: *http://www.hud.gov/offices/hsg/sfh/mhs/mhshome.cfm.*

Alternately, interested parties may contact Elsie Draughn of the Office of Manufactured Housing Programs at (202) 708–6423 (this is not a toll-free number) for conference call information.

FOR FURTHER INFORMATION CONTACT: William W. Matchneer III, Associate Deputy Assistant Secretary, Office of Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with Sections 10(a) and (b) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR 102–3.150. The Manufactured Housing Consensus Committee was established under Section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5403(a)(3). The Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured home construction and safety standards and procedural and enforcement regulations, and with developing and recommending proposed model installation standards to the Secretary.

The purpose of the conference call meeting is to permit the Committee, at its request, to discuss and take action on the submission of its comments to the Office of General Counsel, Department of Housing and Urban Development, in response to the June 14, 2006, **Federal Register** notice on (Title 24, Code of Federal Regulation, Part 3286—Manufactured Home Installation Program; Proposed Rule). It is necessary to have these meetings on these dates, to permit the Committee to take action on this matter in a timely manner.

Tentative Agenda

A. Roll Call.

B. Welcome and opening remarks.

C. Full Committee meeting to discuss and take actions to provide comments in response to the **Federal Register** Notice on 24 CFR Part 3286–Manufactured Home Installation Program; Proposed Rule.

D. Adjournment.

Dated: July 31, 2006.

Frank L. Davis,

General Deputy Assistant Secretary for Housing.

[FR Doc. E6–12665 Filed 8–3–06; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for the Woodville Solid Waste Disposal Site Expansion Project in Tulare County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: The County of Tulare Resource Management Agency, Solid Waste Division (Applicant) has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The Service is considering the issuance of a 41-year permit to the Applicant that would authorize take of nine species incidental to the Applicant's proposed landfill expansion and operation, groundwater monitoring activities, and conservation management activities at the Woodville Solid Waste Disposal Site in Tulare County, CA. These activities on the 414-acre project area would result in the loss of up to 131 acres of covered species habitat.

We request comments from the public on the permit application and an Environmental Assessment, both of which are available for review. The permit application includes the proposed Habitat Conservation Plan (Plan) and an accompanying Implementing Agreement. The Plan describes the proposed project and the measures that the Applicant would undertake to minimize and mitigate take of the covered species.

DATES: Written comments should be received on or before October 3, 2006.

ADDRESSES: Please address written comments to Lori Rinek, Chief, Conservation Planning and Recovery Division, Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, California 95825. Comments may also be sent by facsimile to 916–414–6713.

FOR FURTHER INFORMATION CONTACT: Jesse Wild, Fish and Wildlife Biologist, or Lori Rinek, Chief, Conservation Planning and Recovery Division, Sacramento Fish and Wildlife Office, at 916–414–6600.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Copies of these documents can be obtained for review by contacting the individuals named above [see **FOR FURTHER INFORMATION CONTACT**]. Documents also will be available for public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office [see **ADDRESSES**].

Background

Section 9 of the Act and Federal regulations prohibit the "take" of fish and wildlife species listed as endangered or threatened. Take of federally listed fish or wildlife is defined under the Act to include the following activities: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The Service may, under limited circumstances, issue permits to authorize incidental take (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for endangered species are found in 50 CFR 17.22.

The Applicant is seeking a permit for take of two federally listed species: the endangered San Joaquin kit fox (*Vulpes macrotis mutica*) and the threatened vernal pool fairy shrimp (*Branchinecta lynchi*). The proposed permit would also authorize future incidental take of seven currently unlisted animal species: western burrowing owl (*Athene cunicularia hypugea*), midvalley fairy shrimp (*Branchinecta mesovallensis*), San Joaquin tiger beetle (*Cicindela tranquebarica*), Hopping's blister beetle (*Lytta hoppingi*), moestan blister beetle (*Lytta moesta*), molestan blister beetle (*Lytta molesta*), and Morrison's blister beetle (*Lytta morrisoni*). The following four unlisted plant species are also proposed to be included on the permit: erect-stemmed heartscale (*Atriplex erecticaulis*), lesser saltscale (*Atriplex miniscula*), San Joaquin brittlescale (*Atriplex subtilis*), and recurved larkspur (*Delphinium recurvatum*), should any of these species become listed under the Act during the life of the permit. Take of listed plant species is not prohibited under the Act and cannot be authorized under a section 10 permit. However, plant species may be included on the permit in recognition of the conservation benefits provided for them under the Plan. These species would also receive "No Surprises" assurances under the Service's "No Surprises" regulation (50 CFR 17.22(b)(5) and 17.32(b)(5)). Collectively, the 13 listed and unlisted species are referred to as the "covered species" in the Plan.

The Applicant proposes to expand its existing landfill, the Woodville Solid Waste Disposal Site, which has nearly reached capacity. Project activities that are proposed for coverage under the Plan consist of the following components: (1) The development of additional waste management units (landfill); (2) implementation of a groundwater testing and monitoring program; (3) construction of operations facilities and creation of a borrow area, a retention basin, and a potential ground water remediation area; (4) establishment of conservation areas to compensate for impacts on covered species habitat; and (5) management activities on the conservation areas, including continued agricultural operations in one area and implementation of possible fire management activities. The facility is projected to reach capacity approximately 41 years after expansion begins.

Project activities would result in the loss of 53.32 acres of suitable grassland habitat for the covered species (including 1.77 acres of vernal pool wetlands) and an additional loss of 77.58 acres of agricultural habitat which is not likely to function as kit fox denning habitat, but which can be used by kit foxes for foraging or movement.

Western burrowing owls and the covered plant species were observed in the project area. No other covered animal species was known to occur at the time of reconnaissance surveys, although suitable habitat exists and the site may be used for foraging and/or reproduction. The construction and operation of the facilities is unlikely to result in direct mortality or injury of San Joaquin kit foxes, but may result in take in the form of harassment.

The Applicant proposes to implement specific on-site measures to avoid and minimize take and associated adverse project impacts to covered species. The Applicant also proposes to mitigate for take by establishing two permanent conservation areas; deed restrictions will be established on 158.26 acres of grassland (which include 5.35 acres of vernal pools) and on 124.95 acres of agricultural habitat suitable for kit fox foraging. Activities associated with management of the conservation areas include survey activities, possible fire management activities, and ongoing farming activities on the agricultural area. Additionally, a research program will be implemented to study the structure, dynamics, and ecology of alkali scalds. This research program has been accepted by the Service as an appropriate action for the adaptive management of vernal pool fairy shrimp and mid-valley fairy shrimp due to the uncertainty regarding the species' presence and life history in the alkali pool type found in the project area. This research is designed to determine occurrence of fairy shrimp species in this habitat type and study the physical nature of alkali scalds to identify the specific parameters that promote or restrict species occurrence.

The Service's Environmental Assessment considers the environmental consequences of three alternatives. The Proposed Project Alternative consists of the issuance of the incidental take permit and implementation of the Plan and Implementing Agreement for the Applicant's proposed project which includes the activities described above. This preferred alternative would take 53.32 acres of grassland habitat and 77.58 acres of agricultural habitat. Mitigation for this alternative includes on-site preservation of 158.26 acres of grassland habitat and 124.95 acres of agricultural habitat. Under this alternative, the Applicant also proposes to implement a research program informing the adaptive management of vernal pool shrimp in alkali pool types.

Under Alternative 2, a Section 10 permit would be issued and the multi-species Plan and Implementing Agreement would be implemented for an alternative proposed project which comprises the same components as described in the Proposed Project Alternative except for the implementation of an alkali scalds research program. Because the research program itself would not affect any of the resources analyzed in the EA, the impacts associated with implementation of Alternative 2 are identical to those described for the Proposed Project Alternative.

Under the No Action alternative, no Section 10 permit would be issued and the multi-species HCP would not be implemented. This alternative would result in the closure of the Woodville landfill facility and implementation of a final landfill closure plan in accordance with applicable regulations. The Woodville landfill would permanently close and no conservation areas would be established. The closure plan would require the establishment of a borrow area for the dirt necessary to properly

build and close the existing landfill, which would result in the loss of special-status plant species and suitable habitat for covered animal species. Groundwater monitoring activities could also adversely affect vegetation and wildlife. No conservation areas would be protected.

A number of other project alternatives that would meet the County's need to provide increased refuse disposal were also considered and eliminated for reasons described in the Environmental Assessment.

This notice is provided pursuant to section 10(a) of the Act and the regulations of the National Environmental Policy Act (NEPA) of 1969 (40 CFR 1506.6). All comments that we receive, including names and addresses, will become part of the official administrative record and may be made available to the public. We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the Act. If we determine that those requirements are met, we will issue a permit to the Applicant for the incidental take of the covered species. We will make our final permit decision no sooner than 60 days from the date of this notice.

Dated: July 31, 2006.

Ken McDermond,

Deputy Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E6–12592 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Preparation of a Supplemental Environmental Impact Statement/ Environmental Impact Report in Support of an Application for the Issuance of an Incidental Take Permit to the Imperial Irrigation District, Imperial County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA), the Fish and Wildlife Service (Service) advises the public that we intend to gather information necessary to prepare a Supplemental Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the consideration of a Habitat Conservation Plan and application for an incidental take permit, pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 as amended (ESA), including consideration of conservation measures for State-listed species to address the effects of the conservation and transfer of water from Imperial Irrigation District (IID) to the San Diego County Water Authority (SDCWA) and Coachella Valley Water District (CVWD). The Habitat Conservation Plan will cover a broad array of activities including: water conservation, water conveyance and drainage, operation and maintenance of the water conveyance system, system improvements, miscellaneous activities, and third party activities required to achieve the conservation and transfer of up to 200,000 acre-feet of water per year to the SDCWA and 100,000 acre-feet per year to the CVWD, and to meet the voluntary cap on IID's water use of 3.1 million acre-feet per year from the Colorado River. The IID (Applicant) intends to request an incidental take permit for up to 96 listed and unlisted species of concern under specific provisions of the permit. In the case of unlisted species, the permit would provide coverage should these species be listed in the future.

The Service provides this notice pursuant to the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the NEPA. The purpose of the Supplemental EIS/EIR is to provide any additional environmental assessment required to evaluate additions and changes to the Water Conservation and Transfer Project (Project) that have occurred since the approval of the Final EIS/EIR by the Bureau of Reclamation (Federal lead agency for the Project) and to support the application for an incidental take permit pursuant to section 10(a)(1)(B) of the ESA by the Service. The Service is seeking suggestions and information from other agencies, affected tribes, and the public on the scope of issues to be considered in preparation of the Supplemental EIS/EIR. To satisfy both Federal and State environmental policy requirements, the Service as Federal lead agency and the IID as State lead agency under the California Environmental Quality Act (CEQA) are conducting this joint scoping process for the preparation of the supplemental environmental document.

DATES: The Service requests all scoping comments on this notice be received on or before September 5, 2006.

ADDRESSES: Written comments should be addressed to Ms. Therese O'Rourke, Assistant Field Supervisor, Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011. You may also send comments by facsimile to telephone 760–431–5902.

FOR FURTHER INFORMATION CONTACT: Ms. Carol Roberts, Division Chief/Salton Sea Coordinator, at the above address, or by phone at 760–431–9440.

SUPPLEMENTARY INFORMATION: IID is a customer-owned utility that provides irrigation water and power to the lower southeastern portion of the California desert. IID was established in 1911 to deliver Colorado River water to lands within the Imperial Valley, California, for agricultural, domestic, industrial, and other beneficial uses. IID maintains a complex system of delivery canals, laterals, and drains that serve over 450,000 acres of intensive agriculture. Agricultural drainage flows into the New and Alamo Rivers and into the Salton Sea, a designated repository for agricultural drainage.

On April 29, 1998, IID and SDCWA executed an agreement for the conservation and transfer of up to 300,000 acre-feet of Colorado River water per year from IID to SDCWA. Subsequent negotiations with other Colorado River water rights holders in California resulted in the transfer amount to SDCWA being reduced to a maximum of 200,000 acre-feet per year with the other 100,000 acre-feet per year going to the CVWD under the Quantification Settlement Agreement. As part of this agreement, IID is implementing a conservation program that includes the participation of Imperial Valley landowners and tenants so that on-farm as well as system-based conservation can be implemented to achieve the required level of conservation. This transfer is a key part of the California 4.4 Plan that will result in California water agencies using only their 4.4 million acre-foot apportionment of the Colorado River. California has been diverting up to 5.2 million acre-feet of Colorado River water per year.

IID, as the CEQA lead agency, and the Bureau of Reclamation, as the NEPA lead agency, jointly issued a Draft EIR/EIS for the Project dated January 2002. The Bureau of Reclamation prepared and filed with the Environmental Protection Agency an integrated Final EIR/EIS dated October 2002. Prior to the Secretary of the Interior's issuance of a Record of Decision on October 10, 2003, relating to the Federal actions associated with the Project, the Bureau of Reclamation approved an Environmental Evaluation dated October 2003 that evaluated certain changes to the Project subsequent to their Final EIR/EIS.

A joint Supplemental EIS/EIR is being prepared on behalf of the Service and IID to address the impacts associated with permit issuance for the covered activities included in the Habitat Conservation Plan. The consulting firm, CH2MHill has been selected to prepare the document. Additional information on the previously approved Project may be found in the Bureau of Reclamation's project documents including the amended Notice of Intent published at 65 FR 66557 (November 6, 2000), the Notice of Availability for the Draft Environmental Impact Report/ Environmental Impact Statement (67 FR 3732, January 25, 2002), and the Notice of Availability for the Final Environmental Impact Report/ Environmental Impact Statement (67 FR 68165, November 8, 2002), and the Draft and Final EIR/EISs themselves.

Section 9 of the ESA and the Service regulations prohibit "take" of threatened or endangered fish and wildlife (16 U.S.C. 1538). Take means harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or attempt to engage in such conduct (16 U.S.C. 1532). Harm may include significant habitat modification that actually kills or injures fish and/or wildlife by significantly impairing essential behavior patterns including breeding, feeding, and sheltering [50 CFR 17.3(c)]. The Service, however, may issue permits to take endangered and/or threatened species of fish and wildlife incidental to, and not the purpose of, otherwise lawful activities [50 CFR 17.22 and 17.32]. Take authorization addressing water conservation and transfer activities for the federally-listed species only was previously provided through the Service's Biological Opinion on the Bureau of Reclamation's Voluntary Fish and Wildlife Conservation Measures and Associated Conservation Agreements with the California Water Agencies.

Take of listed plant species is not prohibited under the ESA and cannot be authorized under an incidental take permit. We propose to include plant species on the permit in recognition of the conservation benefits provided for them under the plan. All species included on the permit would receive assurances under the Service's "No Surprises" regulation [50 CFR 17.22(b)(5) and 17.32(b)(5)].

We propose to issue a permit to IID authorizing the take of listed species to the otherwise lawful conservation and transference of up to 200,000 acre-feet of Colorado River water per year to the SDCWA, conservation and transference of up to 100,000 acre-feet of Colorado River water per year to the CVWD, additional conservation necessary to achieve IID's cap of 3.1 million acre-feet per year on their use of Colorado River water, and operations and maintenance activities required to keep the water conveyance and drainage system functioning within the approximately 450,000 acres of agriculture in their Imperial Valley water service area.

The permit application will include a Habitat Conservation Plan and an Implementing Agreement that define the responsibilities of all parties under the Plan. IID's Habitat Conservation Plan will include measures to minimize and mitigate impacts to covered species resulting from the covered activities. These measures are provided in a suite of conservation strategies designed to address the various vegetation communities and aquatic habitats used by covered species in the Plan area. In the Supplemental EIS/EIR we will consider IID's proposed Habitat Conservation Plan (Proposed Action Alternative) and the No Action Alternative (no permit issuance). The Bureau of Reclamation's Draft and Final EIR/EIS previously considered the impacts of a range of water conservation and transfer alternatives on federally listed species. The Supplemental EIS/EIR will address specific changes that have been incorporated since the issuance of the Bureau of Reclamation's Final EIR/EIS and any anticipated changes in environmental impacts on biological resources, land use, air quality, water quality, and other environmental resources that could occur directly or indirectly with the implementation of the Habitat Conservation Plan.

Currently, the IID intends to request a permit authorizing the incidental take of 86 animal species including the following nine federally listed species: desert pupfish (*Cyprinodon macularius*), razorback sucker (*Xyrauchen texanus*), desert tortoise (*Gopherus agassizii*), bald eagle (*Haliaeetus leucocephalis*), southwestern willow flycatcher (*Empidonax traillii extimus*), brown pelican (*Pelecanus occidentalis*), Yuma clapper rail (*Rallus longirostris yumanensis*), California least tern (*Sterna antillarum browni*), and least Bell's vireo (*Vireo bellii pusillus*). The permit also would cover ten plant species including one federally listed species, Peirson's milk-vetch (*Astragalus magdalenae var. peirsonii*). We will evaluate the permit application, the Habitat Conservation Plan, Implementing Agreement, Supplemental EIS/EIR, associated documents, and comments submitted thereon to determine whether the application meets the requirements of section 10(a)(1)(B) of the ESA. If we determine that the requirements have been met, we will issue a permit for the incidental take of covered listed species.

Environmental review of the Supplemental EIS/EIR will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4321 *et seq.*), its implementing regulations (40 CFR parts 1500–1508), other applicable regulations, and Service procedures for compliance with those regulations. We are publishing this notice pursuant to section 10(a) of the ESA and Service regulations for implementing the NEPA (40 CFR 1501.7). The purpose of this notice is to obtain suggestions and information from other agencies, affected tribes, and the public regarding the proposed action. Written comments are invited to ensure that the full range of issues related to the proposed action is identified. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

Dated: July 31, 2006.

Ken McDermond,

Deputy Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E6–12593 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ–420–06–1640–BH–AZZG; 8364]

Modification of Closure of Selected Public Lands in Pima County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This order restricts all public use on a year-round basis on approximately 289 acres of public lands in the Saginaw Hill area administered by the Bureau of Land Management (BLM), Tucson Field Office, Arizona. Existing management designations established in the Phoenix Resource Management Plan and Final Environmental Impact Statement, dated September 1989, remain unchanged. This order modifies the restriction order published in the **Federal Register**, Vol. 70, No. 68, Monday, April 11, 2005, page 18420. This order is issued under the authority of 43 CFR 8364.1 and affects the following public lands:

Gila and Salt River Meridian, Arizona

T. 15 S., R. 12 E.,

Sec. 11, N½NE¼, SE¼NE¼, N½SW¼NE¼, SE¼SW¼NE¼, portion of SE¼ north of the pipeline right-of-way;
Sec. 12, NW¼NW¼, SW¼NW¼, portion of W½SE¼NW¼.

The area described contains approximately 289 acres.

DATES: *Effective Dates:* The use restriction is effective immediately on date of this publication in the **Federal Register**, and shall remain in effect until rescinded or modified by the Authorized Officer. Due to necessity, fencing and signage in the area has been put in place prior to this publication.

SUPPLEMENTARY INFORMATION: Current regulations and management designations allow public use of BLM-administered lands in the Saginaw Hill area. The affected lands contain substances that may compromise public health and safety, such as waste piles containing high levels of arsenic and lead that result from historic mining operations, and are naturally occurring. The public uses the affected area for a variety of recreational activities, exposing these visitors to hazardous substances that may potentially have harmful effects. The restriction prohibiting public entry and use within the affected areas will help mitigate public health and safety threats. This order expands the area restricted under the April 11, 2005, notice. Expansion of the restricted area is necessary to secure several sites more recently identified that contain high levels of arsenic and lead, and provide a safety zone while testing and remediation of the area takes place. The Saginaw Hill area described herein will be subject to the following use restrictions:

1. Unless otherwise authorized, no person shall enter or remain in the restricted area.

2. Persons who are exempt from the restriction include:

(a) Any Federal, State, or local officers engaged in fire, emergency or law enforcement activities;

(b) BLM employees engaged in official duties; and

(c) Persons specifically authorized by the BLM to enter the restricted area.

The area affected by this order will be posted with appropriate regulatory signs and/or physical barriers. Additional information is available in the Tucson Field Office at the address given below.

Penalties: On all public lands, under section 303(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1733(a), 43 CFR 8360.0–7 and 43 CFR 9212.4, any person who violates any of these supplementary rules, closures or restrictions on public lands within the boundaries established in the rules may be tried before a United States Magistrate and fined no more than $1,000.00 or imprisoned for no more than 12 months, or both. Such violations may also be subject to the enhanced fines provided for by 18 U.S.C. 3571 (not to exceed $100,000 and/or imprisonment not to exceed 12 months).

FOR FURTHER INFORMATION CONTACT: Field Office Manager at the Tucson Field Office, 12661 East Broadway Boulevard, Tucson, Arizona 85748–7208; telephone (520) 258–7200.

Dated: July 10, 2006.

Patrick Madigan,

Field Office Manager.

[FR Doc. E6–12609 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–190–06–1220–PN]

Notice of Seasonal Closure of Public Lands

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of seasonal closure of certain public lands referred to as the Serpentine Area of Critical Environmental Concern (ACEC), located in the southern portion of San Benito County and western Fresno County, Central Coast region of California, to motorized and non-motorized recreation use.

SUMMARY: Pursuant to 43 Code of Federal Regulations (CFR) subpart 8364, notice is hereby given that the Bureau of Land Management (BLM), Hollister Field Office will seasonally restrict public access to certain BLM-administered public lands during the period of June 1, 2006 through October 15, 2006. This seasonal closure is needed to ensure visitor safety and protect public land users from potential health risks associated with naturally occurring asbestos found within the closure area.

This seasonal closure affects public lands located within the 30,000-acre Serpentine Area of Critical Environmental Concern (ACEC) situated within the Clear Creek Management Area (CCMA). Public access within this area will only be allowed on county roads and the following route segments: R011 to Wright Mountain Gate, R016, T153 from the junction of R011 to San Carlos peak, and R02 to the junction of T107. Limited non-motorized use will be allowed adjacent to the routes identified above, or by written authorization from the Hollister Field Manager. Personnel of the BLM, California Department of Fish and Game, U.S. Fish & Wildlife Service, and law enforcement, fire, and emergency personnel are exempt from this closure only when performing official duties. Operators of communication facilities may perform maintenance activities; livestock operators may perform permitted activities, and private in-holders may access their private property, as approved.

DATES: This seasonal closure will be effective from June 1, 2006 through October 15, 2006.

FOR FURTHER INFORMATION CONTACT: Rick Cooper, Field Office Manager, BLM, Hollister Field Office, 20 Hamilton Court, Hollister, California 95023. Telephone: 831–630–5010 Fax: 831–630–5055, during regular business hours, 7:30 a.m. to 4 p.m., Monday through Friday, except holidays.

SUPPLEMENTARY INFORMATION: The CCMA is a popular location for off-highway vehicle (OHV) recreation. A variety of other recreation activities also occur within the CCMA, including hunting, rock-hounding, wildlife watching, and hiking. This is a unique geological area with serpentine soils and a suite of rare plants and animals. The type and level of OHV use also must be carefully managed to create an environment that promotes the health and safety of visitors.

BLM will be restricting public access during the dry season within the CCMA, in response to studies being conducted by the U.S. Environmental Protection Agency (EPA), which are analyzing the levels of exposure to naturally occurring asbestos for various recreation activities at the CCMA. Studies conducted by EPA in September and November of 2004 found elevated levels of airborne asbestos fibers present during various recreation activities. This action is also in accordance with the 1995 Final Environmental Impact Statement (FEIS) and Resource Management Plan Amendment for the CCMA.

The soil moisture during the time period of June through October is at the lowest point and therefore the dust generating potential and release of naturally occurring airborne asbestos is greatest. Analysis of airborne asbestos exposure reflected in EPA's Technical Memorandum issued February 5, 2005, titled "Human Health Risk Assessment—Asbestos Air Sampling Clear Creek Management Area, California," based on samples collected September 15, 2004, indicate a higher risk from airborne asbestos exposure in

CCMA than EPA and BLM previously thought. Based on preliminary EPA results, use restrictions in CCMA may be needed to reduce risk to the public from asbestos exposure, particularly during the dry season.

Closure Order

Pursuant to 43 CFR 8364.1, notice is hereby given that the BLM is seasonally restricting access to portions of public lands within the Clear Creek Management Area (CCMA) located in the southern portion of San Benito County and western Fresno County, California. Public access, including motorized and non-motorized recreation use is restricted on public lands within the Serpentine ACEC from June 1, 2006 through October 15, 2006. Limited non-motorized use will be allowed adjacent to the routes identified in this Closure Order. These lands are located in the Mount Diablo Meridian in portions of T.17 S., R. 11 E.; T. 17 S., R. 12 E.; T. 18 S., R 11 E.; T. 18 S., R. 12 E.; T. 18 S., R. 13 E.; T. 19 S., R. 13 E.

This seasonal closure is necessary to ensure visitor safety and protect public land users from potential health risks associated with naturally occurring asbestos found within the restricted area. Dry soil conditions and high dust generating potential from public use activities during this time period create the greatest hazard and risk associated with exposure to asbestos.

Except for travel on San Benito County roads and the following route segments: R011 to Wright Mountain Gate, R016, T153 from the junction of R011 to San Carlos Peak, and R02 to the junction of T107, all public access and motorized vehicle travel within the Serpentine ACEC will be allowed only by written authorization of the Hollister Field Manager. The following persons are exempt from the identified restrictions:

(1) Federal, State, or local law enforcement officers, while engaged in the execution of their official duties.

(2) BLM personnel or their representatives while engaged in the execution of their official duties.

(3) Any member of an organized rescue, fire-fighting force, or emergency medical services organization while in the performance of their official duties.

(4) Any member of a Federal, state, or local public works department while in the performance of an official duty.

(5) Any person in receipt of a written authorization of exemption obtained from the authorized officer from the Hollister Field Office.

(6) Private landowners with in-holdings within the restricted area who have a responsibility or need to access their property, and persons with valid existing rights-of-way, mining claims, or lease operations, or representatives thereof.

During the closure period, the area will be clearly posted. Closure signs will be posted at main entry points to all locations affected by this Notice. Maps of the area will be posted with this notice at key locations that provide access into the closure areas, and may be obtained with further information at the Hollister Field Office, 20 Hamilton Court, Hollister, California 95023.

Seasonal closure orders may be implemented as provided in 43 CFR, subpart 8364.1. Violations of this closure are punishable by a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months.

Dated: April 21, 2006.

Rick Cooper,

Hollister Field Office Manager.

[FR Doc. E6–12640 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–220–1220–MA]

Notice of Continuation of Temporary Closure of Castle Rocks State Park and Castle Rocks Inter-Agency Recreation Area Near Almo, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management announces the continuation of temporary closure of certain public lands in Cassia County. This closure prohibits bolting and placement of fixed anchors to rocks, and overnight camping. This is to allow further time for analysis of a fixed anchor management plan.

DATES: A temporary closure in this area is now in place (70 FR 33651, June 24, 2005), currently set to expire on June 1, 2006. This notice will continue the closure for another year, to remain in effect through June 1, 2007.

Effective Date: This extension of closure is effective June 1, 2006 and shall remain effective until June 1, 2007.

FOR FURTHER INFORMATION CONTACT: Dennis Thompson, Burley Field Office, 200 South 15 East, Burley, ID. 83318. Telephone (208) 677–6641.

SUPPLEMENTARY INFORMATION: The public lands affected by this closure are all lands administered by the BLM within T. 15 S., R. 24 E., Sec. 8, Boise Meridian. This area is known as Castle Rocks State Park and Castle Rocks Inter-Agency Recreation Area. A closure notice including time periods will be posted near the entry point at the Castle Rocks Ranch House.

Authority: This notice is issued under the authority of the 43 CFR 8364.1. Violations of this closure are punishable by a fine not to exceed $1,000 or imprisonment not to exceed 12 months. Persons who are administratively exempt from the closure contained in this notice include: any Federal, State or local officer or employee acting within the scope of their duties, members of any organized rescue or fire-fighting force in the performance of an official duty, and any person holding written authorization from the BLM.

Dated: April 17, 2006.

Kenneth E. Miller,

Burley Field Office Manager.

[FR Doc. E6–12636 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WO–260–09–1060–00–24 1A]

Correction to Notice of Call for Nominations for the Wild Horse and Burro Advisory Board

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction to Notice of Call for Nominations for the Wild Horse and Burro Advisory Board. This notice was previously published in the **Federal Register**: Vol. 71, No. 114/Wednesday, June 14, 2006.

SUMMARY: The **Federal Register** Notice has an incorrect date for nominations to be submitted to the National Wild Horse and Burro Advisory Board. The corrected notice extends the date to September 5, 2006. The nominations should be submitted to the National Wild Horse and Burro Program, Bureau of Land Management, Department of the Interior, P.O. Box 12000, Reno, Nevada 89520–0006, Attn: Ramona DeLorme: fax (775) 861–6711.

FOR FURTHER INFORMATION CONTACT: Don Glenn, Acting Division Chief, Wild Horse and Burro Group, (202) 452–5082. Individuals who use a telecommunications device for the deaf (TDD) may reach Ms. DeLorme at any time by calling the Federal Information Relay Service at 1 (800) 877–8339.

Dated: July 13, 2006.

Carolyn McClellan,

Acting Deputy Assistant Director, Renewable Resources and Planning.

[FR Doc. E6–12606 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–923–06–5870–HN]

Request for Public Nomination of Qualified Properties for Potential Purchase by the Federal Government in the State of Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of request for public nomination of qualified properties for potential purchase by the Federal Government in the State of Colorado.

SUMMARY: In accordance with the Federal Land Transaction Facilitation Act of 2000 (43 U.S.C. 2303) (FLTFA), this notice provides the public the opportunity to nominate lands within the State of Colorado for possible acquisition by the Federal Government acting through the federal agencies identified below. Such lands must be (1) inholdings within a federally designated area or (2) lands that are adjacent to federally designated areas and contain exceptional resources.

DATES: Nominations may be submitted at any time following the publication of this notice.

ADDRESSES: Nominations should be mailed to the attention of the FLTFA Program Manager for the agency listed below having jurisdiction over the pertinent federally designated area:

- Bureau of Land Management, Colorado State Office (CO–923), 2850 Youngfield St., Lakewood, CO 80215–7093.
- National Park Service, Intermountain Region, P.O. Box 728, Santa Fe, NM 87504–0728.
- U.S. Fish and Wildlife Service, Mountain Prairie Region, P.O. Box 25486, DFC, Lakewood, CO 80225–0486.
- USDA Forest Service, Rocky Mountain Region, P.O. Box 25127, Lakewood, CO 80225.
- USDA Forest Service, Intermountain Region, 324 25th St., Ogden, UT 84401.

FOR FURTHER INFORMATION CONTACT: John D. Beck, FLTFA Program Manager, Bureau of Land Management (BLM), Colorado State Office (CO–932), 2850 Youngfield St., Lakewood, CO 80215–7093, (303) 239–3882, or e-mail *john_beck@blm.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the FLTFA, the four agencies noted above are offering to the public at large the opportunity to nominate lands in the State of Colorado that meet FLTFA eligibility requirements for possible Federal acquisition. Under the provisions of FLTFA, only the following lands are eligible for nomination: (1) Inholdings within a federally designated area, or (2) lands that are adjacent to federally designated areas and contain exceptional resources.

An inholding is any right, title, or interest held by a non-Federal entity, in or to a tract of land that lies within the boundary of a federally designated area.

A federally designated area is land that on July 25, 2000, was within the boundary of: a unit of the National Park System; a unit of the National Wildlife Refuge System; an area of the National Forest System designated for special management by an act of Congress; a national monument, national conservation area, national riparian conservation area, national recreation area, national scenic area, research natural area, national outstanding natural area, national natural landmark, or an area of critical environmental concern managed by the Bureau of Land Management; a wilderness or wilderness study area; or a component of the Wild and Scenic Rivers System or National Trails Systems. If you are not sure whether a particular area meets the statutory definition of a federally designated area in FLTFA, you should consult the statute or contact the BLM at the above address.

An exceptional resource refers to a resource of scientific, natural, historic, cultural, or recreational value that has been documented by a Federal, State, or local government authority, and for which there is a compelling need for conservation and protection under the jurisdiction of a Federal agency in order to maintain the resource for the benefit of the public.

Nominations meeting the above criteria may be submitted by any individual, group, or governmental body. If submitted by a party other than the landowner, the landowner must also sign the nomination to confirm the landowner's willingness to sell. Pursuant to FLTFA, nominations will only be considered eligible by the concerned Federal agencies if: (1) The nomination package is complete; (2) acquisition of the nominated land or interest in land would be consistent with an agency's approved land use plan; (3) the land does not contain a hazardous substance and is not otherwise contaminated and would not be difficult or uneconomic to manage as Federal lands; and (4) acceptable title can be conveyed in accordance with Federal title standards. Priority will be placed on nominations for areas where there is no local or tribal government objection to Federal acquisition. Nominations may be made at any time following publication of this notice and will continue to be accepted for consideration during the life of the FLTFA, which ends on July 24, 2010, unless extended by Act of Congress.

A nomination expresses only a landowner's good faith desire to sell. It does not impose a legally enforceable commitment on either the landowner or the Federal Government. A landowner may withdraw a nomination at any time by, in writing, so notifying the Program Manager who initially received the nomination.

Further information, including the required contents of a nomination package and details of the Colorado Interagency Implementation Agreement, may be obtained by contacting John Beck at the aforementioned address and phone number.

Dated: June 9, 2006.

Douglas M. Koza,

Associate State Director, Colorado.

[FR Doc. E6–12611 Filed 8–3–06; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0080]

Civil Division; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Annuity Broker Qualification Declaration Form.

The Department of Justice (DOJ), Civil Division, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for "sixty days" until October 3, 2006. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Director, Communications Office; Civil Division; Department of Justice; Washington, DC 20530.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of

information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension, without change, of a currently approved collection.

(2) *Title of the Form/Collection:* Annuity Broker Qualification Declaration Form.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Department of Justice, Civil Division.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals. This declaration is to be submitted annually to determine whether a broker meets the qualifications to be listed as an annuity broker pursuant to Section 11015(b) of Public Law 107–273.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 400 respondents will complete the form annually within approximately 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 400 total annual burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: August 1, 2006.

Lynn Bryant,

Department Clearance Officer, Department of Justice.

[FR Doc. 06–6697 Filed 8–3–06; 8:45 am]

BILLING CODE 4410–12–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–273N]

Solicitation of Information on the Use of Tryptamine-Related Compounds

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of request for information.

SUMMARY: The DEA is soliciting information on substances that are related in chemical structure to tryptamine (see **SUPPLEMENTARY INFORMATION**). The Controlled Substances Act (CSA), in Title 21 of the United States Code (U.S.C. 812(c) Schedule I (Title 21 of the Code of Federal Regulations (CFR 1308.11(d)), lists certain tryptamines as Schedule I controlled substances. Some tryptamines that are not controlled under the CSA produce central nervous system effects that are similar to tryptamines that are controlled under the CSA. DEA is requesting information to help determine the impact on business if these substances were to be placed under control in the CSA.

DATES: Written comments must be postmarked, and electronic comments must be sent, on or before October 3, 2006.

ADDRESSES: To ensure proper handling of comments, please reference "Docket No. DEA–273N" on all written and electronic correspondence. Written comments being sent via regular mail should be sent to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Attention: DEA Federal Register Representative/ODL. Written comments sent via express mail should be sent to DEA Headquarters, Attention: DEA Federal Register Representative/ODL, 2401 Jefferson-Davis Highway, Alexandria, VA 22301. Comments may be directly sent to DEA electronically by sending an electronic message to *dea.diversion.policy@usdoj.gov*. Comments may also be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site. DEA will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file format other than those specifically listed here.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537; Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Tryptamine is a compound in which the chemical structure can be described as indole substituted at the three position with an 2-aminoethyl chain. Although tryptamine itself is not a controlled substance, its chemical structure constitutes the skeletal makeup of tryptamines listed in Schedule I of the CSA, which are classified as hallucinogenic substances.

Tryptamine is sometimes substituted on the indole ring or the 2-aminoethyl chain or both with various substituents. Title 21 CFR 1308.11(d) lists specific substituted tryptamines in Schedule I. Also included in Schedule I are the salts, isomers, and salts of isomers of the listed tryptamines. The term isomer, as used in this section, means the optical, geometric, and positional isomers.

Individuals have published detailed methods of synthesis for substituted tryptamines and have reported pharmacological effects based on user experiences. Law enforcement personnel encounter such tryptamines, but because they are substituted differently than those listed or described in the CSA, they are not subject to direct control in Schedule I. However, some of these substances can be treated as Schedule I controlled substance analogues if intended for human consumption (21 U.S.C. 802(32); § 813).

DEA is soliciting information on (1) The commercial uses for tryptamines, (2) activities involving research and development, (3) tryptamines as intermediates or analytical standards, (4) import and domestic sources for tryptamines, and (5) any planned or anticipated uses for tryptamines. DEA invites interested persons to provide any information on the uses of tryptamines in industry, academia, research and development, or other applications. Both quantitative and qualitative information is sought.

Although information is requested for all tryptamine substances regardless of substitutions, DEA is particularly interested in tryptamines that meet one

or more of the following conditions: (a) Has a secondary or tertiary amine formed by the substitution on the nitrogen atom of the 2-aminoethyl chain by various alkyl groups, whether in chain or ring form (for example, N-alkyltryptamine, N,N-dialkyltryptamine, N,N-tetramethylenetryptamine), (b) has an alkyl substitution on the alpha position of the 2-aminoethyl chain, and/or (c) has substituents on the indole ring system, including, but not restricted to, various alkyl chains, halogens, hydroxyl, alkoxy, acetyl, or alkylthio groups, at one or more positions except the one (indole nitrogen) position. DEA is especially interested in learning of the uses of the following tryptamines.

2-alpha-dimethyltryptamine
4-hydroxy-N,N-diisopropyltryptamine
4-hydroxy-N,N-dipropyltryptamine
4-hydroxy-N,N-tetramethylenetryptamine
4-hydroxy-N-isopropyl-N-methyltryptamine
4-hydroxy-N-methyl-N-propyltryptamine
5,6-dimethoxy-N-isopropyl-N-methyltryptamine
5-methoxy-alpha,N-dimethyltryptamine
5-methoxy-alpha-methyltryptamine
5-methoxy-N,N-dimethyl-2-methyltryptamine
5-methoxy-N,N-dimethyltryptamine
5-methoxy-N,N-tetramethylenetryptamine
5-methoxy-N-methyltryptamine
6-methoxy-1-methyl-1,2,3,4-tetrahydro-beta-carboline
7-methoxy-1-methyl-1,2,3,4-tetrahydro-beta-carboline
9,10-didehydro-6-allyl-N,N-diethylergoline-8-beta-carboxamide
9,10-didehydro-6-propyl-N,N-diethylergoline-8-beta-carboxamide
9,10-didehydro-N,N,6-triethylergoline-8-beta-carboxamide
alpha,N-dimethyltryptamine
N,N-dibutyltryptamine
N,N-dibutyl-4-hydroxytryptamine
N,N-diethyl-2-methyltryptamine
4-hydroxy-N,N-diethyltryptamine
N,N-diethyl-5-methoxytryptamine
N,N-diisopropyl-4,5-methylenedioxytryptamine
N,N-diisopropyl-5,6-methylenedioxytryptamine
N,N-diisopropyltryptamine
N,N-dimethyl-2-methyltryptamine
N,N-dimethyl-4,5-methylenedioxytryptamine
N,N-dimethyl-4-hydroxytryptamine
N,N-dimethyl-5,6-methylenedioxytryptamine
N,N-dimethyl-5-methylthiotryptamine
N,N-dipropyltryptamine
N,N-tetramethylenetryptamine
N-butyl-N-methyltryptamine
N-ethyl-4-hydroxy-N-methyltryptamine
N-ethyl-N-isopropyltryptamine
N-ethyltryptamine
4-methoxy-N-methyl-N-isopropyltryptamine
5-methoxy-N-methyl-N-isopropyltryptamine
N-isopropyl-N-methyl-5,6-methylenedioxytryptamine
N-isopropyl-N-methyltryptamine
N-methyltryptamine
4-acetoxy-N-methyl-N-isopropyltryptamine
4-acetoxy-N,N-diisopropyltryptamine
4-acetoxy-N,N-dipropyltryptamine
4-acetoxy-N,N-diethyltryptamine
5-methoxy-N,N-diallyltryptamine
5-methoxy-N-monoallyltryptamine
5-methoxy-N-methyl-N-isopropyltryptamin
N-methyl-N-isopropyltryptamine
4-hydroxy-N,N-diethyltryptamine
5-methoxy-N,N-diethyltryptamine

Such information may be submitted to the Drug and Chemical Evaluation Section and is requested by October 3, 2006. Information designated as confidential or proprietary will be treated accordingly. Confidential business information is protected from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4)(FOIA) and the Department of Justice procedures set forth in 28 CFR 16.8.

Dated: July 28, 2006.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. E6–12599 Filed 8–3–06; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,882]

APA Enterprises, Inc., Aberdeen, SD; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment Assistance applicable to TA–W–58,882, which was published in the **Federal Register** on April 17, 2006 (71 FR 19753–19756) in FR Document E6–5658.

This rescinds the certification of eligibility for workers of TA–W–58,882, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19755 in the first column, the second TA–W–number listed.

The Department appropriately published in the **Federal Register** April 17, 2006, page 19755, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,882. The notice appears on page 19755 in the third column, the thirteenth TA–W–number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12614 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,819]

Bentwood Furniture, Inc., Grants Pass, OR; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment Assistance applicable to TA–W–58,819, which was published in the **Federal Register** on April 13, 2006 (71 FR

This rescinds the certification of eligibility for workers of TA–W–58,819, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19209 in the first column, the sixteenth TA–W–number listed.

The Department appropriately published in the **Federal Register** April 13, 2006, page 19210, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,819. The notice appears on page 19210 in the third column, the fifth TA–W–number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12619 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,759]

Buckingham Galleries, New Hartford, CT; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment

Assistance applicable to TA–W–58,759, which was published in the **Federal Register** on April 13, 2006 (71 FR 19208–19210) in FR Document E6–5518, Billing Code 4510–30–P.

This rescinds the certification of eligibility for workers of TA–W–58,759, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19209 in the first column, the twelfth TA–W number listed.

The Department appropriately published in the **Federal Register** April 13, 2006, page 19210, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,759. The notice appears on page 19210 in the third column, the fourth TA–W–number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12616 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,861]

Campbell Hausfeld Leitchfield, KY; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment Assistance applicable to TA–W–58,861, which was published in the **Federal Register** on April 13, 2006 (71 FR 19208–19210) in FR Document E6–5518, Billing Code 4510–30–P.

This rescinds the certification of eligibility for workers of TA–W–58,861, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19209 in the first column, the eighth TA–W-number listed.

The Department appropriately published in the **Federal Register** April 13, 2006, page 19210, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,861. The notice appears on page 19210 in the third column, the eighth TA–W–number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12617 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,753]

Citation Corporation, Camden, TN; Notice of Negative Determination on Remand

On January 23, 2006, the U.S. Court of International Trade (USCIT) granted the Department of Labor's motion for a second voluntary remand in *Former Employees of Citation Corporation* v. *Elaine Chao, U.S. Secretary of Labor,* Court No. 04–00198.

On December 1, 2003, the Tennessee AFL–CIO (Union) filed a petition for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) on behalf of workers of Citation Corporation, Camden, Tennessee producing ductile iron castings (subject worker group). The Department of Labor (Department) terminated the investigation for TA–W–53,753 because no new information or change in circumstance was evident which would have resulted in the reversal of a prior negative determination applicable to the same worker group (TA–W–51,871). The Notice of Termination was issued on December 11, 2003. The Notice was published in the **Federal Register** on January 7, 2004 (69 FR 940).

After the Department dismissed the Union's request for reconsideration (April 6, 2004; 69 FR 18107), the Union appealed to the USCIT for review.

During the first remand investigation, the Department determined that the worker group and the circumstances of the workers' separations in TA–W–51,871 and TA–W–53,753 were the same and that termination of the investigation of TA–W–53,753 was proper because a final decision was issued in TA–W–51,871. The Notice of Negative Determination on Reconsideration on Remand was issued on March 9, 2005 and published in the **Federal Register** on March 28, 2005 (70 FR 15646).

On January 23, 2006, the USCIT directed the Department to conduct a second remand investigation to determine whether the subject worker group is eligible to apply for TAA.

To determine whether the subject worker group is eligible to apply for TAA, the Department conducted an investigation to ascertain if the criteria set forth in 29 CFR 90.16(b) was met:

(1) A significant number or proportion of the workers in such workers' firm (or appropriate subdivision of the firm) have become, or are threatened to become, totally or partially separated;

(2) Sales or production, or both, of such firm or subdivision have decreased absolutely; and

(3) Increases (absolute or relative) of imports of articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

Pursuant to 29 CFR 90.2, "increased imports" means that imports have increased, absolutely or relative to domestic production, compared to a representative base period. The regulation also establishes the representative base period as the one-year period preceding the date twelve months prior to the date of the petition.

Because the date of TA–W–53,753 is December 1, 2003, the relevant period is December 1, 2002 through November 30, 2003 and the representative base period is December 1, 2001 through November 30, 2002. Therefore, increased imports is established if import levels during December 1, 2002 through November 30, 2003 are greater than import levels during December 1, 2001 through November 30, 2002.

During the second remand investigation, the Department confirmed that Citation Corporation, Camden, Tennessee (subject facility) produced ductile iron castings until production ceased on December 9, 2002. SAR 66–68, 72. Due to the domestic shift of production, there were worker separations as well as sales and production declines at the subject facility during the relevant period. SAR 16, 74. Therefore, the Department determines that 29 CFR 90.16(b)(1) and 29 CFR 90.16(b)(2) have been met.

To determine whether 29 CFR 90.16(b)(3) has been met, the Department also requested during the second remand investigation information from the Union, SAR 22, 27–28, Citation Corporation (subject firm), SAR 3–21, 42–75, 81–121, 123–126, 129–130, 133, 136, 138, and the individuals identified by the Union as having relevant information. SAR 26–41, 76–80.

During the second remand investigation, the Department received information that indicates that the

subject facility did not increase its imports of ductile iron castings. SAR 12–13, 21, 72, 74, 111. Because the subject firm retained all of its business, SAR 21, 86–87, 111, 123–125, 140–142, and sales had increased at the subject facility prior to the plant closure, SAR 16, 85 the Department did not inquire whether the subject firm's customers were purchasing from foreign sources instead of purchasing from the subject firm.

In response to the Union's assertion that increased foreign competition caused the consolidation of the subject firm's operations and the subsequent closure of the subject facility, SAR 15, the Department sought clarification from the subject firm, SAR 14, 81–138 and the individuals identified by the Union (former and current subject firm officials). SAR 29–41, 76–80. According to the subject firm, any statement about mergers as a result of foreign competition was a general statement about the domestic foundry and automotive industries. SAR 21.

Further, one of the three individuals identified by the Union as having relevant information recalls hearing that the Chinese government had built furnaces, but could not clearly identify the source of the information and was unable to identify the product the furnaces were built to manufacture. SAR 80.

Another individual identified by the Union did not recall meeting any Union representative and stated that the workers were aware of the subject firm's concerns regarding the high cost of maintaining the facility (the facility was old and in need of much repair). SAR 80. The third individual did not recall any comment made to or from the Union about foreign competition at any meeting, including the December 9, 2002 meeting. SAR 74.

During the second remand investigation, the Department determined that production had not shifted abroad from the subject. SAR 16. Rather, the Department concluded that production had shifted from the subject facility to other domestic subject firm facilities producing similar products. SAR 16, 74, 120–121, 124, 141.

If the subject firm as a whole suffered decreased sales or production prior to the subject facility's closure, the Department may determine that the subject firm was adversely impacted by increased imports and that the closure was part of the subject firm's efforts to stay viable. The Department, therefore, also requested during second remand investigation corporate-wide sales and production figures of articles like and directly competitive with ductile iron castings for 2001, 2002, and 2003, SAR 113, 118–121, 123–138, and sales figures for the subject firm's major customer. SAR 126, 130, 133.

The subject firm provided information for fiscal year 2001 (October 1, 2000 through September 30, 2001), fiscal year 2002 (October 1, 2001 through September 30, 2002), and fiscal year 2003 (October 1, 2002 through September 30, 2003). SAR 115–116, 120–121, 124–125.

For purposes of determining whether the closure of the subject facility was part of the subject firm's efforts to stay viable, the Department inquired into the subject firm's sales and production levels during time periods other than the time periods identified in the initial investigation. These alternative time periods are necessary because the subject facility ceased production on December 9, 2002. For purposes of only this portion of the second remand investigation, the "relevant period" is October 1, 2001 through September 2002, and the "base period" is October 1, 2000 through September 2001.

The data shows that the subject firm's fiscal year 2002 sales were stable when compared to fiscal year 2001 sales and that the subject firm's fiscal year 2002 production level was relatively stable when compared to fiscal year 2001 production level. SAR 122. The data also shows that subject firm sales to its largest customer remained stable during the relevant period. SAR 141–142. Given the stable production levels, sales levels and customer base, the Department determines that the subject firm was not adversely impacted by increased imports of ductile iron castings and that increased imports of ductile iron castings did not contribute importantly to the closing of the subject facility. Further, as indicated by a former subject firm official, the subject facility was old and in need of much repair. SAR 80.

Finally, in accordance with Section 246 of the Trade Act of 1974, as amended, the Department herein presents the results of its investigation regarding certification of eligibility to apply for ATAA.

In order to apply the Department to issue a certification of eligibility to apply for ATAA, the subject worker group must be certified eligible to apply for TAA. Since the workers are being denied eligibility to apply for TAA, they cannot be certified eligible to apply for ATAA.

Conclusion

After careful review of the findings of the second remand investigation, I affirm the notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Citation Corporation, Camden, Tennessee.

Signed at Washington, DC, this 26th day of July 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–12620 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–58,805]

Collins Aikman Premier Molds, Sterling Heights, MI; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment Assistance applicable to TA–58,805, which was published in the **Federal Register** on April 13, 2006 (71 FR 19208–19210) in FR Document E6–5518, Billing Code 4510–30–P.

This rescinds the certification of eligibility for workers of TA–58,805, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19209 in the first column, the sixth TA–W number listed.

The Department appropriately published in the **Federal Register** April 13, 2006, page 19210, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,805. The notice appears on page 19210 in the third column, the sixth TA–W number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12615 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,845]

Dura Automotive, Test Center; Pikeville, TN; Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance; Correction

This notice rescinds the notice of certification of eligibility to apply for Alternative Trade Adjustment Assistance applicable to TA–W–58,845, which was published in the **Federal Register** on April 13, 2006 (71 FR 19208–19210) in FR Document E6–5518, billing code 4510–30–P.

This rescinds the certification of eligibility for workers of TA–W–58,845, to apply for Alternative Trade Adjustment Assistance and confirms eligibility to apply for Worker Adjustment Assistance as identified on page 19209 in the second column, the fifth TA–W number listed.

The Department appropriately published in the **Federal Register** April 13, 2006, page 19210, under the notice of Negative Determinations for Alternative Trade Adjustment Assistance, the denial of eligibility applicable to workers of TA–W–58,845. The notice appears on page 19210 in the third column, the third TA–W number listed.

Signed in Washington, DC, this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12618 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 14, 2006.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 14, 2006.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, D.C. this 28th day of July 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

APPENDIX.—TAA PETITIONS INSTITUTED BETWEEN 7/17/06 AND 7/21/06

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
59726	Johnson Controls (JCI)(Wkrs)	Albany, MO	07/17/06	07/13/06
59727	Eisenhart Wallcoverings(USW)	Hanover, PA	07/17/06	07/14/06
59728	Zoom Technologies, Inc.(Comp)	Boston, MA	07/17/06	07/12/06
59729	Sanyo Energy (USA) Corporation(Wkrs)	San Diego, CA	07/17/06	07/14/06
59730	Tutee Corp.	Vernon, CA	07/17/06	07/06/06
59731	Parino Fashions(Comp)	West New York, NJ	07/17/06	06/29/06
59732	Fibermark Inc.(Wkrs)	Quakertown, PA	07/17/06	07/12/06
59733	Maverick Tube, Inc.(State)	Ferndale, MI	07/17/06	06/30/06
59734	Madison Industries, Inc.(Comp)	Sumter, SC	07/17/06	07/17/06
59735	Southern Die Caster Inc.(Comp)	Shrewbury, PA	07/18/06	07/12/06
59736	RSM Co., Inc.(Wkrs)	Charlotte, NC	07/18/06	07/14/06
59737	Collins & Aikman(USWA)	Nashville, TN	07/18/06	07/17/06
59738	Para-Chem(Comp)	Simpsonville, SC	07/18/06	07/12/06
59739	Michael Feldman(UNITE)	Long Island City, NY	07/18/06	07/17/06
59740	Federal Mogul(Comp)	Scottsville, KY	07/18/06	07/17/06
59741	Eaton Corporation(Comp)	Laurinburg, NC	07/18/06	07/13/06
59742	United Panel, Inc.(Wkrs)	Mt. Bethel, PA	07/18/06	07/17/06
59743	EF Acquisition Corporation(Wkrs)	New York, NY	07/18/06	07/17/06
59744	AGX Corporation(Wrkrs)	New York, NY	07/18/06	06/19/06
59745	Jantzen(Wkrs)	Seneca, SC	07/18/06	07/18/06
59746	Georgia-Pacific Corporation(Comp)	Green Bay, WI	07/19/06	07/14/06
59747	Khoury, Inc.(State)	Kingsford, MI	07/19/06	07/05/06
59748	Highlands Diversified Services, Inc.(Comp)	London, KY	07/19/06	07/18/06
59749	United Airline's Mileage Plus, Inc.(Union)	Tucson, AZ	07/19/06	06/20/06
59750	Anritsu Instruments Co.(Comp)	Utica, NY	07/19/06	07/18/06
59751	Continental Industries(State)	Benzonia, MI	07/19/06	07/18/06
59752	Tarkett Wood, Inc.(Comp)	Brookneal, VA	07/19/06	07/12/06
59753	Lubrizol—Noveon Corp(Wkrs)	Linden, NJ	07/21/06	07/19/06
59754	Artesyn Technologies(Comp)	Redwood Falls, MN	07/21/06	07/17/06
59755	Belden CDT(Comp)	Fort Mill, SC	07/21/06	07/19/06
59756	Volex Power Cord Products(State)	Clinton, AR	07/21/06	07/19/06

APPENDIX.—TAA PETITIONS INSTITUTED BETWEEN 7/17/06 AND 7/21/06—Continued

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
59757	Boxer Rebellion, Inc.(Wkrs)	Emporia, VA	07/21/06	07/12/06
59758	Fulflex of Vermont(Comp)	Brattleboro, VT	07/21/06	07/19/06
59759	Uniwave, Inc.(Comp)	Farmingdale, NY	07/21/06	07/19/06
59760	Huntington Foam Corporation(Comp)	Mt. Pleasant, PA	07/21/06	07/19/06
59761	Ace Products, LLC(Wrks)	Conneautville, PA	07/21/06	07/19/06
59762	United Autoworkers (UAW)(State)	Greenville, MI	07/21/06	07/20/06
59763	Carlisle Publishing Services(Comp)	Dubuque, IA	07/21/06	07/20/06
59764	Astro Dye Works(Comp)	Calhoun, GA	07/21/06	07/20/06
59765	Indiana Tube Corporation(Comp)	Evansville, IN	07/21/06	07/20/06
59766	HBD Industries(State)	Oneida, TN	07/21/06	07/20/06
59767	Cooper Standard(State)	El Dorado, AR	07/21/06	07/20/06
59768	Lenovo, Incorporated(Wkrs)	Durham, NC	07/21/06	07/20/06
59769	Chapin International(State)	Batavia, NY	07/21/06	07/20/06
59770	Surgical Support Services(Wkrs)	Eureka, MO	07/21/06	07/19/06

[FR Doc. E6–12622 Filed 8–3–06; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of July 2006.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

TA–W–59,635; Minnesota Rubber, A Quadion Company, Mason City, IA: June 23, 2005.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–59,481; Electrolux Home Products, Laundry Division, Jefferson, IA: May 22, 2005.

TA–W–59,542; Tyler Pipe Co., Division of McWane, Inc., Macungie, PA: May 15, 2005.

TA–W–59,579; Harodite Industries, Taunton, MA: June 15, 2005.

TA–W–59,641; Arizona Textiles, A Division of Charming Shoppers, Phoenix, AZ: June 27, 2005.

TA–W–59,665; Hillerich and Bradsby Co., Louisville Slugger Division, Ontario, CA: July 3, 2005.

TA–W–59,669; Cedar Works, LLC, Pennington Seed, Inc., Peebles, OH: July 5, 2005.

TA–W–59,448; Collins and Aikman Products Co., Soft Trim Division, Farmville, NC: May 24, 2005.

TA–W–59,541; Waterbury Rolling Mills, Olin Corporation, Waterbury, CT: June 8, 2005.

TA–W–59,604; Georgia Pacific, Idaho White Pine Division, Willstaff Temporary Agency, Savannah, GA: June 21, 2005.

TA–W–59,634; Hi-Lite Industries, Inc., Greensburg, PA: June 26, 2005.

TA–W–59,700; RMG Foundry LLC, Mishawaka, IN: July 10, 2005.

TA–W–59,566; Cho Won, Inc., Van Nuys, CA: June 13, 2005.

TA–W–59,610; E C Service, Inc., New York, NY: June 16, 2005.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–59,608; Eaton Corporation, Oklahoma City Clutch Plant, Express & Manpower, Oklahoma City, OK: June 21, 2005.

TA–W–59,644; Quebecor Would Kingsport, Inc., Kingsport, TN: June 24, 2005.

TA–W–59,661; National Starch and Chemical, A Division of Imperial Chemical Industry, Hazleton, PA: June 30, 2005.

TA–W–59,686; Maxtor Corp., A Wholly owned Subsidiary of Seagate Corp., Shrewsbury, MA: July 7, 2005.

TA–W–59,691; Russell Corporation, Russell Activewear Div., Brundidge, AL: July 7, 2005.

TA–W–59,562; Arkema, Inc., Thiochemicasl Division, Riverview, MI: May 26, 2005.

TA–W–59,619; Williams Controls, Inc., Opti Staffing, Madden Industrial Craftsman, Staffmark, Portland, OR: June 20, 2005..

TA–W–59,663; Stapleton Metals Division, Clarksville, AR: July 3, 2005.

TA–W–59,676; Job Store, Inc. (The), On-Site At Picolight, Inc., Louisville, CO: July 6, 2005.

TA–W–59,692; Hooker Furniture Corp., Roanoke, VA: July 10, 2005.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–59,442; TCI Ceramics, Inc., A Subsidiary of National Magnetics Group, Hagerstown, MD: May 22, 2005.

TA–W–59,558, Clarion Technologies, Inc., Caledonia, MI: June 21, 2005.

TA–W–59,657; IH Services, Inc., Working at Rabun Apparel, Inc., A Division of Fruit of the Loom, Rabun Gap, GA: June 29, 2005.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations For Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department as determined that criterion (1) of Section 246 has not been met. Workers at the firm are 50 years of age or older.

None.

The Department as determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–59,635; Minnesota Rubber, A Quadion Company, Mason City, IA.

The Department as determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Since the workers of the firm are denied eligibility to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–59,624; Pintex Cutting Company, Greenville, SC.

TA–W–59,642; Fontaine International, Inc., Calera, AL.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

None.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–58,891; Molnlycke Health Care, Inc., El Paso, TX.

TA–W–59,517; Advanced Electronics, Inc., Boston, MA.

The investigation revealed that the predominate cause of worker separations is unrelated to criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.C) (shift in production to a foreign country).

TA–W–59,520; Leemah Electronics, Inc., San Francisco, CA.

TA–W–59,627; Liebert Corporation, Irvine, CA.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–59,494; Sun Microsystems, Inc., Information Technology Group, Santa Clara, CA.

TA–W–59,521; Dora L. International, Customer Service Division, Los Angeles, CA.

TA–W–59,632; Lightmaster Systems, Inc., Cupertino, CA.

TA–W–59,637; Americas Finance - Organization, A Subdivision of Lenovo USA, Research Triangle Park, NC.

TA–W–59,640; Armstrong World Industries Inc., Customer Service Call Center, Lancaster, PA.

TA–W–59,662; Geneva Steel LLC, A Subsidiary of Geneva Steel Holdings, Vineyard, UT.

TA–W–59,683; Morse Automotive Corp., Arkadelphia, AR.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

TA–W–59,534; Pictorial Engraving Co., Charlotte, NC.

I hereby certify that the aforementioned determinations were issued during the month of July 2006. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: July 28, 2006.

Erica R. Cantor,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E6–12623 Filed 8–3–06;

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,935]

WSW Company of Sharon, Inc., a Subsidiary of Wormser Company, Sharon, TN; Notice of Negative Determination on Reconsideration

On May 10, 2006, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The Notice was published in the **Federal Register** on May 19, 2006 (71 FR 29184).

The petition for Trade Adjustment Assistance (TAA), dated February 28, 2006, filed on behalf of workers of WSW Company of Sharon, Inc., a Subsidiary of Wormser Company, Sharon, Tennessee (subject facility) was denied because, during the relevant period, the workers did not produce an article within the meaning of the Trade Act and did not support a domestic production facility that was import-impacted. While the subject facility was previously certified for TAA (TA–W–51,848), the certification expired prior to the petition date (expired on June 30, 2005).

In the request for reconsideration, the petitioners assert that, during the relevant period, they were engaged in activity related to the production of an article (children's sleepwear) manufactured by Wormser Company (subject firm).

During the reconsideration investigation, the Department confirmed that domestic production had ceased in 2004 and, therefore, determined that production did not take place at the subject facility during the relevant period.

In subsequent submissions, the petitioners asserted that they produced "pick tickets" (internal-use distribution documents) and labels used for shipping. Although the workers' activities resulted in printed material, this material is incidental to the provision of distribution services. The Department has consistently determined that items produced as a result of the provision of services are not marketable and not an article for purposes of the Trade Act.

Further, information provided by the petitioners reveal that the activities in which they were engaged supported a domestic warehousing and shipping facility, not a production facility.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 27th day of July 2006.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E6–12621 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Solicitation for Grant Applications (SGA); Community-Based Job Training Grants Correction

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice; correction and supplemental information.

SUMMARY: The Employment and Training Administration published a document in the **Federal Register** on July 3, 2006, concerning the availability of grant funds to support workforce training for high-growth/high-demand industries through the national system of community and technical colleges. This correction is to explain how One-Stop Career Center applicants must apply and to provide additional clarification regarding direct training costs, tuition payments, and the leveraging of Workforce Investment Act resources.

FOR FURTHER INFORMATION CONTACT: Kevin Brumback, Grants Management Specialist, Division of Federal Assistance, (202) 693–3381.

Corrections

In the **Federal Register** of July 3, 2006, in FR Volume 71, Number 127: On Page 37953, in the third column, Section III(A)(4) is corrected to read:

4. One-Stop Career Centers, as established under Section 121 of the Workforce Investment Act of 1998 (Pub. L. 105–220). The eligible applicant for One-Stop Career Centers is the One-Stop Operator, as defined under Section 121 of the Workforce Investment Act of 1998 (Pub. L. 105–220), on behalf of the One-Stop Career Center. The applicant must: (1) Have a letter of concurrence from all signatories to the One-Stop Career Center Memorandum of Understanding, including the Local Workforce Investment Board (WIB) and all mandatory partners, as specified in Section 121 of the Workforce Investment Act of 1998; (2) demonstrate that the proposed activities are consistent with the state strategic Workforce Investment Act plan; and (3) demonstrate that the Local Workforce Investment Board, or its designated fiscal agent, will serve as the fiscal agent for the grant. The Workforce Investment Board's support and involvement in the project should be detailed in the letter of concurrence, which should also address the above requirements (2) and (3). The WIB may also address above requirements 2 and 3 in a separate letter

of concurrence. Applications from One-Stop Career Centers without a letter of concurrence from the One-Stop Career Center partners will be considered non-responsive. One-Stop Career Center applications must specify one or more community college(s) where all capacity building and training activities will occur under the grant.

On page 37955, Section III(C), in the first column, is corrected to add:

7. Re-designation of One-Stop Operators. If at any time, the applicant One-Stop Operator changes, then the One-Stop partners may amend their application, on behalf of the One-Stop Career Center, for the purpose of designating a new One-Stop Operator.

SUPPLEMENTARY INFORMATION:

(1) Clarification of the Intent of Behind the Requirement That a Component of All Applications Be Direct Training Costs That Allow Participants, Without Tuition Payments, To Be Enrolled in the Training Program (71 FR 37948 (July 3, 2006) pages 37954.)

ETA's intent with this condition is that grantees do not "double dip" by charging tuition AND direct training costs from the grant for the same enrollee. It is ETA's expectation that the grant will cover the direct training costs for a substantive number of targeted students and that those students would not be charged tuition. Grantees must identify and track the number of individuals trained using grant dollars as well as the number of individuals trained using leveraged resources.

The SGA requires that each project include a component of direct training. Traditionally, institutions of higher education charge a per-credit hour tuition to cover these costs. ETA intends that students participating in the direct training component of the project not be required to pay costs already covered by the grant. Applicants may recoup the costs of the direct training component in two ways: (1) charging the grant the normal tuition rate for the course or (2) charging the actual direct and indirect costs of the course. If the applicants choose to recoup the costs through tuition charged to the grant, they may also charge the grant for the non-tuition costs of attending the course such as lab fees or books.

For the targeted number of students to be trained with leveraged resources, direct training may be leveraged with Department of Education PELL grants, WIA training funds, and other cash sources. Also, these leveraged resources may also cover the non-tuition costs of attending the course such as lab fees or books.

In addition, the capacity building component of the grant may enable students beyond those targeted for training under the grant to access training at the college. The college may charge those students tuition. In these instances, applicants should estimate the impact of this capacity building activity by projecting the numbers of students that will be trained in addition to those targeted for training under the grant and/or leveraged resources.

For reference, direct training costs are the costs associated with the actual provision of a training course as opposed to the capacity building costs associated with the development of training capabilities or curriculums. Direct training costs may include (please note that this is not an exhaustive list):

- Faculty costs, including salaries and fringe benefits
- In-house training staff
- Support staff costs such as lab or teaching assistants
- Classroom space, including laboratories, mock-ups or other facilities used for training purposes
- Books, materials, and supplies used in the training course, including specialized equipment used in the training course

Direct training costs do not include costs that support the college in general, but not the training program, such as fees to support student activities, the library, gym or recreation center, etc, which may be covered through some other mechanism, such as student fees. Indirect training costs may include the applicable share of the Institution's indirect costs (overhead) and library or other student activity fees associated with the operation of the Institution. Both direct and indirect training costs must be allowable costs under the applicable OMB circular. All direct and indirect training costs should be linked to a specific course or curriculum as specified in the proposal or the statement of work.

(2) Clarification of Intent Behind the 5 Bonus Points for Leveraging Workforce Investment Act Resources (71 FR 37948 (July 3, 2006), pages 37951 and 37958.)

The application currently states: "Applications that demonstrate the use of Workforce Investment Act (WIA) funds for Individual Training Accounts, the pilot of Career Advancement Accounts, or for customized training to cover the tuition costs for the CBJTG training program for eligible new or incumbent workers, will receive 5 bonus points," 71 FR 37948 (July 3, 2006). ETA's intent behind this criterion is to award bonus points to applications that demonstrate integration of WIA training funds into grant activities. Examples of WIA training funds include Individual Training Accounts, customized training, and Career Advancement Accounts. Applications that demonstrate the use of WIA training funds, whether through ITAs, customized training, or CAAs, will receive 5 bonus points. This does not change what is allowed for applications to receive bonus points, but is a clarification of the intent of bonus points being for use of WIA training funds generally, not just ITA's, CAA's, or customized training, to cover the tuition costs for eligible new or incumbent workers.

Career Advancement Accounts (CAAs) have been proposed in the President's Fiscal Year 2007 budget; however ETA recognizes that some states may be piloting CAAs in advance of the FY 2007 budget, which is why they are included in the list of programs utilizing WIA training funds.

Dated: August 2, 2006.

Signed at Washington, DC, this 2nd day of August, 2006.

Laura P. Watson,

Division Chief, Division of Federal Assistance.

[FR Doc. E6–12763 Filed 8–3–06; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for

disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before September 18, 2006. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: requestschedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Agricultural Marketing Service (N1–136–05–1, 6 items, 6 temporary items). Inputs, master files, documentation, and electronic mail and word processing copies associated with an electronic information system used to collect and monitor trading practices in the marketing of fresh and frozen fruits and vegetables in interstate and foreign commerce in accordance with the Perishable Agricultural Commodities Act. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

2. Department of Agriculture, Agricultural Marketing Service (N1–136–05–3, 4 items, 4 temporary items). Inputs, outputs, master files, and documentation associated with an electronic information system used to maintain and track fruit and vegetable inspection and certification data. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

3. Department of Agriculture, Agricultural Marketing Service (N1–136–05–8, 5 items, 5 temporary items). Inputs, outputs, master files, and documentation associated with an electronic information system used by the National Science Laboratory to evaluate, retain, and report analytical test data for agricultural commodities. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

4. Department of Agriculture, Agricultural Marketing Service (N1–136–06–8, 6 items, 6 temporary items). Inputs, outputs, master files, documentation, and electronic mail and word processing copies associated with an electronic information system used to collect price information on agricultural commodities in specific markets and marketing areas. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

5. Department of the Army, Agency-wide (N1–AU–06–5, 3 items, 3 temporary items). Records relating to the Army Oil Analysis Program and Product Quality Deficiency Program. Included are such records as oil analysis requests and feedback reports, and deficient product descriptions, findings, and recommendations. Also included are electronic copies of records created using electronic mail and word processing. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

6. Department of the Army, Agency-wide (N1–AU–06–7, 2 items, 2 temporary items). Records relating to waivers for applicants not meeting enlistment standards for the Regular Army and the Army Reserves, including requests, recommendations, and various forms used to collect background information. Also included are electronic copies of records created using electronic mail and word processing. This schedule authorizes the agency to apply the proposed disposition instructions to any recordkeeping medium.

7. Department of Commerce, National Oceanic and Atmospheric Administration (N1–370–06–3, 5 items, 5 temporary items). Records of the National Marine Fisheries Service, including eligible and ineligible applicant files for dedicated access permits under the individual fishing quota program, and registered buyer/receiver permits. Also included are electronic copies of records created using electronic mail and word processing.

8. Department of Housing and Urban Development, Office of Faith-Based and Community Initiatives (N1–207–06–1, 9 items, 2 temporary items). Working papers, and spreadsheet data used for reporting the number of faith-based organizations receiving agency funding. Proposed for permanent retention are

recordkeeping copies of program publications, program planning and project files, correspondence, regulatory and policy affairs files, and documents relating to program liaison activities with agency staff and interaction with the White House Office of Faith-Based and Community Initiatives.

9. Department of Interior, Office of the Secretary (N1–48–06–3, 6 items, 3 temporary items). Files maintained by Deputy Assistant Secretaries and records lacking historical value held by other senior agency officials. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of files maintained by the Secretary and the Secretary's Counselors, Deputy Secretary, Assistant Secretaries, Solicitor, and Inspector General.

10. Department of Justice, Justice Management Division (N1–60–06–1, 3 items, 2 temporary items). Electronic copies of records created using electronic mail and word processing relating to agency whistleblower cases and the Office of Attorney Recruitment and Management's handling of those cases. Proposed for permanent retention are recordkeeping copies of whistleblower protection case files.

11. Department of Justice, Federal Bureau of Investigation (N1–65–06–10, 1 item, 1 temporary item). Consent forms for contractor personnel agreeing to warrantless physical searches of their offices or workplaces within agency facilities.

12. Department of the Treasury, Internal Revenue Service (N1–58–06–10, 1 item, 1 temporary item). Records of the Office of Appeals relating to appraisal review requests for art and cultural property listed in tax returns. Records include copies of taxpayer case files consisting of forms, work papers, recommendations and final appraisal reports. This schedule reduces the retention period for recordkeeping copies of these files, which were previously approved for disposal.

Dated: July 31, 2006.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. E6–12598 Filed 8–3–06; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Availability of a Draft Environmental Assessment

AGENCY: National Science Foundation.

ACTION: Notice of availability of a draft Environmental Assessment for proposed activities in the Pacific Ocean.

SUMMARY: The National Science Foundation gives notice of the availability of a draft Environmental Assessment for proposed activities in the Pacific Ocean.

The Division of Ocean Sciences in the Directorate for Geosciences (GEO/OCE) has prepared a draft Environmental Assessment for a low-energy marine seismic survey by the Research Vessel Roger Revelle in the South Pacific Ocean, in international waters roughly between 23° and 47° S, and between 115° and 165° W during December 2006–January 2007. The draft Environmental Assessment is available for public review for a 30-day period.

DATES: Comments must be submitted on or before September 5, 2006.

ADDRESSES: Copies of the draft Environmental Assessment are available upon request from: Dr. William Lang, National Science Foundation, Division of Ocean Sciences, 4201 Wilson Blvd., Suite 725, Arlington, VA 22230. Telephone: (703) 292–7857. The draft is also available on the agency's Web site at *http://www.nsf.gov/geo/oce/pubs/scripps_seismic_southpac_dec2006_EA.pdf.*

SUPPLEMENTARY INFORMATION: The Scripps Institution of Oceanography (SIO), with research funding from the National Science Foundation (NSF), plans to conduct a piston/gravity coring, magnetic, and seismic survey program at 12 sites in the South Pacific Ocean during December 2006–January 2007. The proposed action is part of the Integrated Ocean Drilling Program (IODP) and will collect data that will be used to (1) document the metabolic activities genetic composition, and biomass of prokaryotic communities in the subseafloor sediments with very low total activity; (2) quantify the extent to which those communities may be supplied with harvestable energy by water radiolysis, a process independent of the surface photosynthetic world; and (3) survey broad characteristics of subseafloor communities and habitats in this region, in order to refine the planning and objectives of IODP South Pacific research. The seismic survey is required to locate optimal piston/gravity-coring sites and involves one vessel, the R/V Roger Revelle. One pair of low-energy Generator-Injector (GI) airguns (45 in^3 discharge volume each) will used as the seismic energy source with a proposed survey program of approximately 1930 km of seismic lines, including turns, with water depths of 3200 to 5700m. The research will be carried out entirely within international waters.

Numerous species of cetaceans and sea turtles occur in the South Pacific Ocean. Several of the species are listed as Endangered under the U.S. Endangered Species Act (ESA). The increased underwater noise from the research may result in avoidance behavior by some marine animals, and other forms of disturbance. An integral part of the planned survey is a monitoring and mitigation program designed to minimize impacts of the proposed activities on marine species present, and to document the nature and extent of any effects. Injurious impacts to marine animals have not been proven to occur near equipment proposed to be used in this research; however, the planned monitoring and mitigation measures would minimize the possibility of such effects should they otherwise occur.

With the planned monitoring and mitigation measures, unavoidable impacts to each of the species of marine mammal that might be encountered are expected to be limited to short-term localized changes in behavior and distribution near the seismic vessel. At most, such effects may be interpreted as falling within the Marine Mammal Protection Act (MMPA) definition of "Level B Harassment" for those species managed by NMFS. No long-term or significant effects are expected on individual marine mammals, or the populations to which they belong, or their habitats. The agency is currently consulting with the National Marine Fisheries Service regarding species within their jurisdiction potentially affected by this proposed activity.

Copies of the draft Environmental Assessment, titled "Environmental Assessment of a Planned Low-Energy Marine Seismic Survey by the Scripps Institution of Oceanography in the South Pacific Ocean, December 2006–January 2007", are available upon request from: Dr. William Lang, National Science foundation, Division of Ocean Sciences, 4201 Wilson Blvd., Suite 725, Arlington, VA 22230. Telephone: (703) 292–7857 or at the agency's Web site at: *http://www.nsf.gov/geo/oce/pubs/scripps_seismic_southpac_dec2006_EA.pdf.* The National Science Foundation invites interested members of the public to provide written comments on this draft Environmental Assessment.

Dated: July 31, 2006.

William Lang,

Program Director, Division of Ocean Sciences, National Science Foundation.

[FR Doc. 06–6668 Filed 8–3–06; 8:45am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

National Science Board and Its Subdivisions; Meetings

Date and Time: August 9–10, 2006.

Wednesday, August 9, 2006—8:15 a.m.–4:45 p.m.

8:15–9:15—open;
9:15–10—open;
10–10:45—open;
10:45–11:30—open;
11:30–12:30—open;
1:30–2:20—open;
2:20–4—closed;
4–4:15—closed;
4:15–4:30—open;
4:30–4:45—closed.

Thursday, August 10, 2006—8 a.m.–3:30 p.m.

8–9:30—open;
9:30–10:30—open;
10:30–11—closed;
11–11:30—open;
11:30–12—closed;
1–1:15—closed;
1:15–1:30—closed;
1:30–3:30—open.

Place: National Science Foundation, 4201 Wilson Blvd, Room 1235, Arlington, VA 22230.

Public Meeting Attendance: All visitors must report to the NSF's visitor's desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge.

Contact Information: Please refer to the National Science Board Web site (*www.nsf.gov/nsb*) for updated schedule. NSB Office: Dr. Robert Webber, (703) 292–7000.

Status: Part of this meeting will be closed to the public. Part of this meeting will be open to the public.

Matters To Be Considered:

Wednesday, August 9, 2006

Open

CPP Subcommittee on Polar Issues (8:15 a.m.–9:15 a.m.)
- Chairman's Remarks
- Approval of Minutes
- Astrophysics and South Pole Infrastructure
- New View on Arctic Climate History
- Ice Sheets
- IPY Solicitations

CPP Task Force on Hurricane Science and Engineering (9:15 a.m.–10 a.m.)
- Approval of Minutes for May 2006 Meeting
- Discussion of Draft Hurricane Science and Engineering Report
- Future Activities of the Task Force

CPP Task Force on Transformative Research (10 a.m.–10:45 a.m.)
- Approval of Minutes for May 2006 Meeting
- Outcomes of Previous TR Workshops—Draft Report

CPP Task Force on International Science (10:45 a.m.–11:30 a.m.)
- Approval of Minutes
- Summary of the May 11 Hearing and Roundtable Discussion
- Discussion of Items To Come Out of the Task Force's Series of Roundtable Discussions
- Discussion of Future Task Force Activities, Including the Roundtable Discussion Scheduled for September 25, 2006 in Singapore

Committee on Programs and Plans (11:30 a.m.–12:30 p.m.)
- Approval of May 10, 2006 CPP Minutes
- Status Reports:
  - Task Force on Transformative Research
  - Task Force on Hurricane Science and Engineering and Dr. Ken Ford
  - Subcommittee on Polar Issues
  - Task Force on International Science
- Discussion Item: NSB Policy on Recompetition of NSF Awards
- Update: NSF's Cyberinfrastructure Vision
- NSB Information Item: NSF Activities in High Performance Computing: Status of the Petascale System Acquisition

Committee on Programs and Plans Open: (1:30 p.m.–2:20 p.m.)
- NSB Information Item: EarthScope Facility Construction Project
- Update: Major Research Facilities & Facility Plan
- Overview of Process for CPP/NSB Re-examination of Priority Order for New Start MREFC Projects

Executive Committee Open: (4:15 p.m.–4:30 p.m.)
- Approval of Minutes for May 2006 Meeting
- Updates or New Business From Committee Members

Closed

Committee on Programs and Plans Closed: (2:20 p.m.–4 p.m.)
- Awards and Agreements

Committee on Programs and Plans Executive Closed: (4 p.m.–4:15 p.m.)
- Awards and Agreements

Executive Committee Closed (4:30 p.m.–4:45 p.m.)
- Specific Personnel Matters
- Future Budgets

Thursday, August 10, 2006

Open

EHR Subcommittee on Science and Engineering Indicators (8 a.m.–9:30 a.m.)
- Approval of May Minutes
- Chairman's Remarks
- What Is Science and Engineering Indicators?
- Role of S&E Indicators Subcommittee
- Introduction of Key NSBO and SRS Staff
- Discussion of Science and Engineering Indicators Chapters
- Introduction to Condensed Version of Indicators and Companion Piece
- Key Board Dates and Activities for Production of Science and Engineering Indicators 2008
- Chairman's Summary

Committee on Audit and Oversight Open: (9:30 a.m.–10:30 a.m.)
- Approval of Minutes of May, 2006 Meeting
- Report by NSF Advisory Committee on GPRA Performance Assessment (ACGPA) Status of Financial Audit Procurement
- CFO Update

Committee on Strategy and Budget Open: (11 a.m.–11:30 a.m.)
- Approval of May 9, 2006 CSB Minutes
- Status of FY 2007 Budget Request to Congress
- Discussion of NSF Strategic Plan FY 2006–2011

Closed

Committee on Audit and Oversight Closed: (10:30 a.m.–11 a.m.)
- Budget
- Pending Investigations

Committee on Strategy and Budget Closed (11:30 a.m.–12 noon)
- Approval of CSB Closed Session Teleconference Minutes
- Discussion of NSF FY 2008 Budget Request

Plenary Sessions of the Board (1 p.m.–3:30 p.m.)

Plenary Executive Closed (1 p.m.–1:15 p.m.)
- Approval of May 2006 Minutes
- Re-examination of Priority Order of MREFC

Plenary closed (1:15 p.m.–1:30 p.m.)
- Approval of May 2006 Minutes
- Awards and Agreements
- Closed Committee Reports

Plenary Open (1:30 p.m.–3:30 p.m.)
- Approval of May 2006 Minutues
- Resolution to Close September 2006

Meeting
- Chairman's Report
- Director's Report
- Open Committee Reports

Michael P. Crosby,

Executive Officer and NSB Office Director.

[FR Doc. 06–6718 Filed 8–2–06; 8:45 am]

BILLING CODE 7555–01–M

OFFICE OF THE TRADE REPRESENTATIVE

Determinations Under the African Growth and Opportunity Act

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The United States Trade Representative (USTR) has determined that Burkina Faso has adopted an effective visa system and related procedures to prevent unlawful transshipment and the use of counterfeit documents in connection with shipments of textile and apparel articles and has implemented and follows, or is making substantial progress toward implementing and following, the customs procedures required by the African Growth and Opportunity Act (AGOA). Therefore, imports of eligible products from Burkina Faso qualify for the textile and apparel benefits provided under the AGOA.

DATES: Effective August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Laurie-Ann Agama, Director for African Affairs, Office of the United States Trade Representative, (202) 395–9514.

SUPPLEMENTARY INFORMATION: The AGOA (Title I of the Trade and Development Act of 2000, Pub. L. 106–200) provides preferential tariff treatment for imports of certain textile and apparel products of beneficiary sub-Saharan African countries. The textile and apparel trade benefits under the AGOA are available to imports of eligible products from countries that the President designates as beneficiary sub-Saharan African countries, provided that these countries: (1) Have adopted an effective visa system and related procedures to prevent unlawful transshipment and the use of counterfeit documents; and (2) have implemented and follow, or are making substantial progress toward implementing and following, certain customs procedures that assist U.S. Customs and Border Protection in verifying the origin of the products.

In Proclamation 7853, the President designated Burkina Faso a "beneficiary sub-Saharan African country." Proclamation 7350 (October 2, 2000) delegated to the USTR the authority to determine whether designated countries have met the two requirements described above. The President directed the USTR to announce any such determinations in the **Federal Register** and to implement them through modifications of the Harmonized Tariff Schedule of the United States (HTS). Based on actions that the Government of Burkina Faso has taken, I have determined that Burkina Faso has satisfied these two requirements.

Accordingly, pursuant to the authority vested in the USTR by Proclamation 7350, U.S. note 7(a) to subchapter II of chapter 98 of the HTS and U.S. note 1 to subchapter XIX of chapter 98 of the HTS are each modified by inserting "Burkina Faso" in alphabetical sequence in the list of countries. The foregoing modifications to the HTS are effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after the date of publication of this notice. Importers claiming preferential tariff treatment under the AGOA for entries of textile and apparel articles should ensure that those entries meet the applicable visa requirements. *See Visa Requirements Under the African Growth and Opportunity Act*, 66 FR 7837 (2001).

Susan C. Schwab,

United States Trade Representative.

[FR Doc. E6–12642 Filed 8–3–06; 8:45 am]

BILLING CODE 3190–W6–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–27442]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

July 28, 2006.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of July, 2006. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch (tel. 202–551–5850). An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 22, 2006, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

For Further Information Contact: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

The Thurlow Funds, Inc. [File No. 811–8219]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 17, 2006, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $16,500 incurred in connection with the liquidation were paid by Thurlow Capital Management, Inc., applicant's investment adviser.

Filing Date: The application was filed on June 30, 2006.

Applicant's Address: 3212 Jefferson St. #416, Napa, CA 94558.

Retirement Income Trust [File No. 811–21320]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 27, 2006, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

Filing Date: The application was filed on July 19, 2006.

Applicant's Address: 5553 Woodmont St., Pittsburgh, PA 15217.

WM Prime Income Fund [File No. 811–9122]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On August 17, 1998, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $4,000 incurred in connection with the liquidation were paid by WM Advisors, Inc., applicant's investment adviser.

Filing Date: The application was filed on June 6, 2006.

Applicant's Address: John T. West, c/o WM Advisors, Inc., 1201 Third Ave., Suite 2200, Seattle, WA 98101.

Smith Barney Principal Return Fund [File No. 811–5678]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 31, 2005, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $27,000 incurred in connection with the liquidation will be paid by applicant using $13,372 in cash held by its custodian, State Street Bank and Trust Company, and remaining amounts will be paid by Smith Barney Fund Management LLC, applicant's investment adviser.

Filing Date: The application was filed on June 27, 2006.

Applicant's Address: 125 Broad St., 10th Floor, New York, NY 10004.

Fidelity Qualified Dividend Fund [File No. 811–3071]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 30, 1991, applicant transferred its assets to Fidelity Utilities Income Fund, a series of Fidelity Devonshire Trust, based on net asset value. Expenses incurred in connection with the reorganization were paid by applicant.

Filing Dates: The application was filed on March 9, 2006, and amended on July 17, 2006.

Applicant's Address: 82 Devonshire St., Boston, MA 02109.

The Nevis Fund, Inc. [File No. 811–8689]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 30, 2005, applicant transferred its assets to Brown Advisory Opportunity Fund, a series of Forum Funds, based on net asset value. Expenses of $164,891 incurred in connection with the reorganization were paid by Nevis Capital Management LLC and Brown Investment Advisory Incorporated, applicant's investment advisers.

Filing Date: The application was filed on June 13, 2006.

Applicant's Address: 2 Hamill Rd., Suite 272, Baltimore, MD 21210.

Highland Institutional Floating Rate Income Fund [File No. 811–8955]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On May 5, 2006, applicant made a final liquidating distribution to its shareholders, based on net asset value. Applicant paid expenses of approximately $14,800 incurred in connection with the liquidation.

Filing Date: The application was filed on June 15, 2006.

Applicant's Address: c/o Highland Capital Management, L.P., Two Galleria Tower, 13455 Noel Rd., Suite 800, Dallas, TX 75240.

CIM High Yield Securities [File No. 811–5328]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On April 28, 2006, applicant made a final liquidating distribution to its shareholders, based on net asset value. Applicant incurred $75,214 in expenses in connection with the liquidation.

Filing Date: The application was filed on June 16, 2006.

Applicant's Address: c/o Invesco Institutional (N.A.), Inc., 400 W Market St., Suite 3300, Louisville, KY 40202.

Morgan Stanley KLD Social Index Fund [File No. 811–10353]; Morgan Stanley Biotechnology Fund [File No. 811–21040]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On April 7, 2006, each applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $10,000 incurred in connection with each liquidation were paid by Morgan Stanley Investment Advisors Inc., investment adviser to each applicant.

Filing Date: The applications were filed on July 18, 2006.

Applicants' Address: Morgan Stanley Investment Advisors Inc., 1221 Avenue of the Americas, New York, NY 10020.

ACM Government Securities Fund, Inc. [File No. 811–5402]; ACM Government Spectrum Fund, Inc. [File No. 811–5500]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 19, 2000, each applicant transferred its assets to ACM Income Fund, Inc. (formerly, ACM Government Income Fund, Inc.), based on net asset value. Each applicant paid $17,500 of the expenses incurred in connection with the reorganizations.

Filing Date: The applications were filed on June 30, 2006.

Applicants' Address: 1345 Avenue of the Americas, New York, NY 10105.

Scudder Yieldwise Funds [File No. 811–8047]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On June 10, 2005, applicant transferred its assets to corresponding series of DWS Money Funds (formerly, Scudder Money Funds), based on net asset value. Expenses of $217,524 incurred in connection with the reorganization were paid by Deutsche Investment Management Americas, Inc., applicant's investment adviser.

Filing Date: The application was filed on June 29, 2006.

Applicant's Address: 222 South Riverside Plaza, Chicago, IL 60606.

Scudder Focus Value Plus Growth Fund [File No. 811–7331]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 26, 2005, applicant transferred its assets to DWS Growth & Income Fund, a series of DWS Investment Trust, based on net asset value. Expenses of $238,121 incurred in connection with the reorganization were paid by Deutsche Investment Management Americas, Inc., applicant's investment adviser.

Filing Date: The application was filed on June 29, 2006.

Applicant's Address: 222 South Riverside Plaza, Chicago, IL 60606.

Scudder Growth Trust [File No. 811–1365]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 14, 2005, applicant transferred its assets to DWS Capital Growth Fund, a series of DWS Investment Trust, based on net asset value. Expenses of $399,868 incurred in connection with the reorganization were paid by Deutsche Investment Management Americas, Inc., applicant's investment adviser.

Filing Dates: The application was filed on July 6, 2006.

Applicant's Address: 222 South Riverside Plaza, Chicago, IL 60606.

Scudder Dynamic Growth Fund [File No. 811–1702]; Scudder Aggressive Growth Fund [File No. 811–7855]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On December 20, 2004 and September 17, 2005, respectively, each applicant transferred its assets to corresponding series of DWS Advisor Funds (formerly, Scudder Advisor Funds), based on net asset value. Expenses of approximately $417,209 and $195,103, respectively, incurred in connection with the reorganizations were paid by Deutsche Investment Management Americas, Inc., applicants' investment adviser.

Filing Date: The applications were filed on July 6, 2006.

Applicants' Address: 222 South Riverside Plaza, Chicago, IL 60606.

Scudder Investors Trust [File No. 811–9057]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 15, 2005, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $115,176 incurred in connection with the liquidation were paid by Deutsche Investment Management Americas, Inc., applicant's investment adviser.

Filing Date: The application was filed on June 29, 2006.

Applicant's Address: 222 South Riverside Plaza, Chicago, IL 60606.

Scudder New Europe Fund, Inc. [File No. 811–5969]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 14, 2005, applicant transferred its assets to DWS Europe Equity Fund, a series of DWS International Fund, Inc. (formerly, Scudder International Fund, Inc.), based on net asset value. Expenses of approximately $283,745 incurred in connection with the reorganization were paid by Deutsche Investment Management Americas, Inc., applicant's investment adviser.

Filing Date: The application was filed on July 6, 2006.

Applicant's Address: 345 Park Ave., New York, NY 10154.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–12634 Filed 8–3–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54239; File No. 4–524]

Joint Industry Plan; Notice of Filing of the NMS Linkage Plan by the American Stock Exchange LLC, Boston Stock Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., The NASDAQ Stock Market LLC, National Stock Exchange, New York Stock Exchange LLC, and NYSE Arca, Inc.

July 28, 2006.

I. Introduction

On July 17, 2006, pursuant to Rule 608 of the Securities Exchange Act of 1934 ("Act"),[1] the American Stock Exchange LLC, ("Amex"), the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated., the Chicago Stock Exchange, Inc., The NASDAQ Stock Market LLC, the National Stock Exchange, the New York Stock Exchange LLC, ("NYSE"), and NYSE Arca, Inc. ("Participants") filed with the Securities and Exchange Commission ("Commission" or "SEC") an executed copy of the NMS Linkage Plan ("Linkage Plan" or "Plan"), a national market system plan to create and operate an intermarket communications linkage pursuant to Section 11A(a)(3)(B) of the Act.[2] The Linkage Plan, as stated in section 13 of the Plan, is to become operative on October 1, 2006. The Linkage Plan was executed by the eight self-regulatory organizations listed above. According to the Plan Participants, the Philadelphia Stock Exchange, Inc. ("Phlx") is in general agreement with the policy and rules associated with the proposed Linkage Plan and may become a Participant before the Plan's operative date of October 1, 2006. Pursuant to Rule 608(b)(1),[3] the Commission is publishing this notice of, and soliciting comments on, the Linkage Plan.

II. NMS Linkage Plan

In the following paragraphs, the Linkage Plan Participants respond to the requirements of Rule 608 under the Act.

1. Purpose of Linkage Plan

The purpose of the proposed Linkage Plan is to enable the Plan Participants to act jointly in planning, developing, operating and regulating the NMS Linkage System ("Linkage" or "System") that will electronically link the Participant Markets to one another, as described in the Linkage Plan, so as to further the objectives of Congress as set forth in Section 11A of the Act and to facilitate compliance by the Participants and their respective members with Rules 610 and 611 under Regulation NMS.

2. Governing or Constitutional Documents

The governing document is the Linkage Plan.

3. Implementation of Plan

The proposed Linkage Plan will become effective on October 1, 2006.[4]

4. Development and Implementation Phases

As provided in section 13 of the proposed Plan, the Plan will become effective on October 1, 2006.

As provided in section 11 of the proposed Plan, the Plan will terminate on June 30, 2007. Participants that wish to extend the term may agree to do so, subject to Commission approval. During the term of the Plan, a Participant may withdraw on 30 days' notice if it continues to maintain connectivity to all other Participants and accepts orders through the Linkage until June 30, 2007. A withdrawing Participant's right to send orders through the Linkage would terminate on the date the withdrawal is effective.

5. Analysis of Impact on Competition

According to the Participants, the Plan imposes no burden on competition. Rather, it enhances intermarket competition by providing a means, in addition to any private linkages established among Participants, by which orders entered in any Participant Market may access interest displayed in other Participant Markets electronically and in compliance with Rule 611. The Linkage Plan imposes no fees or charges in connection with order executions. Further, the Plan provides that any fee imposed by a Participant on its members in connection with use of or access to the System must not discourage use of the System.

6. Written Understandings or Agreements Relating to Interpretation of, or Participation in, Plan

According to the Participants, other than the Plan itself, there are no written understandings or agreements between or among Plan Participants relating to interpretations of the Plan or conditions for becoming a participant in the Plan.

7. Approval of Amendment by Sponsors in Accordance With Plan

Not applicable.

8. Description of Operation of Facility Contemplated by the Proposed Plan

The System includes the data processing hardware, software and communications network that electronically links the Participant Markets to one another. The System accommodates only regular way trading. All System trades must be compared, cleared and settled through SEC-registered clearing corporations. The System is designed to accommodate

[1] 17 CFR 242.608.

[2] This submission supersedes earlier submissions dated April 10, 2006 and June 12, 2006.

[3] 17 CFR 240.608(b)(1).

[4] As the ITS Plan is still in effect, SROs may need exemptions from certain provisions of the ITS Plan, in conjunction with the implementation of the Linkage Plan. SROs should request, and the Commission will consider, appropriate exemptions from the provisions of the ITS Plan.

trading in any Eligible Security, as defined in section VII of the Consolidated Tape Association ("CTA") Plan. Section VII of the CTA Plan provides generally that Eligible Securities include equity securities registered on the NYSE, the Amex or another national securities exchange whose original listing requirements substantially meet those of NYSE or Amex. Eligible Securities do not include securities listed on the Nasdaq Stock Market.

The Securities Industry Automation Corporation ("SIAC") serves as the System's facilities manager and has responsibility for the operation and maintenance of the System. SIAC performs its function as facilities manager in accordance with Plan provisions and subject to the administrative oversight of the Supervisory Committee. (Section 5(d)).

The System accepts immediate or cancel limit orders. Orders must be sent to a Participant Market through the auspices of a member of that Participant, known as a Sponsoring Member.[5] Section 6(a)(ii) states the minimum information that must be specified in an order, including the member of the destination market (the Sponsoring Member); the "give-up" in the originating Participant Market; the security; the side (buy or sell); the amount to be bought or sold (which must be for one unit of trading (*i.e.*, 100 shares) or any multiple thereof); and the price. The price must be equal to the bid or offer then being furnished by the destination Participant Market. An order must specify a "time in force" of 5, 15 or 120 seconds, after which the order will expire if unexecuted.

After February 5, 2007, all routed limit orders will be presumed by the executing market to be intermarket sweep orders sent in accordance with Rule 611(b) of Regulation NMS. (Section 6(a)(vi)). The trading rules applicable in destination Participant Markets will apply to orders received in the market and the execution of those orders in the market. (Section 6(b)).

9. Terms and Conditions of Access

Section 3(c) of the Plan provides that any national securities exchange or national securities association may become a Plan Participant by agreeing, in an amendment to the Plan adopted in accordance with its provisions, to comply, and to enforce compliance, with the Plan as provided in section 3(b) of the Plan. An applicant for Plan participation is required to pay SIAC an amount estimated by SIAC to cover development costs to be incurred to accommodate the new Participant. In addition, before the SEC approves the applicant as a Plan Participant, the applicant must pay SIAC actual development costs in excess of estimated development costs, if any, or SIAC will reimburse the applicant estimated development costs that were paid and are in excess of actual development costs, if any. A new Participant shares in development costs incurred after it becomes a Participant in accordance with section 10(a)(iii)(A). (Section 10(a)(iii)(C)). As noted in Item 8, above, orders sent through the System must be sent through a Sponsoring Member in the executing market. There are no other limitations or conditions to access to the System.

10. Method of Determination and Imposition, and Amount of, Fees and Charges

The Linkage Plan imposes no fees or charges in connection with orders executed through the Linkage. A Sponsoring Member is subject to applicable transaction charges imposed by the executing market.

Section 10 (Financial Matters) provides for sharing by Participants of "development costs" and "production costs," as defined in section 10(a). Development costs must be agreed to by all Participants. Each Participant must pay a fraction equal to its share of the "transactions base" (as defined in section 10(a)(i)(I)) for the calendar quarter preceding the calendar quarter during which the Participants agree to incur such cost. The Plan provides that any development costs incurred for the benefit of less than all Participants will be shared by the Participants that benefit from the costs as they mutually agree.

Production costs are shared by Participants such that each Participant, except the NYSE, pays 50% of the fraction of production costs for a calendar quarter equal to its share of the "routed orders base" defined in section 10(a)(i)(F), as computed for the quarter, but subject to a cap (the "Production Costs Sharing Cap", defined in section 10(a)(iv)(A)). The NYSE will pay the production costs in excess of the costs that section 10(a)(iv)(A) requires other Participants to pay.

Each Participant is required to bear 100% of the costs to provide the communication connection from the Participant's facilities to the System's communications facilities maintained by SIAC. (Section 10(a)(v)).

Each Participant is free to determine whether or not to impose, and the amount of, a fee or charge on its members in connection with use of its facilities to access the System. Any such fee or charge must not be of such size, or so structured, as to discourage use of the System. (Section 10(b)).[6]

In consideration of the NYSE's making available a designated NYSE operating system to assume the functions of the System in the event of a disaster, Participants other than NYSE have agreed to pay the NYSE certain fees as set forth in section 12(d) of the Plan.

11. Method and Frequency of Processor Evaluation

Not applicable.

12. Dispute Resolution

The Linkage Plan does not include specific provisions regarding resolution of disputes between or among Participants. Section 4(d) of the Plan provides that no action or inaction by the Supervisory Committee shall prejudice any Participant's right to present its views to the SEC or any other person with respect to any matter relating to the System or to seek to enforce its views in any other forum it deems appropriate. In addition, section 6(b) provides that the destination market's trading rules apply to orders received in the destination market and executions of orders therein. Each Participant determines the extent to which its trading rules apply to members in its market insofar as such members' issuance of orders from such market and resulting executions are concerned.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Linkage Plan 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 4–524 on the subject line.

[5] The Sponsoring Member will be responsible for paying applicable transaction fees of the destination market. In the event that the Participants are unable to implement Sponsoring Member billing on October 1, 2006, the Participants have agreed to accept direct exchange-to-exchange billing.

[6] Any fees charged by Participants must be filed with the Commission pursuant to Section 19(b) of the Act.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–524. 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 Linkage Plan that are filed with the Commission, and all written communications relating to the Linkage Plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. A copy of the Linkage Plan is attached to this Release as Exhibit A. Copies of the Plan also will be available for inspection and copying at *http://www.itsplan.com*. 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 4–524 and should be submitted on or before August 25, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

Exhibit A—Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11a(A)(3)(B) of the Securities Exchange Act of 1934

Agreement made as of June 12, 2006, among American Stock Exchange LLC, Boston Stock Exchange, Inc., Chicago Board Options Exchange, Inc., Chicago Stock Exchange, Inc., Nasdaq Stock Market LLC, National Stock Exchange, New York Stock Exchange LLC, and NYSE Arca, Inc.

Whereas, the undersigned national securities exchanges are parties to the plan submitted to the Securities and Exchange Commission (the "SEC") for the purpose of creating and operating an intermarket communications linkage pursuant to section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (the "Act").

Now, therefore, in consideration of the premises and the mutual covenants and agreements contained herein, the parties agree to submit this Agreement called the NMS Linkage Plan to the SEC for approval pursuant to section 11A(a)(3)(B) of the Act and Rule 608 thereunder.

Definitions

(1) "Application" means any use of the System to facilitate trades between Participant Markets that is described in the NMS Linkage Plan.

(2) "CTA Plan" means the plan filed with the SEC pursuant to SEC Rule 17a–15 (subsequently amended and redesignated as Rule 11Aa3–1, and subsequently amended and redesignated as Rule 601), approved by the SEC and declared effective as of May 17, 1974, as from time to time amended.

(3) "CTA Plan Processor" means the organization serving as recipient and processor of last sale prices under the CTA Plan.

(4) "Eligible Security" has the meaning assigned to that term in the CTA Plan.

(5) "NMS Linkage Plan" or "Linkage Plan" means the plan amended and restated in this instrument as from time to time amended in accordance with the provisions hereof.

(6) "NMS Linkage System" ("Linkage" or "Linkage System") means the system described in section 5.

(7) "Network A Eligible Security" has the meaning assigned to that term in the CTA Plan.

(8) "Network B Eligible Security" has the meaning assigned to that term in the CTA Plan.

(9) "Participant" means a party to the Linkage Plan with respect to which such plan has become effective pursuant to section 13.

(10) "Participant('s) Market" means each Exchange Market.

(11) "System" means the data processing hardware, software and communications network that links electronically the Participant Markets to one another. The System includes (a) computers that perform such functions as message validation, processing, logging and switching and (b) from a functional standpoint, (i) high speed communications lines that link such computers with the Participant Markets (either directly or through Participant Switches), and (ii) Linkage System stations.

(12) "System security (stock)" means a security (stock) selected for trading through the Applications in accordance with section 5(b)(ii).

(13) "System trade" means any trade made through any Application.

2. Purpose of Linkage Plan

The purpose of the Linkage Plan is to enable the Participants to act jointly in planning, developing, operating and regulating the system as described in the Linkage Plan so as to further the objectives of Congress as set forth in section 11A(a) of the Act and to facilitate compliance by the Participants and their respective members with SEC Rules 610 and 611.

3. Parties

(a) *List of Parties.* The parties to the Linkage Plan are as follows:

American Stock Exchange LLC ("AMEX"), registered as a national securities exchange under the Act and having its principal place of business at 86 Trinity Place, New York, New York 10006.

Boston Stock Exchange, Inc. ("BSE"), registered as a national securities exchange under the Act and having its principal place of business at as 100 Franklin Street, Boston, Massachusetts 02110.

Chicago Board Options Exchange, Inc. ("CBOE"), registered as a national securities exchange under the Act and having its principal place of business at 400 South LaSalle Street, Chicago, Illinois 60605.

Chicago Stock Exchange, Inc. ("CHX"), registered as a national securities exchange under the Act and having its principal place of business at One Financial Place, 440 South LaSalle Street, Chicago, Illinois 60605.

Nasdaq Stock Market LLC ("Nasdaq"), registered as a national securities exchange under the Act and having its principal place of business at 1 Liberty Plaza, 165 Broadway, New York, NY 10006.

National Stock Exchange ("NSX"), registered as a national securities exchange under the Act and having its principal place of business at 440 South LaSalle Street, Suite 2600, Chicago, Illinois 60605.

New York Stock Exchange LLC ("NYSE"), registered as a national securities exchange under the Act and having its principal place of business at 11 Wall Street, New York, New York 10005.

NYSE Arca , Inc. ("Arca"), registered as a national securities exchange under the Act and having its principal place of business at 100 S. Wacker Drive, Chicago, IL 60606.

(b) *Compliance Undertaking.* By subscribing to and submitting the

[7] 17 CFR 200.30–3(a)(27).

Linkage Plan for filing with the SEC, each undersigned party agrees to comply to the best of its ability and, absent reasonable justification or excuse, to enforce compliance by its members in their use of the Linkage through its facilities with the provisions of the Linkage Plan.

(c) *New Participants.* The Participants agree that any other national securities exchange or national securities association may subscribe to the Linkage Plan and become a Participant by agreeing, in an amendment to the Linkage Plan adopted in accordance with its provisions, to comply and to enforce compliance with the provisions of the Linkage Plan as provided in section 3(b).

4. Administration of Linkage Plan

(a) *Supervisory Committee: Composition, Voting.* Each Participant shall select from its staff one individual to represent such Participant as a member of the Supervisory Committee under the Linkage Plan. Except as may be specifically otherwise provided herein, action taken pursuant to the vote of a majority of the members of the Supervisory Committee present at a meeting of the committee at which a majority of the full committee is present shall be deemed to be the action of the Supervisory Committee.

(b) *Supervisory Committee: Authority.* The Supervisory Committee shall not be a policy-making or a rule-making body, but shall, either directly or by delegating its functions to individuals, subcommittees established by it from time to time or others, (i) oversee development of the System in accordance with the specifications therefore agreed upon by each Participant, (ii) monitor the operation of the System and (iii) advise the Participants with respect to any deficiencies, problems or recommendations as the Supervisory Committee may deem appropriate in its administration of the Linkage Plan. In this connection, the Supervisory Committee shall have authority to develop procedures and make administrative decisions necessary to facilitate the operation of the System in accordance with the provisions of the Linkage Plan.

(c) *Amendments to Linkage Plan.* Any proposed change in, addition to, or deletion from the Linkage Plan may be effected only by means of a written amendment to the Linkage Plan which sets forth the change, addition or deletion, is executed on behalf of each Participant and is approved by the SEC or otherwise becomes effective pursuant to section 11A of the Act and Rule 608(b).

(d) *Participant's Rights.* No action or inaction by the Supervisory Committee shall prejudice any Participant's right to present its views to the SEC or any other person with respect to any matter relating to the System or to seek to enforce its views in any other forum it deems appropriate.

5. The System

(a) *System Monitoring.*

(i) *Linkage Supervisory Stations.* Each Participant will maintain a Linkage supervisory station where supervisors appointed by such Participant will be able to coordinate trade adjustments.

(ii) *Linkage Control Center.* The System also includes the Linkage control center ("LCC"), which monitors and controls communications within the System, including the processing of error conditions. The LCC staff is able to display and, when authorized by any Participant, to modify the security and market records of that Participant's Market as such records relate to the System. The LCC staff is also able to indicate whether or not any Participant Market is open for System trades. In addition, the LCC may be used as "back-up" for the Linkage supervisory system-wide broadcasts. Finally, the LCC staff is able to enter adjustments of any trade pursuant to the procedures specified in section 6(a)(iv) and to perform data base control after trading hours.

(b) *General Operation.*

(i) *Registered Clearing Corporations.* The System accommodates only regular way trading, and all System trades must be compared, cleared and settled through clearing corporations registered with the SEC that maintain facilities through which such transactions may be compared and settled and that agree to supply each Participant with data reasonably requested in order to permit such Participant to enforce compliance by its members with its rules, the provisions of the Act, the rules and regulations thereunder, and the Linkage Plan.

(ii) *Selection of System Securities.* The System is designed to accommodate trading in any Eligible Security. The particular securities that may be traded through the System at any time ("System securities") shall be selected by the Supervisory Committee. The Supervisory Committee may add or delete System securities as it deems appropriate and may delay the commencement of trading in any Eligible Security if capacity or other operational considerations shall require such delay.

(c) *Administrative Messages.* Administrative messages, as distinguished from orders, responses thereto and trade adjustment inputs (including names later information), may also be sent through the System.

There are two categories of administrative messages that can be sent by Participant members: Single destination and security broadcast. Another category of administrative message, a "system-wide broadcast", may be sent through the System only from the Linkage control center.

(d) *Facilities Manager.* The Securities Industry Automation Corporation ("SIAC") serves as the System's facilities manager and has responsibility for the operation and maintenance of the System. SIAC performs its function as facilities manager in accordance with the provisions of the Linkage Plan and subject to the administrative oversight of the Supervisory Committee.

6. Linkage System

(a) *Technical Matters.*

(i) The System shall accept immediate or cancel ("IOC") orders, provided however, that, upon the request of a Participant or Participants, and in accordance with Section 10(a)(iii)(A) relating to New Development Costs Sharing, the System shall accommodate additional order types to be utilized by such Participant or Participants. Orders must be sent to a Participant market through the auspices of a member of that Participant, known as a Sponsoring Member. Each market will maintain within SIAC a database of default Sponsoring Members (not to exceed 10) for after hours processing and billing for orders sent to a market where the originating firm is not a member of the destination market.

(ii) *Order Information.* An order shall, at a minimum, specify the following:

(A) The member of the destination market (either clearing member or Sponsoring Member); [8]

(B) Original Clearing member or Omnibus clearing account of the originating Participant Market, commonly referred to as the Give-Up,

[8] The member of the destination market will be identified by a unique clearing number. If the clearing number provided by the originating Participant Market does not identify a member of the destination market, SIAC will identify the default Sponsoring Member of the originating market at the destination market for the security in question and that Sponsoring Member's identification information will be included on the order to the destination market on all reports sent to the destination market, including any report for billing purposes. The member identified on the order will be responsible for any fees in the destination market. SIAC will provide to Participants a key to match the clearing number to the member's name.

(C) The receiving Participant Market,

(D) The security that is the subject of the order,

(E) Designation of the order as an order to buy or to sell,

(F) The amount of the security to be bought or sold, which amount shall be for one unit of trading or any multiple thereof,

(G) A price equal to the offer or bid price then being furnished by the destination Participant Market, which price shall represent the price at or below which the security is to be bought or the price at or above which the security is to be sold, respectively,

(H) To facilitate application of the short sale rule in effect in the destination Participant Market, a designation of the order as "short" or "short exempt" whenever it is a order to sell short, and

(I) Time in force as 5, 15 or 120 seconds.[9]

(iii) *Order Validation, Routing.* At the time of transmission, each order undergoes validation procedures. If the order passes the validation procedures, the System assigns a unique order identifier number (a "OID") to the order, time stamps it and logs it on a mass storage device (the "daily log"). The System also sends a transmission acceptance message to the Participant Market that originated the order. The order is then routed to the destination Participant Market. If the order is accepted, in whole or in part, in the destination Participant Market, the execution is reported back through the System to the originating and receiving Participant Markets.

The System rejects the transmission of a response that fails the validation check and sends an appropriate error message to the Participant Market that originated the response. The validation of a response causes the System to retrieve the related order from the daily log and update it with appropriate response information. This log forms the basis from which the after-hours reports described in section 7(a) are produced. Validation also causes the System to send a transmission acceptance message to the Participant Market that originated the response. The System then sends the response to the Participant Market that originated the order. When an order is only partially executed, the unexecuted shares are not filled, and the System generates a cancellation for the unexecuted quantity and appends the cancellation to the execution report that it sends to the Participant Market that originated the order.

(iv) *Trade Adjustments.* In accordance with section 5(a)(ii), supervisors monitoring the Participant Markets may request the LCC to enter adjustments to trades (*i.e.*, to price, share size, buy or sell side, to cancel a trade or to insert a trade "as-of" a prior day). The following sets forth the procedures to facilitate trade adjustments and to authorize the LCC to make such adjustments. All requests among Participants and to the LCC for trade adjustments shall be in the form of administrative messages sent through the System. For the purposes of this section 6(a)(vi), administrative messages sent or received among Participant Markets, or sent to the LCC, shall be deemed to have been issued by supervisors of Participant Markets authorized by such Participant Markets to issue such administrative messages.

(A) *Adjustments on Trade Day.* The LCC shall make an adjustment to a trade entered into that same day based upon an administrative message request made from a supervisor of the Participant Market that received and executed the order ("executing market supervisor"). Such request shall not be made to the LCC unless an executing market supervisor has received from a supervisor in the Participant Market that issued the order ("issuing market supervisor"), in the form of an administrative message sent through the System, agreement as to the terms of, and authorization to make, the adjustment. The administrative message request to the LCC by the executing market supervisor shall specify the terms of, and authorization to the LCC to make, the adjustment.

In the event that, notwithstanding the provisions of the prior paragraph, an executing market supervisor requests the LCC to make a trade adjustment without having received an administrative message from an issuing market supervisor, and the LCC has made such requested adjustment, then the LCC shall, at the request and direction of an issuing market supervisor, made prior to the settlement for such trade, readjust such trade to its terms as they existed prior to such adjustment.

(B) *Adjustments for Prior Trade Day.* Except as provided in the preceding paragraph, the LCC shall make an adjustment to a trade entered into on a prior day only upon administrative message requests made from both executing and issuing market supervisors, each message specifying the same terms of, and authorization to the LCC to make, the adjustment.

(C) The provisions of paragraphs (A) and (B) of this section 6(a)(iv) shall not restrict the ability of any Participant Market to unilaterally request the LCC to end adjustments to trades or to cancel or adjust any System trade executed in its market pursuant to its rules pertaining to clearly erroneous transactions or obvious errors, and system malfunctions. The sending market may invoke any appellate or review process provided by such rules on behalf of the Sponsoring Member. In the event of any cancellation or adjustment, the executing market shall notify the LCC and all affected Participants by administrative message specifying the terms of the cancellation or adjustment and authorizing the LCC to make the adjustments or cancel the trades.

(D) *LCC Confirmation.* The LCC shall, after making a trade adjustment, send an administrative message to both the executing and sending market supervisors confirming that the adjustment has been made and specifying the terms of the adjustment.

(v) *Intermarket Sweep Orders.* All routed limit orders shall be presumed by the executing market to be orders sent pursuant to the intermarket sweep order exception in SEC Rule 611(b).

(vi) *Other.* Each Participant shall also determine how orders received in the market for which it has responsibility are to be handled therein and agrees that any procedures it may adopt in this regard shall be consistent with the provisions of the Linkage Plan and the efficient operation of the System. Participants are required to execute orders at a minimum at the size of their displayed quotes. Each Participant shall insure that no communication shall be entered into the System from its market except (A) on behalf of a member of such Participant who is permitted by the Linkage Plan and such Participant's rules to use the System with respect to the security or securities that are the subject of the communication or (B) by employees of such Participant in

[9] A Participant Market may prevent the execution, through its facilities, of an otherwise marketable System order, prior to the 5, 15 or 120 second time in force parameter assigned to that order, if the time in force parameter would result in the issuance of an expiration notice to the sending market before execution of such order could be reported to SIAC. Any such procedure must be effective pursuant to a filing with the SEC.

No order with a time in force parameter of 5 or 15 seconds shall be sent to AMEX, CBOE or CHX prior to the earlier of (i) the date on which all automated trading centers intending to qualify their quotations for trade-through protection under Rule 611 of Regulation NMS must have achieved full operation of Regulation NMS-compliant trading systems or (ii) the date on which AMEX, CBOE or CHX, as the case may be, has notified the Supervisory Committee in writing that it is capable of accepting and executing such orders. If an order with either of these time in force parameters is sent to AMEX, CBOE or CHX prior to such time, it will not be executed due to system limitations.

performance of such Participant's obligations under the Linkage Plan.

(b) *Participant Trading Rules.* The trading rules applicable in destination Participant Markets shall apply to orders received in such market and executions of orders therein. Each Participant shall determine the extent to which its trading rules shall apply to members within its market insofar as such members' issuance of orders from such market and resulting executions are concerned.

7. Comparison and Settlement

Comparison of a side of a System trade furnished by a Participant shall be the responsibility of such Participant.

(a) *After Hours Functions.* The functions of the System after the close of trading in all Participant Markets shall consist of the following:

(i) The System's daily log of messages will be put on tape for retention;

(ii) The System will generate four reports:

(A) An order/response report that will match orders to trade with the appropriate responses,

(B) An order/cancellation report that will list all orders to trade that were canceled,

(C) A trade adjustment report that will list all adjustments made to previously executed System trades, and

(D) A traffic summary report that will indicate the number of orders to trade, the number of responses and the number of administrative messages entered from each Participant Market during the trading day; and

(iii) The System will generate the clearing tape referred to in section 7(b).

(b) *Clearing Tape.* At the end of each trading day, the System generates a clearing tape as part of after-hours processing. This tape is in OID sequence, includes all of the day's System trades, and shows:

(i) The OID,

(ii) The originating Participant and clearing member(s), or the clearing corporation(s) through which such clearing member(s) shall settle the trade,

(iii) The destination Participant and destination clearing member(s), or the clearing corporation(s) through which such clearing member(s) shall settle the trade,

(iv) The type of trade action (buy or sell),

(v) The security symbol,

(vi) The executed quantity and price, and

(vii) The date and time of trade.

Adjustments to any System trade made by agreement between both sides of the trade are included in the tape and shown as a separate "trade adjustment record". If a trade has been adjusted, the original trade record is followed by trade adjustment record(s). The trade adjustment record(s) carry the same OID as the original trade record. There are two types of trade adjustments, System trade cancellations and System trade changes. For System trade cancellations, the adjustment record negates the original trade record. For example, a cancellation of a trade to buy is reflected on the adjustment record as a "negative buy". For System trade changes, there are two adjustment records. The first adjustment record negates the original trade record. The second adjustment record logs the trade data as adjusted for, *e.g.*, a change in action, security, quantity and/or price. The adjustment records are generated from the trade adjustment file that is created during trading hours and from inputs from the Linkage control center pursuant to requests from the Participants' supervisors.

(c) *Comparison of System Trades.* The contra side of each System trade ultimately is the clearing interface account used to identify the clearing corporation through which the comparison of such side is completed. If both sides of a System trade are to settle through the same clearing corporation, the clearing corporation may, at its option, either book each side against the clearing member responsible for that side or offset each side against an internal omnibus account (in which case the omnibus account will net to zero).

While sorting and format changes may be required, the various clearing corporations are able to use the System clearing tape as the basic input to their trade comparison operations. The clearing member(s) responsible for an Exchange-supplied side of a System trade shall follow routine comparison procedures. In instances where an uncompared transaction cannot be resolved through routine procedures, the Exchange-supplied side(s) of the trade discrepancy will be handled in accordance with the rules of the Participant(s) and clearing corporation(s) involved.

Once comparison has been completed, clearance and settlement can proceed in a routine manner. System trades are processed with all other transactions through established clearing interfaces.

(d) *Participant Settlement Obligations.* The rules of each Participant shall be designed to assure that if a System trade reported on the clearing tape (as adjusted) at the close of any trading day, as such trade relates to such Participant, cannot be compared notwithstanding the use of routine comparison procedures, such Participant shall on the scheduled settlement date honor such uncompared trade; provided, however, that, if such a System trade as it relates to such Participant is rejected or excluded from the settlement operation conducted by the clearing corporation to which it was reported for settlement either because of the insolvency of the member(s) for whose account(s) it was to be settled or for any other reason (other than failure to compare), such Participant shall not be obligated to honor such trade and such trade shall be returned to such member(s).

In the event that a System trade as it relates to any Participant is rejected or excluded from the settlement operation conducted by the clearing corporation to which it was reported for settlement for any reason other than failure to compare, neither the Participant from whose market the side of the trade that is rejected or excluded was supplied, the Participant from whose market the contra side of such trade was supplied nor any clearing corporation to which either side of the trade was submitted shall be obligated to honor the trade. Instead, the member(s) constituting the contra side of the rejected or excluded trade (the "contra party") shall, without unnecessary delay after receipt of notice of such rejection or exclusion, close out such trade in the best available market, except insofar as the rules of the clearing corporation to which the contra side was submitted or of the Participant from whose market the contra side was supplied are applicable and provide an alternative method for closing. The rules of each Participant shall state the foregoing closing obligations of the contra party.

8. Pre-Opening Price Information

The NYSE and AMEX will disseminate, through the System, pre-opening price information whenever a member in that Participant market, in arranging an opening transaction in his or her market in a System security, anticipates that the opening transaction will be at a price that represents a change from the "previous day's consolidated closing price" of more than the "applicable price change."

The "previous day's consolidated closing price" is the last price at which a transaction in the security was reported by the CTA Plan Processor on the last previous day on which transactions in the security were

reported by the CTA Plan Processor. The "applicable price changes" are:

Security	Consolidated closing price	Applicable price change ($) (more than)
Network A ...	Under $15	0.10
	$15 or over ..	[10] 0.25
Network B ...	Under $5	0.10
	$5 or over	[11] 0.25

Prior to the opening of trading in a System security for which the NYSE or AMEX has disseminated pre-opening price information, orders in that security shall be sent to that Participant through the Participant's order delivery system and not the NMS Linkage.

9. Operating Hours

Regular trading hours are from 9:30 a.m. to 4 p.m. eastern time. The normal operating hours of the System are 9 a.m. to 6:30 p.m. eastern time or such other period as the Supervisory Committee, by affirmative vote of all its members, may specify. Any period outside the normal operating hours of the System is herein referred to as an "additional period". The System shall be operable during any additional period requested in writing by any two or more Participants; provided that such Participants have agreed to pay all costs and expenses attributable to the operation of the System during such additional period as agreed to by those Participants.

10. Financial Matters

(a) *Costs.* The Participants shall share the "development costs" and "production costs", in accordance with the provisions of this section 10(a).

(i) *Costs Definitions.*

(A) "Computer software" includes all programs or routines developed by or at the direction of the System's facilities manager (including such development in connection with the Intermarket Trading System) to cause computers to perform tasks required for any one or more Applications and the documentation required to describe and maintain those programs. Computer programs of all classes, for example, operating systems, execution systems, monitors, compilers and translators, assembly routines, and utility programs are included.

(B) "Development costs" mean all costs incurred by the System's facilities manager in developing and improving the computer software and installing hardware as necessary to facilitate System functionality (including any testing conducted in connection with the System).

(C) "Installing hardware as necessary" includes, but is not limited to, installation and maintenance of all installations and computer facilities required to support the System.

(D) "New Participant" means any national securities exchange or national securities association that becomes a Participant in accordance with section 3(c) after SEC approval of this Linkage Plan.

(E) "Production costs" mean all operating expenses associated with the operation of the System, including all costs and expenses (including appropriate overhead costs and all applicable taxes however designated, exclusive of net income taxes) of the System's facilities manager associated with, relating to, or resulting from its operation or maintenance of the System, but excluding any cost or expense associated with any Participant's self-regulatory function. Production costs also include the costs and expenses of the facilities manager: (i) In maintaining "hot lines" that permit conversations among broker-dealers and staff in different Participant Markets and with the Systems control center; and (ii) associated with reports rendered by a firm of independent accountants pursuant to paragraph (a)(vi) of this section 10.

(F) "Routed orders base" for any calendar quarter means the total number of orders sent through the System.

(G) "Share of the routed orders base" of any Participant as computed for any calendar quarter means a fraction, the numerator of which is the total number of orders sent through the System by that Participant during the calendar quarter and the denominator of which is the routed orders base for the calendar quarter.

(H) "Share of the transactions base" for a calendar quarter means:

(1) For any Participant other than AMEX or NYSE, a fraction, the numerator of which is the total number of transactions in Network A Eligible Securities that the Participant reports to the CTA Plan Processor during that quarter and the denominator of which is the quarter's transactions base;

(2) For AMEX, a fraction, the numerator of which is the number of transactions in "Top Ten Network B Eligible Securities" (as clause (2) of section 10(a)(i)(I) defines that term) that AMEX reports to the CTA Plan Processor during that quarter and the denominator of which is the quarter's transactions base; and

(3) For NYSE, the fraction derived by subtracting from 1 (one) the sum of all other Participants' shares of the transaction base for the quarter.

(I) "Transactions base" for any calendar quarter means the sum of (1) the number of transaction reports in Network A Eligible Securities that the CTA Plan Processor disseminates during the quarter and (2) the number of transaction reports in the "Top Ten Network B Eligible Securities" that the CTA Plan Processor disseminates during the quarter. A quarter's "Top Ten Network B Eligible Securities" refers to the ten Network B Eligible securities for which the CTA Plan Processor disseminates the greatest number of transaction reports during that quarter.

(ii) *Dispute Costs Excluded.* The development costs and production costs shall not include any cost or expense incurred by any Participant as a result of or in connection with the defense of any claim, suit or proceeding against the Supervisory Committee or any one or more of the Participants relating to the Linkage Plan or the operation of the System. All such costs and expenses incurred by any Participant shall be borne by such Participant without contribution or reimbursement.

(iii) *Development Costs.*

(A) *New Development Costs Sharing.* Development costs shall not be incurred except as agreed to by all Participants. Each Participant shall pay a fraction equal to its share of the transactions base for the calendar quarter preceding the calendar quarter during which the Participants agree to incur such cost. Any development costs that are incurred for the benefit of less than all Participants shall be shared by the Participant or Participants that benefit therefrom as they shall mutually agree.

(B) *Development Costs Payment.* Development costs will be computed by the System's facilities manager as soon as practicable following the close of the calendar month or, if relatively small, the calendar quarter during which they were incurred. Each Participant's share shall be billed to, and payable by, such Participant promptly thereafter.

(C) *New Participant's Share of Development Costs.* At the time any national securities exchange or national securities association applies to become a new Participant, such applicant shall

[10] If the previous day's consolidated closing price of a Network A Eligible Security exceeded $100 and the security does not underlie an individual stock option contract listed and currently trading on a national securities exchange, the "applicable price change" is one dollar.

[11] If the previous day's consolidated closing price of a Network B Eligible Security exceeded $75 and the security is not a Portfolio Depositary Receipt, Index Fund Share, or Trust Issued Receipt, or does not underlie an individual stock option contract listed and currently trading on a national securities exchange, the "applicable price change" is one dollar.

be charged by, and shall pay to, the System's facilities manager an amount estimated by the System's facilities manager to cover development costs to be incurred to accommodate such applicant's status as a Participant. Prior to the effective date of the SEC's approval of such Participant status, the applicant shall pay to the System's facility manager actual development costs in excess of estimated development costs, if any, or the System's facility manager shall reimburse to the applicant estimated development costs that were paid and that are in excess of actual development costs. Each new Participant shall share in development costs incurred after it becomes a Participant in accordance with section 10(a)(iii)(A).

(D) *Title to Software.* The entire right, title and interest in and to all "computer software" (as defined in section 10(a)(i)(A)) developed prior to July 1, 1978 shall be vested in the Participants who share the cost of such computer software as joint owners. The entire right, title and interest in and to all computer software developed after June 30, 1978 shall be vested in the Participant who pays the cost thereof. If more than one Participant shares in the cost of computer software developed after June 30, 1978, then the entire right, title and interest in and to such computer software, the cost of which is so shared, shall be vested in the Participants who share such cost as joint owners. The System's facilities manager shall use computer software solely for the purpose of performing tasks required for the Applications as provided in the Linkage Plan.

(iv) *Production Costs.*

(A) *Production Costs Sharing.* The production costs attributable to any calendar quarter shall be shared by the markets that were Participants during any portion of the calendar quarter. Each such Participant, except the NYSE, shall pay 50% of the fraction of such production costs equal to its share of the routed orders base as computed for the calendar quarter. Notwithstanding the foregoing, the aggregate dollar amount of all of a Participant's quarterly payments shall not exceed its "Production Costs Sharing Cap." A Participant's "Production Costs Sharing Cap" means total production costs for calendar year 2005 multiplied by 50 percent of the Participant's percentage of the routed order base for the period commencing January 1, 2005, and ending July 31, 2005. The NYSE shall pay those production costs that this Paragraph does not require the other Participants to pay.

(B) *Production Costs Payment.* Production costs will be computed by the System's facilities manager as soon as practicable following the close of each calendar month. Each Participant's (or former Participant's) estimated share thereof shall be billed by the System's facilities manager and shall be payable to the System's facilities manager promptly following receipt. Any appropriate adjustment will be made between the System's facilities manager and each Participant promptly following the close of each calendar quarter.

(v) *Communications Connection Costs.* Each Participant shall bear 100% of the costs to provide communication connection from a Participant's facilities to the System's communications facilities maintained by the facilities manager.

(vi) *Accounts.* The System's facilities manager and the independent public accountants hereinafter referred to shall furnish any information and/or documentation reasonably requested in writing by a majority of the Participants in support of or relating to any of the computations referred to in this section 10(a). All expenses, allocations and computations referred to or required by this section 10(a) shall be reported at least annually to the Participants. For even numbered years, (or such other yearly interval as the Supervisory Committee, by affirmative vote of all its members, may specify), such reports shall be rendered by a firm of independent public accountants (which may be the firm regularly employed by the NYSE or the System's facilities manager), and such accountants shall render their opinion that such expenses, allocations and computations have been reported in accordance with the understanding among the Participants as set forth in this section 10(a). For those years when a firm of independent public accountants is not engaged to render a report, the facilities manager's internal auditor shall review all expenses, allocations and computations referred to or required by this section 10(a) and that internal auditor shall report that such expenses, allocations and computations have been reported in accordance with the understanding among the Participants as set forth in this section 10(a).

(b) *User Charges.* Each Participant shall be free to determine whether or not to impose a fee or charge on some or all of its members in connection with use of its facilities to access the System and, if so, the amount of such fee or charge. Any fee or charge that may be imposed by any Participant shall not be of such size, and shall not be so structured, as to discourage use of the System.

(c) *Facilities Manager Liability Limits.* The System's facilities manager shall not be liable to any Participant or to any member of any Participant using or having access to the System or to any other person for any loss or damage resulting from any non-performance, or interruption in the operation of the System, from any inaccuracies, errors or omissions in any of the information conveyed or received through the System, or from any delays or errors in the transmission of any such information, or for making trade adjustments.

11. Termination; Withdrawal

The Linkage Plan will terminate on June 30, 2007. Participants that wish to extend the term may agree to do so, subject to filing with and approval by the SEC. During the term of the Plan a Participant may withdraw with 30 days notice if it continues to maintain connectivity to all other Participants and accept orders through the Linkage until June 30, 2007. A withdrawing Participant's right to send orders through the Linkage shall terminate on the date the withdrawal is effective. In addition, a withdrawing Participant's obligation to share development and production costs shall terminate on the date the withdrawal is effective, provided, however, that such Participant shall remain liable for, and shall pay upon demand, its portion of the costs of developing and operating the System and any other amounts payable by it as determined pursuant to sections 10 and 12 of the Linkage Plan.

12. System Inoperability

(a) *General.* In the event of a disaster that renders the System inoperable, the NYSE has authorized the facilities manager to utilize a designated NYSE operating system (the "NYSE System") on a preemptive and priority basis to function as detailed in section (c)(i), below.

(b) *Participants' Implementation Obligations.*

(i) At any time the NYSE System assumes the functions of the System, all Plan provisions not inconsistent with this section 12, and Participant rules and policies governing use of the System will continue to apply.

(ii) Each Participant's cost of maintaining communications connectivity to the NYSE System shall be borne by that Participant.

(c) *NYSE Implementation Obligations.* In consideration of the fees to be paid to the NYSE as specified in paragraph (d) of this section 12, the NYSE agrees:

(i) To have and to make available the NYSE System to assume the functions of the System on a preemptive and priority basis in the event of a disaster which renders the System inoperable. Such system is composed of computers and peripheral equipment sufficient to operate the System at a minimum of 50% of the System's rated 150 messages per second capacity and 75% of the System's disk capacity.

(ii) That the facilities manager is authorized to take the actions necessary to make the NYSE System available to assume the functions of the System within two hours in the event of a limited disaster and on the next day in the event of a full site disaster. The facilities manager is authorized to make the determinations that, in its good faith judgment, there has been a limited disaster or full site disaster, the System is inoperable, and the NYSE System will assume the functions of the System.

(iii) That the NYSE System will be located at a site remote from the site where the System is located.

(d) *Implementation Obligations of Participants Other than NYSE ("Other Participants").*

(i) *Fees.* In consideration of the NYSE's making available the NYSE System to assume the functions of the System in the event of a disaster, the Other Participants agree to pay to the NYSE: (A) A preemptive and priority reserve fee totaling $24,800 per calendar quarter (such reserve fee shall be adjusted each January by the same percentage change as in the Consumer Price Index as calculated by the U.S. Department of Commerce for the preceding calendar year); and (B) a *per diem* fee, if in the event of a disaster the NYSE System assumes the functions of the System, for each day in excess of five consecutive trading days that the NYSE System is so utilized. Such *per diem* fee shall equal 1/250 of the yearly dollar amount the facilities manager charges the NYSE to operate the NYSE System.

This subsection (d)(i) shall become effective on the date that the facilities manager confirms in writing to the Supervisory Committee that it has taken all actions necessary to make the NYSE System available to assume the functions of the System as specified in subsection (c) of this section 12. If such effective date is other than the first day of the calendar quarter, then the preemptive and priority reserve fee for such calendar quarter shall be calculated pro rata based upon the number of days in such calendar quarter that the NYSE System is so available.

(ii) *Fee Sharing.* Each of the Other Participants agrees to pay a share of the preemptive and priority reserve and per diem fees based upon a proportional share of its production costs excluding the NYSE's share.

(iii) *Fee Payment.* Fee payment will be computed by the System's facilities manager as soon as practicable following the close of each calendar month. Each Other Participant's (or former Participant's) estimated share thereof shall be billed by the System's facilities manager and shall be payable to the System's facilities manager promptly following receipt. Any appropriate adjustment will be made between the System's facilities manager and each Other Participant promptly following the close of each calendar quarter. The facilities manager shall forward such payments to the NYSE as the NYSE may from time to time instruct the facilities manager.

(e) *Liability Limits.* Neither the NYSE nor the facilities manager shall be liable to any Participant, to any member of any Participant using or having access to the NYSE system, or to any other person for any loss or damage resulting from any non-performance or interruption in the operation of the NYSE System, from any inaccuracies, errors or omissions in any of the information conveyed or received through the NYSE System, or from any delays, omissions, or errors in the transmissions, or errors in the transmission of any such information.

(f) *Termination.*

(i) In the event that the NYSE determines to withdraw the NYSE System from use by the Linkage, it shall so notify the Supervisory Committee, in writing, a minimum of six months prior to such withdrawal.

(ii) In the event of such withdrawal, this section 12 shall be terminated and the Participants must then determine whether they should provide for alternative procedures in the event of System inoperability.

13. Effective Date

The Linkage Plan shall become operative on October 1, 2006.

14. Counterparts

The Linkage Plan may be executed in any number of counterparts, no one of which need contain all signatures of all Participants, and as many of such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

By _____
American Stock Exchange LLC

By _____
Boston Stock Exchange, Inc.

By _____
Chicago Board Options Exchange, Inc.

By _____
Chicago Stock Exchange, Inc.

By _____
NASDAQ Stock Market LLC

By _____
National Stock Exchange

By _____
New York Stock Exchange LLC

By _____
NYSE Arca, Inc.

By _____
Philadelphia Stock Exchange, Inc.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54249; File No. SR–NASDAQ–2006–017]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Technical and Conforming Changes to Nasdaq's 1000 Series Rules

July 31, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2006, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as constituting a non-controversial rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b 4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission.[5] 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 proposes to conform the Rule 1000 Series of Nasdaq's rules to certain changes made to the Rule 1000 Series of the rules of the National Association of Securities Dealers, Inc. ("NASD") since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] Nasdaq requested the Commission to waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii). 17 CFR 240.19b–4(f)(6)(iii).

rules. Nasdaq proposes to implement the proposed rule change immediately.

The text of the proposed rule change is available on Nasdaq's Web site (*http://www.complinet.com/nasdaq*), at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is modifying its 1000 Series Rules, which are based to a substantial extent on comparable NASD Rules, to conform them to certain changes made to the Rule 1000 Series of the rules of NASD since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved rules. Specifically, Nasdaq is:

- Amending Nasdaq IM–1002–2 (currently erroneously designated as IM–1000–2), to conform it to recent changes to comparable NASD Interpretive Material. The rule allows associated persons to be placed on inactive status, thereby preserving their registration, while serving in the Armed Forces of the United States. In SR–NASD–2005–135,[6] NASD tolled the two-year licensing expiration provisions under its Rule 1000 Series for a person previously registered with a member who commences active military duty within two years after he or she has ceased to be registered with the member, and also tolled the expiration provisions for a person placed upon "inactive" status pursuant to the Interpretive Material, who while serving in the Armed Forces of the United States, ceases to be registered with a member. Nasdaq is proposing to adopt the same tolling provisions as the NASD.
- Amending Nasdaq Rule 1013 to reflect changes to the names of the forms used by NASD to authorize access to its Web CRD system.[7]
- Correcting an error in the description of the requirements for registration as a Limited Representative—Equity Trader. The comparable NASD Rule requires an associated person of an NASD member engaged in trading "otherwise than on a securities exchange" to register as an equity trader and pass the applicable qualifications examination, known as the Series 55 exam. Because the trading systems of The Nasdaq Stock Market, Inc. had historically been the primary systems for trading otherwise than on an exchange, the exam has been focused largely on the use of those systems. Nasdaq Rule 1032(f) had likewise been intended to focus registration and examination requirements on traders using Nasdaq systems, but the words "otherwise than on a securities exchange" were deleted from the rule without an appropriate substitution. Accordingly, Nasdaq is amending the rule to require registration "with respect to transactions in equity, preferred or convertible debt securities *on Nasdaq*." Thus, if an associated person of a Nasdaq member is engaged in trading securities on a venue other than Nasdaq, the Nasdaq Rule would not require the trader to register under this category.
- Amending Nasdaq Rules 1011, 1012, 1013, 1032, and 1140 and IM–1002–4 to correct typographical errors.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change conforms the Rule 1000 Series of Nasdaq's rules to certain changes made to the Rule 1000 Series of NASD rules since approval of Nasdaq's rules by the Commission in January 2006 and corrects certain errors in the approved rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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 foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder[11] because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6)[13] thereunder.

Nasdaq has requested that the Commission waive the 30-day operative delay.[14] The Commission believes that the waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the 30-day operative period will allow Nasdaq to implement these changes immediately so that they can be in place prior to the time Nasdaq begins to operate as a national securities exchange. Accordingly, the Commission designates the proposal to be effective

[6] Securities Exchange Act Release No. 53182 (January 26, 2006), 71 FR 5391 (February 1, 2006) (SR–NASD–2005–135).

[7] *See* Securities Exchange Act Release No. 53564 (March 29, 2006), 71 FR 16847 (April 4, 2006) (SR–NASD–2006–038). Web CRD is an NASD system used by NASD and other SROs for maintenance of registration information concerning broker-dealers and their associated persons. Nasdaq members are required to use Web CRD.

SR–NASD–2006–038 also adopted a uniform form for registration of NASD members, Form NMA. Nasdaq is not at this time formally adopting Form NMA, because of differences between the requirements of Nasdaq Rule 1013 and the comparable NASD Rule 1013. Applicants for Nasdaq membership may, however, use Form NMA to enhance their understanding of those aspects of Nasdaq Rule 1013 that directly parallel requirements of NASD Rule 1013.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] CFR 240.19b–4(f)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

and operative upon filing with the Commission.[15]

At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR NASDAQ–2006–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2006–017. 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, 100 F Street, NE., Washington, DC 20549–1090. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2006–017 and should be submitted on or before August 25, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–12612 Filed 8–3–06; 8:45 am]

BILLING CODE 8010–01–P

[15] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54252; File No. SR–NASDAQ–2006–022]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Regarding Technical and Conforming Changes to Nasdaq's 6000, 9000, and 11000 Series Rules

July 31, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 28, 2006, The NASDAQ Stock Market LLC ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as constituting a "non-controversial" rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to conform the Rule 6000, 9000, and 11000 Series of Nasdaq's rules to certain changes made to the corresponding rule series of the rules of the National Association of Securities Dealers, Inc. ("NASD") since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved rules. Nasdaq proposes to implement the proposed rule change immediately. The text of the proposed rule change is available on Nasdaq's Web site (*http://www.nasdaq.com*), at Nasdaq's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is modifying its 6000, 9000 and 11000 Series Rules to conform them to certain changes made to the corresponding NASD rule series since approval of Nasdaq's rules by the Commission in January 2006 and to correct certain errors in the approved rules. Specifically, Nasdaq is:

- Amending Nasdaq Rule 6951 to reflect the effectiveness of a change to the definition of "Reporting Member."
- Adding Nasdaq Rule 6958 to provide exemptive authority comparable to the authority provided to NASD by NASD Rule 6958.[4]
- Amending Nasdaq Rule 9120 to reflect the deletion, effective August 28, 2006, of the Nasdaq Rule 5000 Series and to eliminate an erroneous reference to the Nasdaq Rule 7000 Series.[5]
- Amending Nasdaq IM–11810 in accordance with changes to NASD IM–11810 made by SR–NASD–2005–087.[6]
- Amending Nasdaq Rule 11890 to reflect changes made to NASD Rule 11890 by SR–NASD–2006–033.[7]
- Amending Nasdaq Rules 6250, 6800, 6954, 9110, 11310, and 11840 and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] Securities Exchange Act Release Nos. 53819 (May 17, 2006), 71 FR 29697 (May 23, 2006) (SR–NASD–2006–052); and 53580 (March 30, 2006), 71 FR 17529 (April 4, 2006) (SR–NASD–2006–040).

[5] Securities Exchange Act Release No. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR–NASDAQ–2006–001).

[6] Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (SR–NASD–2005–087).

[7] Securities Exchange Act Release No. 53541 (March 22, 2006), 71 FR 15792 (March 29, 2006) (SR–NASD–2006–033).

Nasdaq IM–9216 and IM–11110 to correct typographical errors.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(5) of the Act,[9] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Nasdaq believes that the proposed rule change conforms the Nasdaq Rules 6000, 9000, and 11000 Series of Nasdaq's rules to certain changes made to the corresponding rule series of the rules of NASD since approval of Nasdaq's rules by the Commission in January 2006 and corrects certain errors in the approved rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Nasdaq has designated the foregoing rule change as a "non-controversial" rule change pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder[11] because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

Nasdaq has requested that the Commission waive the 30-day pre-operative period requirement for "non-controversial" proposals, based upon a representation that such waiver will allow Nasdaq to implement the rule changes, which have either recently been made effective as changes to NASD rules or are technical in nature, prior to the time when Nasdaq begins to operate as a national securities exchange. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Waiver of the 30-day operative period will allow Nasdaq to implement these changes immediately so that they can be in place prior to the time Nasdaq begins to operate as a national securities exchange. Accordingly, the Commission has determined to waive the operative delay, and the proposed rule change has become effective upon filing with the Commission.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2006–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2006–022. 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, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2006–022 and should be submitted on or before August 25, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E6–12613 Filed 8–3–06; 8:45 am]

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[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes only of waiving the operative date of this proposal, he Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54231; File No. SR–NYSEArca–2006–19]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Trading of the Index-Linked Securities of Barclays Bank PLC Linked to the Performance of the GSCI® Total Return Index Pursuant to Unlisted Trading Privileges

July 27, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 16, 2006, NYSE Arca, Inc. ("Exchange"),

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

through its wholly owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities" or "Corporation"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On July 20, 2006, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested persons and is approving the proposal, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Through NYSE Arca Equities, the Exchange proposes to amend its rules governing NYSE Arca, L.L.C. (also referred to as the "NYSE Arca Marketplace"), the equities trading facility of NYSE Arca Equities. Pursuant to NYSE Arca Equities Rule 5.2(j)(6), the Exchange proposes to trade pursuant to unlisted trading privileges ("UTP") the Index-Linked Securities ("Securities") of Barclays Bank PLC ("Barclays"), which are linked to the performance of the GSCI® Total Return Index ("Index").

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to NYSE Arca Equities Rule 5.2(j)(6), the Exchange proposes to trade pursuant to UTP the Securities of Barclays, which are linked to the performance of the Index. Barclays intends to issue the Securities under the name "iPath℠ Exchange-Traded Notes." A rule proposal for the original listing and trading of the Securities was filed with the Commission by the New York Stock Exchange LLC ("NYSE")[4] and approved by the Commission.[5] In SR–NYSEArca–2006–17, the Exchange proposed new Commentary .01 to NYSE Arca Equities Rule 5.2(j)(6) to accommodate trading in the Securities.[6]

(a) *The Securities and the Index*

(i) *The Securities*

In August 2005, the Commission approved NYSE Arca Equities Rule 5.2(j)(6), which provides general standards for the listing and trading of "Index-Linked Securities."[7] Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes. Such securities may or may not provide for the repayment of the original principal investment amount. As permitted in NYSE Arca Equities Rule 5.2(j)(6), the Exchange is submitting this rule proposal to the Commission pursuant to Section 19(b)(2) of the Act, to obtain Commission approval to trade the Securities pursuant to UTP.

A description of the Securities and the Index is set forth in the NYSE Proposal.[8] The Securities are a series of medium-term debt securities of Barclays that provide for a cash payment at maturity or upon earlier exchange at the holder's option, based on the performance of the Index subject to the adjustments described below.

The Securities will not have a minimum principal amount that will be repaid and, accordingly, payment on the Securities prior to or at maturity may be less than the original issue price of the Securities. In fact, the value of the Index must increase for the investor to receive at least the $50 principal amount per Security at maturity or upon exchange or redemption. If the value of the Index decreases or does not increase sufficiently to offset the investor fee,[9] the investor will receive less, and possibly significantly less, than the $50 principal amount per Security. In addition, holders of the Securities will not receive any interest payments from the Securities. The Securities will have a term of 30 years.

Holders who have not previously redeemed their Securities will receive a cash payment at maturity equal to the principal amount of their Securities times the index factor[10] on the Final Valuation Date[11] minus the investor fee on the Final Valuation Date.

Prior to maturity, holders may, subject to certain restrictions,[12] redeem their Securities on any Redemption Date[13] during the term of the Securities provided that they present at least 50,000 Securities for redemption, or they act through a broker or other financial intermediaries (such as a bank or other financial institution not required to register as a broker-dealer to engage in securities transactions) that are willing to bundle their Securities for redemption with other investors' Securities. If a holder chooses to redeem such holder's Securities, the holder will receive a cash payment on the applicable Redemption Date equal to the principal amount of such holder's Securities times the index factor on the applicable Valuation Date minus the investor fee on the applicable Valuation Date. To redeem their Securities, holders must instruct their broker or other person through whom they hold their Securities to follow certain

[3] In Amendment No. 1, the Exchange clarified certain aspects of its proposal regarding trading rules and surveillance.

[4] *See* Securities Exchange Act Release No. 53658 (April 14, 2006), 71 FR 21064 (April 24, 2006) (SR–NYSE–2006–20) (the "NYSE Proposal").

[5] *See* Securities Exchange Act Release No. 53849 (May 22, 2006), 71 FR 30706 (May 30, 2006) (SR–NYSE–2006–20) (the "NYSE Order").

[6] *See* Securities Exchange Act Release No. 54189 (July 21, 2006) (SR–NYSEArca–2006–17).

[7] See Securities Exchange Act Release No. 52204 (August 3, 2005), 70 FR 46559 (August 10, 2005) (SR–PCX–2005–63).

[8] See *supra* note 4.

[9] The investor fee is equal to 0.75% per year times the principal amount of a holder's Securities times the index factor, calculated on a daily basis in the following manner. The investor fee on the date of issuance of the Securities will equal zero. On each subsequent calendar day until maturity or early redemption, the investor fee will increase by an amount equal to 0.75% times the principal amount of a holder's Securities times the index factor on that day (or, if such day is not a trading day, the index factor on the immediately preceding trading day) divided by 365. The investor fee is the only fee holders will be charged in connection with their ownership of the Securities.

[10] The "index factor" on any given day will be equal to the closing value of the Index on that day divided by the initial index level. The index factor on the Final Valuation Date will be equal to the final index level divided by the initial index level. The "initial index level" is the closing value of the Index on the date of issuance of the Securities (the "Trade Date") and the "final index level" is the closing value of the Index on the Final Valuation Date. Telephone conference between John Carey, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division, Commission, on July 14, 2006.

[11] The "Final Valuation Date" is the last Thursday before maturity of the Securities.

[12] Telephone conference between John Carey, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division of Market Regulation ("Division"), Commission, on July 13, 2006.

[13] A "Redemption Date" is the third business day following a Valuation Date (other than the Final Valuation Date). A "Valuation Date" is each Thursday from the first Thursday after issuance of the Securities until the last Thursday before the Final Valuation Date inclusive (or, if such date is not a trading day, the next succeeding trading day).

procedures as described in the NYSE Proposal.[14]

If an event of default occurs and the maturity of the Securities is accelerated, Barclays will pay the default amount in respect of the principal of the Securities at maturity. More information regarding default procedures, including a quotation period and an objection period, is set forth in the NYSE Proposal.

(ii) *The Index*

The Index was established in May 1991 and is designed to be a diversified benchmark for physical commodities as an asset class. The Index reflects the excess returns that are potentially available through an unleveraged investment in the contracts comprising the GSCI® plus the Treasury Bill rate of interest that could be earned on funds committed to the trading of the underlying contracts.[15] The value of the Index, on any given day, reflects: (i) The price levels of the contracts included in the GSCI® (which represents the value of the GSCI®; (ii) the "contract daily return," which is the percentage change in the total dollar weight of the GSCI® from the previous day to the current day; and (iii) the Treasury Bill rate of interest that could be earned on funds committed to the trading of the underlying contracts.

The GSCI,® upon which the Index is based, is a proprietary index on a production-weighted basket of futures contracts on physical commodities traded on trading facilities in major industrialized countries. The value of the GSCI® has been normalized such that its hypothetical level on January 2, 1970 was 100. Futures contracts on the GSCI®, and options on such futures contracts, are currently listed for trading on the Chicago Mercantile Exchange. More information regarding the operation, calculation methodology, weighting, and historical performance of the Index is set forth in the NYSE Proposal.

(b) *Dissemination and Availability of Information*

(i) *The Intraday Indicative Value.*

According to the NYSE Proposal, an "Intraday Indicative Value" (or "IIV") meant to approximate the intrinsic economic value of the Securities will be calculated and published via the facilities of the Consolidated Tape Association ("CTA") at least every 15 seconds from 9:30 a.m. to 4 p.m. Eastern Time ("ET") on each day on which the Securities are traded on the NYSE.[16] Additionally, Barclays or an affiliate will calculate and publish the closing IIV of the Securities on each trading day at *http://www.ipathetn.com*. In connection with the Securities, the term "IIV" refers to the value at a given time determined based on the following equation: IIV = Principal Amount per Unit ($50) multiplied by (Current Index Level divided by Initial Index Level)[17] minus Current Investor Fee.[18]

The IIV will not reflect price changes to the price of an underlying commodity between the close of trading of the futures contract at the relevant futures exchange and 4 p.m. ET. The value of the Securities may accordingly be influenced by non-concurrent trading hours between the Exchange and the various futures exchanges on which the futures contracts based on the Index commodities are traded.

While the market for futures trading for each of the Index commodities is open, the IIV can be expected to closely approximate the redemption value of the Securities. However, during NYSE Arca Marketplace trading hours when the futures contracts have ceased trading, spreads and resulting premiums or discounts may widen, and therefore, increase the difference between the price of the Securities and their redemption value. The IIV should not be viewed as a real-time update of the redemption value.

(ii) *The Index*

According to the NYSE Proposal, the Index Sponsor makes the official calculations of the GSCI®. At present, this calculation is performed continuously and is reported on Reuters page GSCI® (or any successor or replacement page) and is updated on Reuters[19] at least every 15 seconds[20] during business hours on each day on which the offices of the Index Sponsor in New York City are open for business (a "GSCI Business Day").[21] The settlement price for the Index is also reported on Reuters page GSCI® (or any successor or replacement page) on each GSCI Business Day between 4 p.m. and 6 p.m., New York time.

(c) *UTP Trading Criteria*

The Exchange will cease trading in the Securities if: (1) The listing market stops trading the Securities because of a regulatory halt similar to a halt based on NYSE Arca Equities Rule 7.12 or a halt because the IIV or the value of the underlying Index is no longer available on at least a 15-second delayed basis; or (2) the listing market delists the Securities.[22] In the event that the Exchange is open for business on a day that is not a GSCI Business Day, the Exchange will not permit trading of the Securities on that day. Additionally, the Exchange may cease trading the Securities if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

(d) *Trading Rules*

The Exchange deems the Securities to be equity securities, thus rendering trading in the Securities subject to the Exchange's rules governing the trading

[14] If holders elect to redeem their Securities, Barclays may request that Barclays Capital Inc. (a broker-dealer) purchase the Securities for the cash amount that would otherwise have been payable by Barclays upon redemption. In this case, Barclays will remain obligated to redeem the Securities if Barclays Capital Inc. fails to purchase the Securities. Any Securities purchased by Barclays Capital Inc. may remain outstanding.

[15] The Treasury Bill rate of interest used for purposes of calculating the index on any day is the 91-day auction high rate for U.S. Treasury Bills, as reported on Telerate page 56, or any successor page, on the most recent of the weekly auction dates prior to such day.

[16] The IIV calculation will be provided for reference purposes only.

[17] The Current Index Level is the most recent published level of the Index as reported by the Index Sponsor, whereas the Initial Index Level is the Index level on the initial trade date for the Securities.

[18] The Current Investor Fee is the most recent daily calculation of the investor fee with respect to the Securities, determined as described above (which, during any trading day, will be the investor fee determined on the preceding calendar day).

[19] The intraday information with respect to the Index reported on Reuters is derived solely from trading prices on the principal trading markets for the various Index components. For example, the Index currently includes contracts traded on the Intercontinental Exchange (formerly known as the International Petroleum Exchange, which now operates its futures business through ICE Futures) and the London Metal Exchange ("LME"), both of which are located in London and consequently have trading days that end several hours before those of the U.S.-based markets on which the rest of the Index components are traded. During the portion of the New York trading day when ICE Futures and LME are closed, the last reported prices for Index Components traded on ICE Futures or LME are used to calculate the intraday Index information disseminated on Reuters.

[20] Telephone conference between John Carey, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division, Commission, on July 27, 2006 (clarifying that the Index value will be disseminated at least every 15 seconds, not every 3 minutes, during the time the Securities trade on the Exchange).

[21] NYSE, as the listing exchange, will not permit trading in the Securities if certain information about the Index value is not disseminated on, for example, a date that is not a GSCI Business Day. In such event, NYSE Arca would not permit trading in the Securities. *See supra*.

[22] E-mail between Janet Kissane, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division, Commission, dated July 31, 2006 (clarifying that the Securities will cease trading during all trading hours).

of equity securities. Trading in the Securities on the NYSE Arca Marketplace will occur from 4 a.m. to 8 p.m. ET in accordance with NYSE Arca Equities Rule 7.34(a).[23] The Exchange has appropriate rules to facilitate transactions in the Securities during all trading sessions. The minimum trading increment for Securities on the Exchange will be $0.01.

Further, Commentary .01 to NYSE Arca Equities Rule 5.2(j)(6) sets forth certain restrictions on ETP Holders acting as registered Market Makers in the Securities to facilitate surveillance.[24] Commentary .01(b)–(c) to NYSE Arca Equities Rule 5.2(j)(6) will require that the ETP Holder acting as a registered Market Maker in the Securities provide the Exchange with necessary information relating to its trading in the Index components, the commodities underlying the Index components, or options, futures or options on futures on the Index, or any other derivatives (collectively, "derivative instruments") based on the Index or based on any Index component or any physical commodity underlying an Index component. Commentary .01(d) to NYSE Arca Equities Rule 5.2(j)(6) will prohibit the ETP Holder acting as a registered Market Maker in the Securities from using any material nonpublic information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the Index components, the commodities underlying the Index components, or any derivative instruments based on the Index or based on any Index component or any physical commodity underlying an Index component (including the Securities). In addition, Commentary .01(a) to NYSE Arca Equities Rule 5.2(j)(6) will prohibit the ETP Holder acting as a registered Market Maker in the Securities from being affiliated with a market maker in the Index components, the commodities underlying the Index components, or any derivative instruments based on the Index or based on any Index component or any physical commodity underlying an Index component unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Securities. Trading in the Securities may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Securities inadvisable. These may include: (1) The extent to which trading is not occurring in the Index components or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Securities will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's "circuit breaker" rule[25] or by the halt or suspension of the trading of the Index components.[26]

The Securities will be deemed "Eligible Listed Securities," as defined in NYSE Arca Equities Rule 7.55, for purposes of the Intermarket Trading System ("ITS") Plan and therefore will be subject to the trade through provisions of NYSE Arca Equities Rule 7.56, which require that ETP Holders avoid initiating trade-throughs for ITS securities.

(e) *Surveillance*

The Exchange's surveillance procedures will incorporate and rely upon existing Exchange surveillance procedures governing equities. The Exchange believes that these procedures are adequate to monitor Exchange trading of the Securities in all trading sessions and to detect violations of Exchange rules, thereby deterring manipulation.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange is able to obtain information regarding trading in the Securities and the Index components through ETP Holders in connection with such ETP Holders' proprietary or customer trades which they affect on any relevant market. In addition, with regard to the Index components, the Exchange can obtain market surveillance information, including customer identity information, with respect to transactions occurring on the New York Mercantile Exchange ("NYMEX"), the Kansas City Board of Trade, ICE Futures, and the LME, pursuant to its comprehensive information sharing agreements with each of those exchanges. All of the other trading venues on which current Index components are traded are members of the Intermarket Surveillance Group ("ISG"), and the Exchange therefore has access to all relevant trading information with respect to those contracts without any further action being required on the part of the Exchange.

(f) *Information Bulletin*

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Securities. Specifically, the Information Bulletin will discuss the following: (1) The procedures for redemptions of Securities (and that Securities are not individually redeemable but are redeemable only in aggregations of at least 50,000 Securities); (2) NYSE Arca Equities Rule 9.2(a),[27] which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Securities; (3) how information regarding the IIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Securities prior to or

[23] During all NYSE Arca Equities trading sessions, the Exchange represents that if the official Index Sponsor calculates an updated Index value, then such value will be updated and disseminated at least every 15 seconds during such trading session, and always will be so during the Exchange's core trading session (although during this session, the Exchange may rely on the listing exchange to monitor such calculation and dissemination). The Exchange represents that the official Index Sponsor calculates and disseminates the Index value from 8 a.m. to 4 p.m. ET. Because this product is not in continuous distribution, an IIV is not required to be disseminated at least every 15 seconds in all trading sessions; however, because of the weekly redemption process for this product, such dissemination of the IIV is required during the Exchange's core trading session. The Exchange may rely on the listing market to monitor such dissemination of the IIV during the Exchange's core trading session. Telephone conference between John Carey, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division, Commission, on July 12, 2006.

[24] *See* Securities Exchange Act Release No. 54189 (July 21, 2006) (SR–NYSEArca–2006–17).

[25] *See* NYSE Arca Equities Rule 7.12.

[26] *See* "UTP Trading Criteria" above for specific instances when the Exchange will cease trading the Securities.

[27] The Exchange recently amended NYSE Arca Equities Rule 9.2(a) ("Diligence as to Accounts") to provide that ETP Holders, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the proposed rule amendment provides that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holders should make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives and any other information that they believe would be useful to make a recommendation. *See* Securities Exchange Act Release No. 54045 (June 26, 2006), 71 FR 37971 (July 3, 2006) (SR–PCX–2005–115).

concurrently with the confirmation of a transaction; and (5) trading information.

The Information Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical commodities, and that the Commission has no jurisdiction over the trading of physical commodities such as aluminum, gold, crude oil, heating oil, corn, and wheat, or the futures contracts on which the value of the Securities is based.

The Information Bulletin will also discuss terms of no-action or exemptive relief by the Commission staff in connection with the Securities under the Act.

2. Statutory Basis

The Exchange believes that the basis under the Act for this proposed rule change is consistent with the requirements under Section 6(b)(5)[28] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transaction in securities, to remove impediments and perfect the mechanisms of a free and open market, and, in general, to protect investors and the public interest.

In addition, the Exchange believes that the proposal is consistent with Rule 12f–5 under the Act[29] because it deems the Securities to be equity securities, thus rendering the Securities subject to the Exchange's rules governing the trading of equity securities.[30]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

[28] 15 U.S.C. 78s(b)(5).

[29] 17 CFR 240.12f–5.

[30] Telephone conference between John Carey, Assistant General Counsel, NYSE Group, Inc., and Florence Harmon, Senior Special Counsel, Division, Commission, on July 12, 2006 (the Exchange requested that the Commission delete the word "existing" to clarify that the Securities will be subject to all applicable Exchange rules governing the trading of equity securities for the Securities).

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2006–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2006–19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2006–19 and should be submitted on or before August 25, 2006.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[31] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[32] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general to protect investors and the public interest.

In addition, the Commission finds that the proposal is consistent with Section 12(f) of the Act,[33] which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.[34] The Commission notes that it previously approved the listing and trading of the Securities on the NYSE.[35] The Commission also finds that the proposal is consistent with Rule 12f–5 under the Act,[36] which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. NYSE Arca Equities rules deem the Securities to be equity securities, thus trading in the Securities will be subject to the Exchange's rules governing the trading of equity securities and the specific rules set forth herein for this product class.

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[37] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

In support of the portion of the proposed rule change regarding UTP of the Securities, the Exchange has made the following representations:

[31] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[32] 15 U.S.C. 78f(b)(5).

[33] 15 U.S.C. 78*l*(f).

[34] Section 12(a) of the Act, 15 U.S.C. 78*l*(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to Section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange "extends UTP." When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

[35] *See* NYSE Order, *supra* note 5.

[36] 17 CFR 240.12f–5.

[37] 15 U.S.C. 78k–1(a)(1)(C)(iii).

1. NYSE Arca Equities has appropriate rules to facilitate transactions in this type of security in all trading sessions.

2. NYSE Arca Equities surveillance procedures are adequate to properly monitor the trading of the Securities on the Exchange.

3. NYSE Arca Equities will distribute an Information Bulletin to its members prior to the commencement of trading of the Securities on the Exchange that explains the terms, characteristics, and risks of trading such securities.

4. NYSE Arca Equities will require a member with a customer who purchases newly issued Securities on the Exchange to provide that customer with a product prospectus and will note this prospectus delivery requirement in the Information Bulletin.

5. The Exchange will cease trading in the Securities if: (1) The primary market stops trading the securities because of a regulatory halt similar to a halt based on NYSE Arca Equities Rule 7.12 and/or a halt because the updated IIV or Index value are not disseminated at least every 15 seconds; or (2) if such other event occurs or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable; or (3) the primary market delists the Securities.

This approval order is conditioned on NYSE Arca Equities' adherence to these representations.

The Commission finds good cause for approving this proposed rule change, as amended, before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted previously, the Commission previously found that the listing and trading of these Securities on the NYSE is consistent with the Act.[38] The Commission presently is not aware of any issue that would cause it to revisit that earlier finding or preclude the trading of these funds on the Exchange pursuant to UTP. Therefore, accelerating approval of this proposed rule change should benefit investors by creating, without undue delay, additional competition in the market for these Securities.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (NYSEArca–2006–19), as amended, is hereby approved on an accelerated basis.[39]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[40]

Nancy M. Morris,

Secretary.

[FR Doc. E6–12635 Filed 8–3–06; 8:45 am]

BILLING CODE 8010–01–P

[38] *See* NYSE Order, *supra* note 5.

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12).

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed priorities; request for public comment.

SUMMARY: As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the Federal sentencing guidelines, and in accordance with Rule 5.2 of its Rules of Practice and Procedure, the Commission is seeking comment on possible priority policy issues for the amendment cycle ending May 1, 2007.

DATES: Public comment should be received on or before September 1, 2006.

ADDRESSES: Send comments to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, South Lobby, Washington, DC 20002–8002, Attention: Public Affairs-Priorities Comment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for Federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The Commission provides this notice to identify tentative priorities for the amendment cycle ending May 1, 2007. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission's ability to complete work on any of the tentative priorities by the statutory deadline of May 1, 2007. Accordingly, it may be necessary to continue work on some of these issues beyond the amendment cycle ending on May 1, 2007.

As so prefaced, the Commission has identified the following tentative priorities:

(1) Implementation of crime legislation enacted during the 109th Congresses warranting a Commission response, including (A) the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181; (B) the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109–177; (C) the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109–162; (D) the Trafficking Victims Protection Reauthorization of 2005, Pub. L. 109–164; (E) the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109–59; and (F) other legislation authorizing statutory penalties, creating new offenses, or pertaining to victims, that requires incorporation into the guidelines;

(2) Continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on appropriate responses to *United States* v. *Booker*, including any appropriate guideline changes in light of the Commission's 2006 report to Congress, *Final Report on the Impact of United States* v. *Booker on Federal Sentencing*, as well as its continued analysis of post-*Booker* data, case law, and other feedback, including reasons for departures and variances stated by sentencing courts;

(3) Continuation of its policy work regarding immigration offenses, specifically, offenses sentenced under 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien) and 2L1.2 (Unlawfully Entering or Remaining in the United States) and implementation of any immigration legislation that may be enacted;

(4) Continuation of its work with the congressional, executive, and judicial branches of the government and other interested parties on cocaine sentencing policy, to possibly include a hearing on this issue and a reevaluation of the Commission's 2002 report to Congress, *Cocaine and Federal Sentencing Policy*;

(5) Consideration and possible development of guideline simplification options that might improve the operation of the sentencing guidelines;

(6) Continuation of its policy work, in light of the Commission's prior research on criminal history, to develop and consider possible options that might improve the operation of Chapter Four (Criminal History);

(7) Continuation of its policy work to implement 28 U.S.C. 994(t), specifically regarding the development of further commentary to 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons); and

(8) Resolution of a number of circuit conflicts, pursuant to the Commission's continuing authority and responsibility, under 28 U.S.C. 991(b)(1)(B) and *Braxton* v. *United States*, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the Federal courts.

The Commission hereby gives notice that it is seeking comment on these tentative priorities and on any other issues that interested persons believe the Commission should address during the amendment cycle ending May 1, 2007, including short- and long-term research issues. To the extent practicable, comments submitted on such issues should include the following: (1) A statement of the issue, including scope and manner of study, particular problem areas and possible solutions, and any other matters relevant to a proposed priority; (2) citations to applicable sentencing guidelines, statutes, case law, and constitutional provisions; and (3) a direct and concise statement of why the Commission should make the issue a priority.

Authority: 28 U.S.C. 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Ricardo H. Hinojosa,

Chair.

[FR Doc. E6–12649 Filed 8–3–06; 8:45 am]

BILLING CODE 2211–01–P

DEPARTMENT OF STATE

[Public Notice 5483]

Bureau of International Security and Nonproliferation; Imposition of Nonproliferation Measures Against Foreign Entities, Including a Ban on U.S. Government Procurement

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that seven entities have engaged in activities that require the imposition of measures pursuant to Section 3 of the Iran Nonproliferation Act of 2000, which provides for penalties on entities for the transfer to Iran since January 1, 1999, of equipment and technology controlled under multilateral export control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists, but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists.

DATES: *Effective Date:* July 28, 2006.

FOR FURTHER INFORMATION CONTACT: On general issues: Pamela K. Durham, Office of Missile Threat Reduction, Bureau of International Security and Nonproliferation, Department of State (202–647–4931). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement Executive, Department of State (703–516–1691).

SUPPLEMENTARY INFORMATION: Pursuant to Sections 2 and 3 of the Iran Nonproliferation Act of 2000 (Pub. L. 106–178), the U.S. Government determined on July 25, 2006 that the measures authorized in Section 3 of the Act shall apply to the following foreign entities identified in the report submitted pursuant to Section 2(a) of the Act:

Korean Mining and Industrial Development Corporation (KOMID) (North Korea) and any successor, sub-unit, or subsidiary thereof;

Korea Pugang Trading Corporation (North Korea) and any successor, sub-unit, or subsidiary thereof;

Center for Genetic Engineering and Biotechnology (Cuba) and any successor, sub-unit, or subsidiary thereof;

Balaji Amines (India) and any successor, sub-unit, or subsidiary thereof;

Prachi Poly Products (India) and any successor, sub-unit, or subsidiary thereof;

Rosoboronexport (Russia) and any successor, sub-unit, or subsidiary thereof; and

Sukhoy (Russia) and any successor, sub-unit, or subsidiary thereof.

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on these entities:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;

2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government;

3. No United States Government sales to the foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and

4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for two years from the effective date, except to the extent that the Secretary of State may subsequently determine otherwise. A new determination will be made in the event that circumstances change in such a manner as to warrant a change in the duration of sanctions.

Dated: July 31, 2006.

Francis C. Record,

Acting Assistant Secretary of State for International Security and Nonproliferation, Department of State.

[FR Doc. E6–12641 Filed 8–3–06; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements: Notice of Request for Extension of a Previously Approved Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) this notice announces the Department of Transportation's (DOT) intention to request an extension of a currently approved information collection. Before submitting this information collection to OMB for renewal, DOT is soliciting comments 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; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Comments to this notice must be received by October 3, 2006.

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

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* To the Docket Management System; 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.

Instructions: You must include the agency name and docket number *[OST–2006–25550]* of this notice at the beginning of your comment. 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 section of this document.

Docket: You may view the public docket through the Internet at *http://dms.dot.gov* or in person at the Docket Management System office at the above address.

FOR FURTHER INFORMATION CONTACT: Bohdan Baczara, Office of Drug and Alcohol Policy and Compliance, 400 Seventh Street, SW., Washington, DC 20590; 202–366–3784 (voice), 202–366–3897 (fax), or *bohdan.baczara@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Office of the Secretary, Office of Drug and Alcohol Policy and Compliance

Title: Procedures for Transportation Drug and Alcohol Testing Program.

OMB Control Number: 2105–0529.

Expiration Date: October 31, 2006.

Type of Request: Extension without change of a previously approved collection.

Abstract: Under the Omnibus Transportation Employee Testing Act of 1991, DOT is required to implement a drug and alcohol testing program in various transportation-related industries. This specific requirement is elaborated in 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. Included in this program are the U.S. Department of Transportation Alcohol Testing Form (ATF) and the DOT Drug and Alcohol Testing Management Information System (MIS) Data Collection Form. The ATF includes the employee's name, the type of test taken, the date of the test, and the name of the employer. Custody and control is essential to the basic purpose of the alcohol testing program. Data on each test conducted, including test results, are necessary to document tests conducted and actions taken to ensure safety in the workplace.

The MIS form includes employer specific drug and alcohol testing information such as the reason for the test and the cumulative number of positive, negative and refusal test results. The MIS data is used by each of the affected DOT Agencies (*i.e.*, Federal Aviation Administration, Federal Transit Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration) and the United States Coast Guard when calculating their random testing rates.

Affected Entities: Transportation Industry.

Estimated Number of Respondents: 8,733,483.

Estimated Total Number Burden on Respondents: The estimated annual burden is 8,053,257. Included in this number are 10,799 burden hours for the MIS form and 267,787 burden hours for the ATF form.

Comments are invited on: (a) 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; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Authority and Issuance.

Jim Swart,

Deputy Director, Office of Drug and Alcohol Policy and Compliance, United States Department of Transportation.

[FR Doc. E6–12605 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Availability of Draft Written Reevaluation and Request for Comments

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of a Draft Written Reevaluation of environmental impacts of a proposed centerfield taxiway at Boston-Logan International Airport, Boston, Massachusetts. FAA also announces that it will consider comments on the Draft Written Reevaluation until August 21, 2006.

FOR FURTHER INFORMATION CONTACT: John C. Silva, Federal Aviation Administration, New England Region, Airports Division, ANE–600, 12 New England Executive Park, Burlington, Massachusetts 01803.

SUPPLEMENTARY INFORMATION: On August 2, 2002, FAA issued *Record of Decision; Airside Improvements Planning Project; Logan International Airport; Boston, Massachusetts.* This Record of Decision covered projects proposed by the Massachusetts Port Authority and environmentally assessed in an Environmental Impact Statement of the Airside Improvements Planning Project. FAA approved the following projects: (1) Construction and operation of unidirectional Runway 14–32, (2) reconfiguration of the southwest corner taxiway system, (3) extension of Taxiway Delta, and (4) realignment of Taxiway November. FAA deferred a decision concerning the Centerfield Taxiway until FAA conducted an additional evaluation of potential beneficial operational procedures that would preserve or improve the operational and environmental benefits of the Centerfield Taxiway shown in the Final EIS. This additional evaluation was completed with the publication of *Logan International Airport; Additional Taxiway Evaluation Report; Per FAA, August 2, 2002, Record of Decision;* May 2006; and this draft written reevaluation. The taxiway evaluation report and Draft Written Reevaluation

are available on request (781–238–7602) or on FAA's public Web site (*http://www.faa.gov/airports_airtraffic*). FAA is accepting comments on the Draft Written Reevaluation until August 21, 2006. Comments should be mailed to FAA at the above address under the heading: **FOR FURTHER INFORMATION CONTACT.** Questions may be directed to this address or by telephoning John Silva at 781–238–7602.

Issued in Burlington, Massachusetts, on July 6, 2006.

LaVerne F. Reid,

Manager, Airports Division.

[FR Doc. 06–6701 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2006–23]

Petitions for Exemption; Summary of Petitions Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petitions for exemption received.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of Title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain petitions seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 24, 2006.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number FAA–200X–XXXXX] 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.
- *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–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.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267–8033, Sandy Buchanan-Sumter (202) 267–7271, or John Linsenmeyer (202) 267–5174, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC, on July 27, 2006.

Anthony F. Fazio,

Director, Office of Rulemaking.

Petitions for Exemption

Docket No.: FAA–2006–24202.

Petitioner: United Air Lines, Inc.

Section of 14 CFR Affected: 14 CFR 61.57(a)(1)(ii) and (b)(1)(ii).

Description of Relief Sought: To allow United Air Lines, Inc. (UAL), Type Rated, Flight Test Captains to continue to operate UAL Boeing 747–400, Boeing 777–200, Boeing 767–300/757–200, and Boeing 737 300/500 aircraft, in non-routine flight operations without accomplishing at least three takeoffs and landings, within the previous 90 days, in each category, class, and type of airplane.

[FR Doc. E6–12656 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement No. ANE–2006–33.3–4]

Policy for Repair and Alteration of Rotating Turbine Engine-Life-Limited Parts

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance; policy statement.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of policy for the repair and alteration of rotating turbine engine-life-limited parts, § 33.3.

DATES: The FAA issued policy statement number ANE–2006–33.3–4 on July 27, 2006.

FOR FURTHER INFORMATION CONTACT: Karen M. Grant, FAA, Engine and Propeller Standards Staff, ANE–110, 12 New England Executive Park, Burlington, MA 01803; e-mail: *karen.m.grant@faa.gov*; telephone: (781) 238–7119; fax: (781) 238–7199. The policy statement is available on the Internet at the following address: *http://www.faa.gov.* (click on the "Regulations and Policies" tab, then "Regulatory and Guidance Library"). If you do not have access to the Internet, you may request a copy of the policy by contacting the individual listed in this section.

SUPPLEMENTARY INFORMATION: The FAA published a notice in the **Federal Register** on October 13, 2005 (70 FR 59801) to announce the availability of the proposed policy and invite interested parties to comment.

We have filed in the docket all comments we received, as well as a report summarizing each substantive public contact with FAA personnel concerning this policy. The docket is available for public inspection. If you wish to review the docket in person, go to the above address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Background

This policy memorandum provides guidance for determining the effect proposed repairs or alterations may have on rotating turbine engine-life-limited parts. It also reaffirms guidance identified in Orders 8110.37 and 8110.4 for coordinating the review of data for these proposed repairs and alterations. This policy does not create any new requirements.

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

Issued in Burlington, Massachusetts, on July 27, 2006.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 06–6700 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–2006–23612]

Surface Transportation Environment and Planning Cooperative Research Program (STEP)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: In an earlier notice and request for comments, the FHWA announced the creation of an FHWA Web site to provide information regarding the Surface Transportation Environment and Planning Cooperative Research Program (STEP) and solicited public input on the implementation strategy for this program. Based on the review and analysis of the comments received in response to the notice, the FHWA has finalized and posted the implementation strategy for the STEP on the STEP Web site at: *http://www.fhwa.dot.gov/hep/step/index.htm.* In addition, the FHWA has posted information on the STEP Web site soliciting comments on proposed STEP research activities.

DATES: The implementation strategy is effective August 4, 2006.

FOR FURTHER INFORMATION CONTACT: Felicia Young, Office of Interstate and Border Planning, (202) 366–1263, *Felicia.young@fhwa.dot.gov;* or Grace Reidy, Office of the Chief Counsel, (202) 366–6226; Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov* and the Government Printing Office's Web site at *http://www.access.gpo.gov.*

Background

On March 1, 2006, the FHWA published a notice in the **Federal Register** (71 FR 10586) announcing the creation of an FHWA Web site to provide information regarding the Surface Transportation Environment and Planning Cooperative Research Program (STEP) and to solicit public input on the implementation strategy for this program.

Section 5207, Surface Transportation Environment and Planning Cooperative Research Program (STEP), of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59; Aug. 10, 2005) established a new cooperative research program for environment and planning research in section 507 of Title 23, United States Code, Highways (23 U.S.C. 507). The general objective of the STEP is to improve understanding of the complex relationship between surface transportation, planning, and the environment. Among other areas, STEP will address environment and planning issues related to SAFETEA–LU implementation; Executive Order 13274: Environmental Stewardship and Transportation Infrastructure Project Reviews; the U.S. Department of Transportation's Research and Development Strategic Plan (section 508 of title 23 U.S.C.); and the environmental costs associated with growing surface transportation system congestion.

Discussion of Comments

The comment period for the notice closed on April 17, 2006. As of June 19, 2006, the FHWA received ten comments in the docket. The FHWA received comments from national associations, State Departments of Transportation (State DOTs), a consulting firm, and a private citizen. The FHWA has reviewed and analyzed these comments as well as a new Secretarial initiative related to congestion.[1] Summaries of the docket comments and the FHWA's analyses and determinations are discussed below. After considering and analyzing the comments, the FHWA has decided to revise and finalize the implementation strategy.

Most of the respondents supported the principles outlined in Section 5207 of SAFETEA–LU, which established the STEP. We received numerous comments regarding the STEP emphasis areas. Some respondents indicated that additional emphasis areas should be added to the 22 proposed STEP emphasis areas.

Another respondent recommended reducing the number of emphasis areas. Respondents identified the need to clarify the activities eligible for STEP funding under the proposed emphasis areas. Respondents commented that activities such as outreach, peer exchanges, symposia, public involvement and other activities associated with the deployment and sharing of information among stakeholders should be eligible for STEP funding.

Respondents also commented on the proposed stakeholder involvement in the STEP. Respondents indicated support for multiple stakeholder involvement throughout the STEP implementation process.

Comments on STEP program included a recommendation that at least 50 percent of STEP funding be dedicated to State DOT-led research and a recommendation that the STEP research focus on "projects that can add the best value across the nation rather than specific States or regions." Two respondents recommended that the STEP governance include a structure similar to the Transportation Research Board's National Cooperative Highway Research Program.[2]

Respondents also acknowledged the STEP's funding limitations and recommended that limited funding be spent effectively. Another respondent recommended that funding focus on high priority research that advances the goals of the Federal-aid highway program.

Changes to STEP

After reviewing the comments, the FHWA revised and augmented the STEP implementation strategy by: (1) Grouping the STEP into four major categories: Environment; Planning; Planning Tools for Planning and Environment; and Program Management and Outreach; (2) identifying 17 specific research emphasis areas and potential funding; (3) providing information regarding the goals and potential activities to be implemented within each of these emphasis areas; and (4) adding contact persons for each of these emphasis areas.

The FHWA also included Right of Way associations in the list of Tier II transportation and environmental stakeholders and included the Transportation Pooled Fund Program, University Transportation Centers, and State planning research under the section for coordination with other relevant research programs.

[1] Speaking before the National Retail Federation's annual conference on May 16, 2006, in Washington, DC, U.S. Transportation Secretary Norman Mineta unveiled a new plan to reduce congestion plaguing America's roads, rail and airports. The National Strategy to Reduce Congestion on America's Transportation Network includes a number of initiatives designed to reduce transportation congestion and it is available at the following URL: *http://isddc.dot.gov/OLPFiles/OST/012988.pdf.*

[2] The National Cooperative Highway Research Program (NCHRP) which was established in 1962 is a national research program that is administered by the *Transportation Research Board.* The NCHRP is sponsored by the member departments (i.e., individual state departments of transportation) of the *American Association of State Highway and Transportation Officials* in cooperation with the Federal Highway Administration.

The FHWA did not revise the proposed structure for stakeholder/public involvement within the STEP. Because of the numerous and diverse STEP stakeholders, the FHWA believes that it is important that the limited STEP resources focus on priority environment and planning surface transportation research needs. Also, we expect to continue efforts to coordinate STEP implementation with other cooperative research resources like State Planning Research (SPR), the Future Strategic Highway Research Program (SHRPII), National Cooperative Highway Research Program (NCHRP) and others to further leverage STEP funding. The final implementation strategy is available on the STEP Web site at: *http://www.fhwa.dot.gov/hep/step/index.htm*.

Suggestions for Research Activities

At this time, the FHWA is requesting suggestions for the lines of research that should be pursued within each emphasis area. For example, stakeholders who have an interest in the "Tools to Support Environment and Planning" emphasis area might suggest that it is important to research ways to identify business models to enhance transportation decision-making using geospatial data. Specific research work statements for this suggestion, if pursued under the STEP, would be crafted by FHWA, after careful consideration of stakeholder views.

Thus, the FHWA does not seek specific, detailed research proposals and discourages researchers from submitting proposals of that nature. Rather, the FHWA staff who will serve as contacts for each Emphasis Area will work with stakeholders in the 17 research emphasis areas to identify and prioritize lines of research within each area and to subsequently develop specific work activities.

The FHWA is issuing this notice to: (1) Announce the posting of the final STEP Implementation strategy on the STEP Web site; and (2) to solicit comments on proposed research activities to be undertaken in the STEP via the STEP Web site. The URL for the STEP is *http://www.fhwa.dot.gov/hep/step/index.htm*. The FHWA will use this Web site as a major mechanism for informing the public regarding the status of the STEP.

We invite the public to visit this Web site to obtain additional information on the STEP, as well as information on the process for forwarding comments to the FHWA regarding the STEP implementation plan.

Authority: Section 5207 of Public Law 109–59.

Issued on: July 28, 2006.

J. Richard Capka,

Federal Highway Administrator.

[FR Doc. E6–12664 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Announcing the Fifteenth Public Meeting of the Crash Injury Research and Engineering Network (CIREN)

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Meeting announcement.

SUMMARY: This notice announces the Fifteenth Public Meeting of members of the Crash Injury Research and Engineering Network. CIREN is a collaborative effort to conduct research on crashes and injuries at eight Level 1 Trauma Centers linked by a computer network. Researchers can review data and share expertise, which could lead to a better understanding of crash injury mechanisms and the design of safer vehicles. Seven presentations on current research based on CIREN cases will be presented. The agenda will be posted to the CIREN Web site *http://www-nrd.nhtsa.dot.gov/departments/nrd-50/ciren/CIREN.html* three weeks prior to the meeting.

Date and Time: The meeting is scheduled from 8:30 a.m. to 2 p.m. on Wednesday, September 20th, 2006. This meeting will be hosted by the Froedtert Hospital and the Medical College of Wisconsin (MCW) CIREN Center.

ADDRESSES: The meeting will be held at: Radisson Hotel, 2300 N. Mayfair Road, Milwaukee, WI 53226, (414) 257–3400.

Special Demonstration: Following the CIREN research presentations, a tour of the MCW's car crash facility will be given along with a demonstration of an oblique pole impact test and an overview of current Federal Motor Vehicle Safety Standards including FMVSS No. 208 and FMVSS No.214.

To Register for This Event: Contact Judy Citta at (414) 266–6435 or e-mail *_WICIREN@MCW.edu* (Under score precedes WICIREN). Please provide name, affiliation, phone number and e-mail address. Registration is strongly recommended and required for parties wishing to participate in the special demonstration. You must register by September 5, 2006. Late registrations or those not registered are still welcome to attend the public meeting but you may not be able to attend the special demonstrations.

For General Information: Dale Halloway, (414) 805–5439.

SUPPLEMENTARY INFORMATION: The CIREN System has been established, and crash cases have been entered into the database by each Center. CIREN cases may be viewed from the NHTSA/CIREN Web site at: *http://www-nrd.nhtsa.dot.gov/departments/nrd-50/ciren/CIREN.html*. NHTSA has held three Annual Conferences where CIREN research results were presented. Further information about the three previous CIREN conferences is also available through the NHTSA Web site. NHTSA held the first public meeting on May 5, 2000, with a topic of lower extremity injuries in motor vehicle crashes; the second public meeting on July 21, 2000, with a topic of side impact crashes; the third public meeting on November 30, 2000, with a topic of thoracic injuries in crashes; the fourth public meeting on March 16, 2001, with a topic of offset frontal collisions; the fifth public meeting on June 21, 2001, on CIREN outreach efforts; the sixth public meeting (held in Ann Arbor, Michigan), with a topic of injuries involving sport utility vehicles; the seventh public meeting on December 6, 2001, with a topic of age related injuries (elderly and children); the eighth public meeting on April 25, 2002, with a topic of head and traumatic brain injuries; the ninth public meeting on August 22, 2002 (held at Harborview Injury Prevention and Research Center in Seattle, Washington), with presentations highlighting the various research specialties of the Centers; the tenth public meeting on December 5, 2002, with a topic of occult injuries; the eleventh public meeting on April 3, 2003, with papers on the injuries sustained in crashes where vehicles are mismatched in terms of size or weight; the twelfth public meeting on December 5, 2003 (held at the University of Alabama at Birmingham), with presentations on various research specialties of the Centers; the thirteenth public meeting on November 4, 2004 (held at the University of Maryland/National Study Center), with presentations on various research specialties and the fourteenth public meeting on March 28, 2006, in Washington, DC with presentations on various research specialties. Presentations from these meetings are available through the NHTSA Web site.

NHTSA plans to continue holding CIREN meetings on a regular basis to disseminate CIREN information to interested parties. This is the fifteenth such meeting. The CIREN Centers will

be presenting papers on a variety of research topics.

Should it be necessary to cancel the meeting due to inclement weather or to any other emergencies, a decision to cancel will be made as soon as possible and posted immediately on CIREN's Web site *http://www-nrd.nhtsa.dot.gov/departments/nrd-50/ciren/CIREN.html.* If you do not have access to the Web site, you may call or e-mail the contacts listed in this announcement and leave your telephone number or e-mail address. You will be contacted only if the meeting is postponed or canceled.

Issued on: August 1, 2006.

Joseph N. Kanianthra,

Associate Administrator for Vehicle Safety Research.

[FR Doc. E6–12662 Filed 8–3–06; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34879]

Wallowa Union Railroad Authority—Acquisition and Operation Exemption—Union Pacific Railroad Company

Wallowa Union Railroad Authority (WURA), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire from the Union Pacific Railroad Company (UP) approximately one half-mile of rail line between milepost 21.0 at Elgin, OR, and milepost 20.50 at the North line of Baltimore Street in Elgin, OR.[1]

WURA certifies that its projected annual revenues as a result of the transaction will not result in WURA becoming a Class II or Class I rail carrier and will not exceed $5 million.

The transaction was expected to be consummated shortly after July 20, 2006, the effective date of this exemption (7 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34879, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Of Counsel, Ball Janik LLP, Suite 225, 1455 F Street, NW., Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: July 28, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–12643 Filed 8–3–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub-No. 431X)]

BNSF Railway Company—Abandonment and Discontinuance Exemption—in Knox and Fulton Counties, IL

BNSF Railway Company (BNSF) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments and Discontinuances of Services* to: (1) Abandon a 1-mile line of railroad between milepost 51.58 and milepost 52.58 near Farmington, in Fulton County, IL; and (2) discontinue service over a 4.69-mile line of railroad between milepost 46.89 near Yates City, and milepost 51.58 near Farmington, in Knox County, IL, a total distance of 5.69 miles. The line traverses United States Postal Service Zip Codes 61531 and 61572.

BNSF has certified that: (1) No traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements of 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 5, 2006, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by August 14, 2006. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by August 24, 2006, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to BNSF's representative: Sidney L. Strickland, Jr., Sidney Strickland and Associates, PLLC, 3050 K Street, NW., Suite 101, Washington, DC 20007.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

BNSF has filed environmental and historic reports which address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by August 11, 2006. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

[1] WURA owns and operates the adjacent rail line between milepost 21.0 at Elgin and milepost 83.58 at Joseph, OR. *See Wallowa Union Railroad Authority-Acquisition and Operation Exemption—Wallowa County, OR, and Idaho Northern & Pacific Railroad Company*, STB Finance Docket No. 34349 (STB served Nov. 26, 2003).

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which was increased to $1,300 effective on April 19, 2006. *See Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2006 Update*, STB Ex Parte No. 542 (Sub-No. 13) (STB served Mar. 20, 2006).

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by August 4, 2007, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 1, 2006.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. E6–12733 Filed 8–3–06; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Proposed Collection; Comment Request; Currency Transaction Report by Casinos—Nevada

AGENCY: Department of the Treasury, Financial Crimes Enforcement Network.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Financial Crimes Enforcement Network invites comment on a proposed extension, without change, of an existing information collection requirement contained in the form "Currency Transaction Report by Casinos—Nevada, FinCEN Form 103–N." This request for comments is being made pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

DATES: Written comments are welcome and must be received on or before October 3, 2006.

ADDRESSES: Written comments should be submitted to: Financial Crimes Enforcement Network, Department of the Treasury, P.O. Box 39, Vienna, VA 22183, Attention: Paperwork Reduction Act Comments—Currency Transaction Report by Casinos—Nevada Form. Comments also may be submitted by electronic mail to the following Internet address: *regcomments@fincen.gov*, again with a caption, in the body of the text, "Attention: Paperwork Reduction Act Comments—Currency Transaction Report by Casinos—Nevada Form."

Inspection of comments. Comments may be inspected, between 10 a.m. and 4 p.m., in the Financial Crimes Enforcement Network reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll free number).

FOR FURTHER INFORMATION CONTACT: Financial Crimes Enforcement Network, Regulatory Policy and Programs Division at (800) 949–2732.

SUPPLEMENTARY INFORMATION:

Title: Currency Transaction Report by Casinos—Nevada.

OMB Number: 1506–0003.

Form Number: FinCEN Form 103–N.

Abstract: The statute generally referred to as the "Bank Secrecy Act," Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5332, authorizes the Secretary of the Treasury, *inter alia*, to require financial institutions to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, or in the conduct of intelligence or counter-intelligence activities, to protect against international terrorism, and to implement counter-money laundering programs and compliance procedures.[1] Regulations implementing Title II of the Bank Secrecy Act appear at 31 CFR part 103. The authority of the Secretary of the Treasury to administer the Bank Secrecy Act has been delegated to the Director of the Financial Crimes Enforcement Network.

Section 5313(a) of the Bank Secrecy Act authorizes the Secretary of the Treasury to issue regulations that require a report when "a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation * * *" Regulations implementing section 5313(a) are found at 31 CFR 103.22. In general, the regulations require the reporting of transactions in currency in excess of $10,000 a day. Casinos, as defined in 31 U.S.C. 5312(a)(2)(X) and 31 CFR 103.11(n)(5)(i), are financial institutions subject to the currency transaction reporting requirement. (See 63 FR 1919, January 13, 1998.) The Currency Transaction Report by Casinos—Nevada, FinCEN Form 103–N, is the form that casinos in Nevada use to comply with the currency transaction reporting requirements. All Nevada casinos having gross annual gaming revenues in excess of $10 million and having annual table games statistical win in excess of $2 million, or having actual or projected annual gross gaming revenue in excess of $1 million that the Chairman of the Nevada Gaming Control Commission directs to do so, are required to file Currency Transaction Report by Casinos—Nevada, FinCEN Form 103–N, pursuant to Nevada Gaming Commission Regulation 6A ("Regulation 6A"), entitled "Cash Transactions Prohibitions, Reporting, and Recordkeeping." Nevada casinos comply with Regulation 6A in lieu of 31 U.S.C. 5313(a) and 31 CFR 103.22 based upon an exemption granted to the state of Nevada by the Department of the Treasury.

The Currency Transaction Report by Casinos—Nevada is available for review on the Financial Crimes Enforcement Web site at *http://www.fincen.gov/forms/fin103n_ctrc-n.pdf.*

Type of Review: Extension, without change, of an approved information collection.

Affected Public: Business or other for-profit institutions.

Frequency: As required.

Estimated Burden: Reporting average of 19 minutes per response. Form recordkeeping average of 5 minutes per response, for a total of 24 minutes.

Estimated Number of Respondents: 115.

Estimated Total Annual Responses: 137,000.

Estimated Total Annual Burden Hours: 54,800.

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 Office of Management and Budget control number. Records required to be retained under the Bank Secrecy Act must be retained for five years.

Request for Comments:

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget 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

[1] Language expanding the scope of the Bank Secrecy Act to intelligence or counter-intelligence activities to protect against international terrorism was added by section 358 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Public Law 107–56.

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.

Dated: July 28, 2006.

Robert W. Werner,

Director, Financial Crimes Enforcement Network.

[FR Doc. E6–12583 Filed 8–3–06; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

United States Mint

Notification of Call for Artists To Apply for the United States Mint's Artistic Infusion Program

Summary: The United States Mint is accepting applications from professional artists to fill up to ten new Associate Designer positions in its Artistic Infusion Program to help design United States coins and medals. The Artistic Infusion Program was created in 2003 to enrich and invigorate the design of United States coins and medals by developing a pool of professional artists (Master & Associate Designers) and college and graduate-level art students (Student Designers) in visual arts who will be invited to create and submit new designs for selected coin and medal programs throughout the year.

The United States Mint encourages applications from talented artists, representing diverse backgrounds and a variety of interests reflecting those of the American people, who will look at coin design in new ways. Artists selected to participate in the program will be paid an established fee for their work, and those whose designs are used for certain coins and medals will be named as the designer in historical documents, including certificates of authenticity and promotional materials. Most important, the program provides the nation's most gifted artists with the opportunity to contribute beautiful designs to coins that will be enjoyed by all Americans.

An orientation session and designer symposium will be held for artists selected to participate in the program (attending at the United States Mint's expense) at the United States Mint at Philadelphia in early 2007. This session's purpose will be to inform selected artists about the history of United States coin and medal design, the coin making process and upcoming design opportunities.

Please Note: At this time, the Artistic Infusion Program is limited to coin and medal design (i.e., drawings) and does not encompass the execution (sculpting and engraving) of designs. The United States Mint Sculptor-Engravers will model designs created by the Artistic Infusion Program artists.

Application Deadline: September 15, 2006.

How to Apply: Artists who are U.S. citizens should submit a completed Application Packet which includes program details, eligibility requirements, evaluation criteria and detailed application guidelines. The packet is available on the United States Mint's Web site at *http://www.usmint.gov* or by contacting the United States Mint at (202) 354–7727 or *art@usmint.treas.gov*. The application includes the submission of a drawing exercise as well as samples of the applicant's work.

Dated: July 31, 2006.

Jerry Horton,

Acting Director, United States Mint.

[FR Doc. E6–12581 Filed 8–3–06; 8:45 am]

BILLING CODE 4810–37–P

Corrections

Federal Register
Vol. 71, No. 150
Friday, August 4, 2006

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.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Office of the Federal Register

Rules and Regulations

Corrections

In the Rules and Regulations section of the Tuesday, August 1, 2006 edition of the **Federal Register**, make the following corrections to these page numbers:

1. Page 83346 should read page 43346.
2. Page 83356 should read page 83356.
3. Page 83358 should read page 83358.

[FR Doc. C6–99999 Filed 8–3–06; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Friday,
August 4, 2006

Part II

Department of Energy

Office of Energy Efficiency and Renewable Energy

10 CFR Part 431

Energy Conservation Program for Commercial Equipment: Distribution Transformers Energy Conservation Standards; Proposed Rule

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 431

[Docket Number: EE–RM/STD–00–550]

RIN 1904–AB08

Energy Conservation Program for Commercial Equipment: Distribution Transformers Energy Conservation Standards

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and public meeting.

SUMMARY: The Energy Policy and Conservation Act (EPCA or the Act) authorizes the Department of Energy (DOE or the Department) to establish energy conservation standards for various consumer products and commercial and industrial equipment, including those distribution transformers for which DOE determines that energy conservation standards would be technologically feasible and economically justified, and would result in significant energy savings. In this notice, the Department is proposing energy conservation standards for distribution transformers and is announcing a public meeting.

DATES: The Department will hold a public meeting on Wednesday, September 27, 2006, from 9 a.m. to 4 p.m., in Washington, DC. The Department must receive requests to speak at the public meeting before 4 p.m., Wednesday, September 13, 2006. The Department must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Wednesday, September 13, 2006.

The Department will accept comments, data, and information regarding the notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than October 18, 2006. See section VII, "Public Participation," of this NOPR for details.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 1E245, 1000 Independence Avenue, SW., Washington, DC. (Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures, requiring a 30-day advance notice. If you are a foreign national and wish to participate in the workshop, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards-Jones at (202) 586–2945 so that the necessary procedures can be completed.)

You may submit comments, identified by docket number EE–RM/STD–00–550 and/or Regulatory Information Number (RIN) 1904–AB08, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: TransformerNOPR Comment@ee.doe.gov.* Include docket number EE–RM/STD–00–550 and/or RIN 1904–AB08 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, NOPR for Distribution Transformers Energy Conservation Standards, docket number EE–RM/STD–00–550 and/or RIN 1904–AB08, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards-Jones, U.S. Department of Energy, Building Technologies Program, Room 1J–018, 1000 Independence Avenue, SW., Washington, DC 20585. Telephone: (202) 586–2945. Please submit one signed original paper copy.

Instructions: All submissions received must include the agency name and docket number or RIN for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see section VII of this document (Public Participation).

Docket: For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Forrestal Building, Room 1J–018 (Resource Room of the Building Technologies Program), 1000 Independence Avenue, SW., Washington, DC, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards-Jones at the above telephone number for additional information regarding visiting the Resource Room. **Please note:** The Department's Freedom of Information Reading Room (formerly Room 1E–190 at the Forrestal Building) is no longer housing rulemaking materials.

FOR FURTHER INFORMATION CONTACT: Antonio Bouza, Project Manager, Energy Conservation Standards for Distribution Transformers, Docket No. EE–RM/STD–00–550, U.S. Department of Energy, Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–4563, e-mail: *Antonio.Bouza@ee.doe.gov.*

Thomas B. DePriest, Esq., U.S. Department of Energy, Office of General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–9507, e-mail: *Thomas.Depriest@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Summary of the Proposed Rule

Pursuant to the Energy Policy and Conservation Act, as amended, the Department is proposing energy conservation standards for liquid-immersed and medium-voltage, dry-type distribution transformers. The Department believes these standards will achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified, and will result in significant energy savings. In the advance notice of proposed rulemaking (ANOPR) for distribution transformers, the Department had also conducted analysis on low-voltage, dry-type distribution transformers. 69 FR 45376 (July 29, 2004). However, the Energy Policy Act of 2005 (EPACT 2005) established energy conservation standards for low-voltage, dry-type distribution transformers. (42 U.S.C. 6295(y)) Because of these amendments, DOE removed low-voltage, dry-type distribution transformers—product class 3 (low-voltage, dry-type, single-phase) and product class 4 (low-voltage, dry-type, three-phase)—from this rulemaking. Table I.1 shows the proposed standard levels for the product classes that are still within the scope of this rulemaking.

TABLE I.1.—PROPOSED STANDARD LEVELS FOR DISTRIBUTION TRANSFORMERS

Superclasses—product classes (PC)	Proposed standard levels
Liquid-immersed	Trial Standard Level 2.
Single-phase (PC 1)	
Three-phase (PC 2)	
Medium-voltage, dry-type	Trial Standard Level 2.
Single-phase, 25–45 kV BIL (PC 5)	
Three-phase, 25–45 kV BIL (PC 6)	
Single-phase, 46–95 kV BIL (PC 7)	
Three-phase, 46–95 kV BIL (PC 8)	
Single-phase, ≥96 kV BIL (PC 9)	
Three-phase, ≥96 kV BIL (PC 10)	

Note: PC stands for product class; kV is kilovolt; BIL is basic impulse insulation level.

Tables II.1 and II.2 show the specific efficiency levels for the various kilovolt ampere (kVA) sizes, within each product class, that reflect the Department's proposed standards.

The Department's analyses indicate that the proposed standards, trial standard level 2 (TSL2) for liquid-immersed transformers and TSL2 for medium-voltage, dry-type transformers, would save a significant amount of energy—an estimated 2.4 quads (quadrillion (10^{15}) British thermal units (BTU)) of cumulative energy over 29 years (2010–2038). This amount is roughly equal to the total energy consumption of the Commonwealth of Virginia in 2001. The economic impacts on commercial consumers (*i.e.*, the average life-cycle cost (LCC) savings) are positive.

The national net present value (NPV) of TSL2 is $2.52 billion using a seven-percent discount rate and $9.43 billion using a three-percent discount rate, cumulative from 2010 to 2073 in 2004$. This is the estimated total value of future savings minus the estimated increased equipment costs, discounted

to the year 2004. Using a real corporate discount rate of 8.9 percent, the Department estimates the liquid-immersed and medium-voltage, dry-type distribution transformer industry's NPV to be $558 million in 2004$. The impact of the proposed standard on liquid-immersed transformer manufacturers' industry net present value (INPV) is expected to be between a 2.4 percent loss and a 2.0 percent increase (−$12.9 million to $10.7 million). The medium-voltage, dry-type transformer industry is estimated to lose between 10.1 percent and 13.4 percent of its NPV (−$3.3 million to −$4.3 million) as a result of the proposed standard. Based on the Department's interviews with the major manufacturers of distribution transformers, DOE expects minimal plant closings or loss of employment as a result of the proposed standards.

The proposed standards will lead to reductions in greenhouse gases, resulting in cumulative (undiscounted) emission reductions of 167.1 million tons (Mt) of carbon dioxide (CO_2). Additionally, the standards would generate 46.4 thousand tons (kt) of nitrogen oxides (NO_X) emissions reductions or a similar amount of NO_X emissions allowance credits in areas where such emissions are subject to emissions caps. The Department expects the energy savings from the proposed standards to eliminate the need for approximately 11 new 400-megawatt (MW) power plants by 2038.

Therefore, the Department concludes that the benefits (energy savings, commercial consumer LCC savings, national NPV increases, and emissions reductions) to the Nation of the proposed standards outweigh their costs (loss of manufacturer NPV and commercial consumer LCC increases for some users of distribution transformers). The Department concludes that the proposed standards of TSL2 for liquid-immersed and TSL2 for medium-voltage, dry-type transformers are technologically feasible and economically justified. At present, both liquid-immersed and medium-voltage, dry-type transformers are commercially available at the TSL2 standard level.

II. Introduction

A. Consumer Overview

The Department is proposing to set energy-efficiency standard levels for distribution transformers as shown in Tables II.1 and II.2. The proposed standard would apply to liquid-immersed and medium-voltage, dry-type distribution transformers manufactured for sale in the United States, or imported to the United States, on or after January 1, 2010. In preparing these tables, the Department identified some areas where the analytical methods used to develop the efficiency values resulted in discontinuities in the table of efficiencies. Generally, larger transformers will have greater efficiency than smaller transformers, all other factors being equal. Not all efficiency ratings that result from the Department's analysis fit this pattern. The Department invites comment on all the efficiency ratings.

TABLE II.1.—PROPOSED STANDARD LEVEL, TSL2, FOR LIQUID-IMMERSED DISTRIBUTION TRANSFORMERS

Single-phase		Three-phase	
kVA	Efficiency (%)	kVA	Efficiency (%)
10	98.40	15	98.36
15	98.56	30	98.62
25	98.73	45	98.76
37.5	98.85	75	98.91
50	98.90	112.5	99.01
75	99.04	150	99.08
100	99.10	225	99.17
167	99.21	300	99.23
250	99.26	500	99.32
333	99.31	750	99.24
500	99.38	1000	99.29
667	99.42	1500	99.36
833	99.45	2000	99.40
		2500	99.44

Note: All efficiency values are at 50 percent of nameplate-rated load, determined according to the DOE Test-Procedure. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972.

TABLE II.2.—PROPOSED STANDARD LEVEL, TSL2, FOR MEDIUM-VOLTAGE, DRY-TYPE DISTRIBUTION TRANSFORMERS

Single-phase				Three-phase			
BIL kVA	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV efficiency (%)	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV efficiency (%)	kVA
15	98.10	97.86		15	97.50	97.19	
25	98.33	98.12		30	97.90	97.63	
37.5	98.49	98.30		45	98.10	97.86	
50	98.60	98.42		75	98.33	98.12	
75	98.73	98.57	98.53	112.5	98.49	98.30	
100	98.82	98.67	98.63	150	98.60	98.42	
167	98.96	98.83	98.80	225	98.73	98.57	98.53
250	99.07	98.95	98.91	300	98.82	98.67	98.63
333	99.14	99.03	98.99	500	98.96	98.83	98.80
500	99.22	99.12	99.09	750	99.07	98.95	98.91
667	99.27	99.18	99.15	1000	99.14	99.03	98.99
833	99.31	99.23	99.20	1500	99.22	99.12	99.09

TABLE II.2.—PROPOSED STANDARD LEVEL, TSL2, FOR MEDIUM-VOLTAGE, DRY-TYPE DISTRIBUTION TRANSFORMERS—Continued

Single-phase				Three-phase			
BIL kVA	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV efficiency (%)	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV efficiency (%)	kVA
				2000	99.27	99.18	99.15
				2500	99.31	99.23	99.20

Note: BIL means basic impulse insulation level.
Note: All efficiency values are at 50 percent of nameplate rated load, determined according to the DOE Test-Procedure. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972.

B. Authority

Title III of EPCA sets forth a variety of provisions designed to improve energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the Energy Conservation Program for Consumer Products other than Automobiles. Part C of Title III (42 U.S.C. 6311–6317) establishes a similar program for "Certain Industrial Equipment," and includes distribution transformers, the subject of this rulemaking. The Department publishes today's NOPR pursuant to Part C of Title III, which provides for test procedures, labeling, and energy conservation standards for distribution transformers and certain other products, and authorizes DOE to require information and reports from manufacturers. The distribution transformer test procedure appears in Title 10 Code of Federal Regulations (CFR) Part 431, Subpart K, Appendix A; 71 FR 24972.

EPCA contains criteria for prescribing new or amended energy conservation standards. The Department must prescribe standards only for those distribution transformers for which DOE: (1) Has determined that standards would be technologically feasible and economically justified and would result in significant energy savings, and (2) has prescribed test procedures. (42 U.S.C. 6317(a)) Moreover, as indicated above, the Department analyzed whether today's proposed standards for distribution transformers will achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (See 42 U.S.C. 6295(o)(2)(A), 6316(a), and 6317(a) and (c)) In addition, DOE will decide whether today's proposed standard is economically justified, after receiving comments on the proposed standard, by determining whether the benefits of the standard exceed its costs. The Department will make this determination by considering, to the greatest extent practicable, the following seven factors which are set forth in 42 U.S.C. 6295(o)(2)(B)(i):

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;

(3) The total projected amount of energy savings likely to result directly from the imposition of the standard;

(4) Any lessening of the utility or the performance of the products likely to result from the imposition of the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(6) The need for national energy conservation; and

(7) Other factors the Secretary considers relevant.

In developing energy conservation standards for distribution transformers, DOE is also applying certain other provisions of 42 U.S.C. 6295. First, the Department will not prescribe a standard for the product if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any type (or class) of this product with performance characteristics, features, sizes, capacities, and volume that are substantially the same as those generally available in the United States. (See 42 U.S.C. 6295(o)(4))

Second, DOE is applying 42 U.S.C. 6295(o)(2)(B)(iii), which establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that "the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy * * * savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure * * *" The rebuttable-presumption test is an alternative path to establishing economic justification.

Third, in setting standards for a type or class of equipment that has two or more subcategories, DOE will specify a different standard level than that which applies generally to such type or class of equipment for any group of products "which have the same function or intended use, if * * * products within such group—(A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard" than applies or will apply to the other products. (See 42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies such a different standard for a group of products, the Department considers such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. Any rule prescribing such a standard will include an explanation of the basis on which DOE established such higher or lower level. (See 42 U.S.C. 6295(q)(2))

Federal energy efficiency requirements for equipment covered by 42 U.S.C. 6317 generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c) and 42 U.S.C. 6316(a)) The Department can, however, grant waivers of preemption for particular State laws or regulations, in accordance with the procedures and other provisions of section 327(d) of the Act. (42 U.S.C. 6297(d) and 42 U.S.C. 6316(a))

C. Background

1. Current Standards

Presently, there are no national energy conservation standards for the liquid-immersed and medium-voltage, dry-type distribution transformers covered by this rulemaking. However, on August 8, 2005, EPACT 2005 established energy conservation standards for low-voltage, dry-type distribution transformers that

will take effect on January 1, 2007. (42 U.S.C. 6295(y))

2. History of Standards Rulemaking for Distribution Transformers

On October 22, 1997, the Secretary of Energy published a notice stating that the Department "has determined, based on the best information currently available, that energy conservation standards for electric distribution transformers are technologically feasible, economically justified and would result in significant energy savings." 62 FR 54809.

The Secretary's determination was based, in part, on analyses conducted by the Department's Oak Ridge National Laboratory (ORNL). In July 1996, ORNL published a report entitled *Determination Analysis of Energy Conservation Standards for Distribution Transformers*, ORNL–6847, which assessed options for setting energy conservation standards. That report was based on information from annual sales data, average load data, and surveys of existing and potential transformer efficiencies obtained from several organizations.

In September 1997, ORNL published a second report entitled *Supplement to the "Determination Analysis" (ORNL–6847) and NEMA Efficiency Standard for Distribution Transformers*, ORNL–6925. This report assessed the suggested efficiency levels contained in the then-newly published National Electrical Manufacturers Association (NEMA) Standards Publication No. TP 1–1996, *Guide for Determining Energy Efficiency for Distribution Transformers*, along with the efficiency levels previously considered by the Department in the determination study.[1] In its supplemental assessment, ORNL–6925, the ORNL research team used a more accurate analytical model and better transformer market and loading data developed following the publication of ORNL–6847. Downloadable versions of both ORNL reports are available on the DOE Web site at: *http://www.eere.energy.gov/buildings/appliance_standards/commercial/distribution_transformers.html*

As a result of its positive determination, the Department developed the *Framework Document for Distribution Transformer Energy Conservation Standards Rulemaking* in 2000, describing the procedural and analytic approaches the Department anticipated using to evaluate the establishment of energy conservation standards for distribution transformers.[2] This document is also available on the aforementioned DOE Web site. On November 1, 2000, the Department held a public meeting on the Framework Document to discuss the proposed analytical framework. Manufacturers, trade associations, electric utilities, environmental advocates, regulators, and other interested parties attended the Framework Document meeting. The major issues discussed were: Definition of covered transformer products, definition of product classes, possible proprietary (patent) issues regarding amorphous material, ties between efficiency improvements and installation costs, baseline and possible higher efficiency levels, base case trends (i.e., trends absent regulation), transformer costs versus transformer prices, appropriate LCC subgroups, LCC methods (e.g., total owning cost (TOC)), loading levels, utility impact analysis vis-a-vis deregulation, scope of environmental assessment, and harmonization of standards with other countries.

Stakeholder comments submitted during the Framework Document comment period elaborated on the issues raised at the meeting and also addressed the following issues: Options for the screening analysis, approaches for the engineering analysis, discount rates, electricity prices, the number and basis for the efficiency levels to be analyzed, the national energy savings (NES) and NPV analyses, the analysis of the effects of a potential standard on employment, the manufacturer impact analysis (MIA), and the timing of the analyses.

As part of the information gathering and sharing process, the Department met with manufacturers of liquid-immersed and dry-type distribution transformers during the first quarter of 2002. The Department met with companies that produced all types of distribution transformers, ranging from small to large manufacturers, and including both NEMA and non-NEMA members. The Department had three objectives for these meetings: (1) Solicit feedback on the methodology and findings presented in the draft engineering analysis update report that the Department posted on its Web site December 17, 2001, (2) obtain information and comments on production costs and manufacturing processes presented in the draft engineering analysis update report, and (3) provide to manufacturers an opportunity, early in the rulemaking process, to express specific concerns to the Department.

Seeking early and frequent consultation with stakeholders, the Department posted draft reports on its website as it prepared for the publication of the ANOPR. The reports included draft screening analysis findings, and draft engineering analysis and LCC analysis reports on 50 kVA single-phase, liquid-immersed, pad-mounted transformers and 300 kVA three-phase, medium-voltage, dry-type transformers. The Department also held a live, online Web cast on October 17, 2002, giving an overview of the LCC analysis and a tutorial on the use of the LCC spreadsheet. The Department received comments from stakeholders on all the draft publications, which helped improve the quality of the analysis included in the ANOPR published on July 29, 2004. 69 FR 45376.

In the ANOPR, the Department invited stakeholders to comment on the following key issues: Definition and coverage, product classes, engineering analysis inputs, design option combinations, the 0.75 scaling rule, modeling of transformer load profiles, distribution chain markups, discount rate selection and use, baseline determination through purchase evaluation formulae, electricity prices, load growth over time, life-cycle cost subgroups, and utility deregulation impacts.

In preparation for the September 28, 2004, ANOPR public meeting, the Department held a Web cast on August 10, 2004, to acquaint stakeholders with the analytical tools (spreadsheets) and other material published the previous month. During the ANOPR comment period, which ended on November 9, 2004, stakeholders submitted comments on the 13 issues listed above, as well as on other issues. These comments are discussed in section IV of this NOPR.

On August 5, 2005, the Department posted on its Web site several draft NOPR analyses for early public review, including draft technical support document (TSD) chapters on the engineering analysis, the energy use and end-use load characterization, the markups for equipment price determination, the LCC and payback period analyses, the shipments analysis, the national impact analysis, and the MIA. The Department also posted draft NOPR spreadsheets for the engineering

[1] **Note:** NEMA later updated TP 1 in 2002 (NEMA TP 1–2002), in which it increased some of the efficiency levels. The latest version of TP 1 is available at the NEMA Web site: *http://www.nema.org/stds/tp1.cfm#download.*

[2] The Department published a notice of availability of the Framework Document in the **Federal Register**. 65 FR 59761 (October 6, 2000). The Framework Document itself is available on the DOE Web site: *http://www.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/trans_framework.pdf.*

analysis, LCC analysis, national impact analysis, and MIA on its Web site.

On August 8, 2005, President Bush signed into law EPACT 2005, Public Law 109–58. Section 135(c)(4) of this Act establishes minimum efficiency levels for low-voltage, dry-type transformers manufactured, or imported into the U.S., on or after January 1, 2007. (42 U.S.C. 6295(y)) The levels are those appearing in Table 4–2 of NEMA TP 1–2002, *Guide for Determining Energy Efficiency for Distribution Transformers.* The Department incorporated this standard along with efficiency standards for several other products and equipment in a **Federal Register** Notice. 70 FR 60407 (October 18, 2005). Because EPACT 2005 established standards for low-voltage, dry-type distribution transformers, the Department is no longer considering standards for the single- and three-phase, low-voltage dry-type distribution transformers in this rulemaking.

In conjunction with this NOPR, the Department also published on its website the complete TSD and several spreadsheets. The TSD contains technical documentation of each analysis conducted under this rulemaking, providing specific information on the methodology and results. The spreadsheets, discussed in the relevant TSD chapters, represent the analytical tools and results that support today's proposed rule. The engineering analysis spreadsheets represent the Department's design database, providing the cost-efficiency relationships for the 10 specific distribution transformer units analyzed—five liquid-immersed and five medium-voltage, dry-type units. The LCC spreadsheet calculates the LCC and payback periods at six standard levels for these representative units. The national impact analysis spreadsheet tool calculates impacts of efficiency standards on distribution transformer shipments, as well as the NES and NPV of the standard levels considered. The MIA spreadsheet evaluates the financial impact of standards on distribution transformer manufacturers. All of these spreadsheet tools are posted on the Department's Web site, along with the complete NOPR TSD, at *http://www.eere.energy.gov/buildings/appliance_standards/commercial/distribution_transformers_draft_analysis_nopr.html.*

3. Process Improvement

The "Process Rule," *Procedures, Interpretations and Policies for Consideration of New or Revised Energy Conservation Standards for Consumer Products,* Title 10 CFR Part 430, Subpart C, Appendix A, applies to the development of energy-efficiency standards for consumer products. While distribution transformers are considered a commercial product, the Department decided to apply some of the provisions of the "Process Rule" to this rulemaking.

In today's notice, the Department describes the framework and methodologies for developing the proposed standards. The framework and methodologies reflect improvements made, and steps taken, in accordance with the Process Rule, including DOE's use of economic models and analytical tools. Since the rulemaking process is dynamic, if timely new data, models, or tools that enhance the development of standards become available, the Department will incorporate them into the rulemaking.

III. General Discussion

A. Test Procedures

Section 7(b) of the Process Rule requires that the Department propose necessary modifications to the test procedure for a product before issuing a NOPR concerning efficiency standards for that product. Section 7(c) of the Process Rule states that DOE will issue a final, modified test procedure prior to issuing a proposed rule for energy conservation standards. The test procedure for distribution transformers was published as a final rule on April 27, 2006. 71 FR 24972.

B. Technological Feasibility

1. General

The Department considers design options technologically feasible if they are in use by the respective industry or if research has progressed to the development of a working prototype. The Process Rule sets forth a definition of technological feasibility as follows: "Technologies incorporated in commercially available products or in working prototypes will be considered technologically feasible." 10 CFR Part 430, Subpart C, Appendix A, section 4(a)(4)(i).

In each standards rulemaking, the Department conducts a screening analysis, which is based on information gathered regarding existing technology options and prototype designs. In consultation with manufacturers, design engineers, and other stakeholders, the Department develops a list of design options for consideration in the rulemaking. Once the Department has determined that a particular design option is technologically feasible, it then further evaluates each design option in light of the other three criteria in the Process Rule. 10 CFR Part 430, Subpart C, Appendix A, section 4(a)(3) and (4). The three additional criteria are: (a) Practicability to manufacture, install, or service, (b) adverse impacts on product utility or availability, or (c) health or safety concerns that cannot be resolved. 10 CFR Part 430, Subpart C, Appendix A, section 4(a). All design options that pass these screening criteria are candidates for further assessment.

As discussed in the ANOPR for this rulemaking, the Department is not considering the following design options because they do not meet one or more of the screening criteria: Silver as a conductor material, high-temperature superconductors, amorphous core material in stacked core configuration, carbon composite materials for heat removal, high-temperature insulating material, and solid-state (power electronics) technology. 69 FR 45387. For the NOPR, there were no changes to the list of technology options screened out of the ANOPR analysis. Discussion of the application of the screening analysis criteria to the design options appears in Chapter 4 of the TSD.

The Department believes that all of the efficiency levels evaluated in today's notice are technologically feasible. The technologies incorporated in the transformer design database have all been used (or are being used) in commercially available products or working prototypes. The designs all incorporate core steel and conductor types that are commercially available in today's transformer materials supply market. Any one manufacturer may not be using all the materials considered by the Department for a given model analyzed, but these materials could be purchased from multiple suppliers today if design changes warranted it.

In addition, to prepare transformer designs for evaluation, DOE used transformer design software that is also used by manufacturers in the U.S. and abroad. The Department evaluated the transformer design software by comparing the software's designs against six transformers it purchased, tested, and disassembled. For these units, the software accurately predicted the performance and manufacturer selling prices when using the same material cost, labor cost, and manufacturer markup assumptions that were used in the engineering analysis for the NOPR (see TSD Chapter 5, section 5.7).

For liquid-immersed distribution transformers, the designs prepared by the software were all wound-core designs. The least efficient design used M6 core steel and the most efficient used amorphous material. All designs

contained in the Department's design database could be built today. For medium-voltage, dry-type transformers, DOE used commercially available core steels, ranging from M6 through domain-refined 9-mil (0.009 inch) high permeability, grain-oriented steel (H–O DR). Core-construction techniques included butt-lap, mitered, and cruciform construction. The conductors and insulation types used were all conventional, and are commercially available in distribution transformers today. Thus, the Department believes that all the efficiency levels discussed in today's proposed rule are technologically feasible.

2. Maximum Technologically Feasible Levels

In developing today's proposed standards, the Department followed the provisions of 42 U.S.C. 6295(p)(2), which states that, when the Department proposes to adopt, or to decline to adopt, an amended or new standard for each type (or class) of covered product, "the Secretary shall determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible." The Department determined the maximum technologically feasible ("max-tech") efficiency level in the engineering analysis (see TSD Chapter 5) using the most efficient materials not screened out and applying design parameters that drove the transformer design software to create designs at the highest efficiencies achievable. The Department then used these highest-efficiency designs to establish the max-tech level for the LCC analysis (see TSD Chapter 8). In the national impact analysis (see TSD Chapter 10), the Department then scaled these max-tech efficiencies to the other kVA ratings within a given design line, establishing max-tech efficiencies at all the distribution transformer kVA ratings. Tables III.1 and III.2 provide the complete list of max-tech efficiency levels considered for all kVA ratings within each product class.

TABLE III.1.—MAX-TECH LEVELS FOR LIQUID-IMMERSED DISTRIBUTION TRANSFORMERS

Single-phase		Three-phase	
kVA	Efficiency (%)	kVA	Efficiency (%)
10	99.32	15	99.31
15	99.39	30	99.42
25	99.46	45	99.47
37.5	99.51	75	99.54
50	99.59	112.5	99.58
75	99.59	150	99.61
100	99.62	225	99.65
167	99.66	300	99.67
250	99.70	500	99.71
333	99.72	750	99.66
500	99.75	1000	99.68
667	99.77	1500	99.71
833	99.78	2000	99.73
		2500	99.74

Note: All efficiency values are at 50 percent of nameplate rated load, determined according to the DOE Test-Procedure. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972.

TABLE III.2.—MAX.-TECH LEVELS FOR MEDIUM-VOLTAGE, DRY-TYPE DISTRIBUTION TRANSFORMERS

Single-phase				Three-phase			
BIL kVA	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV (%)	kVA	20–45 kV efficiency (%)	46–95 kV efficiency (%)	≥96 kV efficiency (%).
15	99.05	98.54		15	98.75	98.08	
25	99.17	98.71		30	98.95	98.38	
37.5	99.25	98.84		45	99.05	98.54	
50	99.30	98.92		75	99.17	98.71	
75	99.37	99.02	99.22	112.5	99.25	98.84	
100	99.41	99.09	99.28	150	99.30	98.92	
167	99.48	99.20	99.36	225	99.37	99.02	99.22
250	99.42	99.42	99.42	300	99.41	99.09	99.28
333	99.46	99.46	99.46	500	99.48	99.20	99.36
500	99.51	99.51	99.52	750	99.42	99.42	99.42
667	99.54	99.54	99.55	1000	99.46	99.46	99.46
833	99.57	99.57	99.57	1500	99.51	99.51	99.52
				2000	99.54	99.54	99.55
				2500	99.57	99.57	99.57

Note: BIL means basic impulse insulation level.

Note: All efficiency values are at 50 percent of nameplate rated load, determined according to the DOE Test-Procedure. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972.

C. Energy Savings

One of the criteria that govern the Department's adoption of standards for distribution transformers is that the standard must result in "significant" energy savings. (42 U.S.C. 6317(a)) While the term "significant" is not defined by EPCA, a U.S. Court of Appeals, in *Natural Resources Defense Council* v. *Herrington*, 768 F.2d 1355, 1373 (D.C. Cir. 1985), indicated that Congress intended "significant" energy savings in a similar context in Section 325 of the Act to be savings that were not "genuinely trivial." The energy savings for all of the trial standard levels considered in this rulemaking are nontrivial, and therefore the Department considers them "significant" as required by 42 U.S.C. 6317.

D. Economic Justification

As noted earlier, EPCA provides seven factors to be evaluated in determining whether an energy conservation standard for distribution transformers is economically justified. The following discusses how the Department has addressed each of those seven factors thus far in this rulemaking. (42 U.S.C. 6295(o)(2)(B)(i))

1. Economic Impact on Manufacturers and Commercial Consumers

The Process Rule established procedures, interpretations, and policies to guide the Department in the consideration of new or revised appliance efficiency standards. The provisions of the rule have direct bearing on the implementation of the MIA. First, the Department used an annual-cash-flow approach in determining the quantitative impacts of a new or amended standard on manufacturers. This included both a short-term assessment based on the cost and capital requirements during the period between the announcement of a regulation and the time when the regulation comes into effect, and a long-term assessment. Impacts analyzed include industry NPV, cash flows by year, changes in revenue and income, and other measures of impact, as appropriate. Second, the Department analyzed and reported the impacts on different types of manufacturers, with particular attention to impacts on small manufacturers. Third, the Department considered the impact of standards on domestic manufacturer employment, manufacturing capacity, plant closures, and loss of capital investment. Finally, the Department took into account cumulative impacts of different DOE regulations on manufacturers.

For commercial consumers, measures of economic impact are the changes in installed (first) cost and annual operating costs. To assess the impact on first cost, the Department considered the percent increase in the consumer equipment cost before installation. To assess the impact on life-cycle costs, which include both consumer equipment costs and annual operating costs, the Department conducted an LCC analysis of the equipment at each candidate standard level (CSL) (*see* below).

2. Life-Cycle Costs

The LCC is the sum of the purchase price, including the installation, and the operating expense—including operating energy consumption, maintenance, and repair expenditures—discounted over the lifetime of the equipment. To determine the purchase price including installation, DOE estimated the markups that are added to the manufacturer selling price by distributors and contractors, and estimated installation costs from an analysis of transformer installation cost estimates for a wide range of weights and sizes. The Department assumed that maintenance and repair costs are not dependent on transformer efficiency. In estimating operating energy costs, DOE used the full range of commercial consumer marginal energy prices, which are the energy prices that correspond to incremental changes in energy use.

For each distribution transformer representative unit, the Department calculated both LCC and LCC savings from a base-case scenario for six candidate standard efficiency levels. The six candidate standard levels were chosen to correspond to the following:

- NEMA TP 1–2002;
- ⅓ of efficiency difference between TP 1 and minimum LCC;
- ⅔ of efficiency difference between TP 1 and minimum LCC;
- Minimum LCC;
- Maximum energy savings with no change in LCC; and
- Maximum technologically feasible.

In order to calculate the appropriate efficiency levels for kVA ratings that were not analyzed (*i.e.*, all the kVA ratings other than the ten representative units), the Department applied a scaling rule to extrapolate the findings on the ten representative units to these other ratings. For information on the scaling rule, *see* section IV.B.1 and TSD Chapter 5, section 5.2.2.

The Department presents the calculated LCC savings as a distribution, with a mean value and range. The Department used a distribution of consumer real discount rates for the calculations, with mean values ranging from 3.3 to 7.5 percent, specific to the cost of capital faced by purchasers of the representative units. Chapter 8 of the TSD contains the details of the LCC calculations. The LCC is one of the factors DOE considers in determining the economic justification for a new or amended standard. (*See* 42 U.S.C. 6295(o)(2)(B)(i)(II))

3. Energy Savings

While significant conservation of energy is a separate statutory requirement for imposing an energy conservation standard, in determining the economic justification of a standard, the Department considers the total projected energy savings that are expected to result directly from the standard. (See 42 U.S.C. 6295(o)(2)(B)(i)(III)) The Department used the NES spreadsheet results in its consideration of total projected savings. The savings figures are discussed in section V.A.3 of this notice.

4. Lessening of Utility or Performance of Equipment

In establishing classes of products, and in evaluating design options and the impact of potential standard levels, the Department avoided having new standards for distribution transformers that lessen the utility or performance of the equipment under consideration in this rulemaking. None of the proposed trial standard levels reduces the utility or performance of distribution transformers. (See 42 U.S.C. 6295(o)(2)(B)(i)(IV)) The Department's engineering options do not change the utility and performance of distribution transformers. The impact of any increase in transformer weight associated with efficiency improvements is captured by the economic analysis. Specifically, installation costs for pole-mounted transformers include estimates of stronger pole and pole change-out costs that may be incurred with heavier, more efficient transformers.

5. Impact of Any Lessening of Competition

The Department considers any lessening of competition that is likely to result from standards. Accordingly, DOE has written to the Attorney General to request that the Attorney General transmit to the Secretary, not later than 60 days after the publication of this proposed rule, a written determination of the impact, if any, of any lessening of competition likely to result from the proposed standard, together with an analysis of the nature and extent of such

impact. (See 42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii))

6. Need of the Nation To Conserve Energy

The non-monetary benefits of the proposed standard are likely to be reflected in improvements to the security and reduced reliability costs of the Nation's energy system—namely, reductions in the overall demand for energy will result in reduced costs for maintaining reliability of the Nation's electricity system. The Department conducts a utility impact analysis to show the reduction in installed generation capacity requirements. Reduced power demand (including peak power demand) generally reduces the costs of maintaining the security and reliability of the energy system.

The Department has determined that today's proposed standard should result in reductions in greenhouse gas emissions. The Department quantified a range of primary energy conversion factors and estimated the emissions reductions associated with the generation displaced by energy-efficiency standards. The environmental effects from each trial standard level for this equipment are reported in the TSD environmental assessment. (See 42 U.S.C. 6295(o)(2)(B)(i)(VI))

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, considers any other factors that the Secretary deems to be relevant. (See 42 U.S.C. 6295(o)(2)(B)(i)(VII)) For today's proposed standard, the Secretary took into consideration a factor relating to several comments received at the ANOPR public meeting, during the comment period following the meeting, and in the MIA interviews. Stakeholders expressed concern about the increasing cost of raw materials for building transformers, the volatility of material prices, and the cumulative effect of material price increases on the transformer industry (see section IV.B.2, Engineering Analysis Inputs). The Department conducted supplementary engineering and LCC analyses using first-quarter 2005 material prices and considered the impacts on LCC savings and payback periods when evaluating the appropriate standard levels for liquid-immersed and medium-voltage, dry-type distribution transformers. The results of the engineering and LCC analyses for the first-quarter 2005 material pricing analysis are in TSD Appendix 5C.

IV. Methodology and Discussion of Comments

A. Market and Technology Assessment

1. Product Classes

In general, when evaluating and establishing energy-efficiency standards, the Department divides covered products into classes by: (a) The type of energy used, or (b) capacity, or other performance-related features, such as those that affect both consumer utility and efficiency. Different energy-efficiency standards may apply to different product classes. As discussed in the ANOPR, the Department received some guidance from stakeholders on establishing appropriate product classes for the population of distribution transformers. 69 FR 45385. Originally, the Department created 10 product classes, dividing up the population of distribution transformers by:

- Type of transformer insulation—liquid-immersed or dry-type;
- Number of phases—single or three;
- Voltage class—low or medium (for dry-type units only); and
- Basic impulse insulation level (for medium-voltage, dry-type units only).

EPACT 2005 includes provisions establishing energy conservation standards for two of the Department's product classes (PC3, low-voltage, single-phase, dry-type and PC4, low-voltage, three-phase, dry-type). (42 U.S.C. 6295(y)) With standards thereby established for low-voltage, dry-type distribution transformers, the Department is no longer considering these two product classes for standards. Table IV.1 presents the eight product classes that remain within the scope of this rulemaking.

TABLE IV.1.—DISTRIBUTION TRANSFORMER PRODUCT CLASSES FOR THE NOPR

PC No.*	Insulation	Voltage	Phase	BIL rating	kVA range
PC1	Liquid-Immersed		Single		10–833 kVA.
PC2	Liquid-Immersed		Three		15–2500 kVA.
PC5	Dry-Type	Medium	Single	20–45 kV BIL	15–833 kVA.
PC6	Dry-Type	Medium	Three	20–45 kV BIL	15–2500 kVA.
PC7	Dry-Type	Medium	Single	46–95 kV BIL	15–833 kVA.
PC8	Dry-Type	Medium	Three	46–95 kV BIL	15–2500 kVA.
PC9	Dry-Type	Medium	Single	≥96 kV BIL	75–833 kVA.
PC10	Dry-Type	Medium	Three	≥96 kV BIL	225–2500 kVA.

*Note: Although the PC3 and PC4 product classes are no longer included in this rulemaking, for consistency with prior material published under this rulemaking, the Department has not renumbered the liquid-immersed and medium-voltage, dry-type product classes that remain.

DOE received no comments that requested modifications to the Department's product classes as proposed in the ANOPR. However, Howard Industries commented that it supported the independent categorization of liquid-immersed and dry-type transformers. It pointed out that the applications and type of customers for these two types of transformers can vary widely. (Howard, No. 70 at p. 2) The Department agrees with this comment and continues to treat liquid-immersed and dry-type transformers separately in its analysis.

Concerning the use of three basic impulse insulation level (BIL) groupings for medium-voltage, dry-type transformers, Federal Pacific Transformer (FPT) noted that BIL levels do affect cost and efficiency, and agreed that DOE should conduct its analysis by BIL grouping. It commented that the efficiency levels should be modeled according to the BIL levels as much as possible. (FPT, No. 64 at p. 3) NEMA commented that it was willing to change the BIL groupings in TP 1–2002 from two to three, so TP 1 would have the same BIL groupings for medium-voltage, dry-type transformers as the Department's proposal. (NEMA, No. 60 at p. 2) The Alliance to Save Energy (ASE) commented that the Department's refinement of BIL classifications over TP 1 is justified and should result in more appropriate efficiency levels. (ASE, No. 52 at p. 2 and No. 75 at p. 2) Finally, the Oregon Department of Energy (ODOE) commented that it supports the refinements that created three BIL groupings for these transformers. (ODOE, No. 66 at p. 2) The Department did not receive any comments critical of the three BIL

groupings for medium-voltage, dry-type transformers, and therefore continues to use these same BIL groupings in today's proposed rule.

Howard Industries and ASE commented on whether DOE should regulate the efficiency of liquid-immersed transformers. Howard commented that, for liquid-immersed transformers—especially for the utility, municipal, and co-operative segments—energy-efficiency standards should be voluntary because these transformer customers are already considering life-cycle costs in their purchasing decisions. (Howard, No. 70 at p. 4) Howard commented that it feels a voluntary program would be better for the whole utility market than a mandatory standard. Howard believes a mandatory program would contribute to standardization of liquid-immersed transformer designs, and encourage manufacturers to move to countries with lower labor costs. Howard suggested that the ballast and electric motor industries are two examples of products where mandatory standards were implemented and domestic manufacturing declined. (Howard, No. 70 at p. 2) ASE agreed with the Department's decision that liquid-immersed transformers fall within the scope of the standard. (ASE, No. 75 at p. 2) Under 42 U.S.C. 6317, the Department is charged in this rulemaking with determining whether standards for distribution transformers are technologically feasible and economically justified and would result in significant energy savings. Based on the Department's analysis and information available to date, standards for liquid-immersed transformers appear to be technologically feasible and economically justified, and would result in significant energy savings. The Department considered a voluntary program, NEMA TP–1 in its Determination Analysis, but concluded that the "efficiency levels would capture the most cost effective energy savings but may not capture substantial energy savings that appear to be economically justified and technologically feasible." 62 FR 54816. In addition, the Department considered the impact of voluntary programs in its regulatory impact analysis (see the report in the TSD "Regulatory Impact Analysis for Electrical Distribution Transformers"), and found that a voluntary program would not result in standards that achieve the maximum efficiency level that is technologically feasible and economically justified. Thus, in accordance with 42 U.S.C. 6317, the Department intends to continue to consider liquid-immersed distribution transformers for energy efficiency standards. To gain a better understanding of the concern raised by Howard Industries about minimum efficiency standards leading to design standardization, the Department requests that other stakeholders comment on this issue.

2. Definition of a Distribution Transformer

The Department received several comments from stakeholders on the definition of a distribution transformer. The Department has established the definition (and scope of this rulemaking) in its final rule on the test procedure for distribution transformers. 10 CFR Part 431, Subpart K; 71 FR 24972.

EPCA directed DOE to develop standards for those "distribution transformers" for which energy conservation standards would be technologically feasible and economically justified, and would result in significant energy savings, but did not specify a definition for a distribution transformer. (42 U.S.C. 6317(a)) Thus, the Department began developing a definition in the determination analysis, and refined that definition through the test procedure rulemaking and this rulemaking. This process was obviated to a substantial extent by the enactment of EPACT 2005, which amended EPCA to, among other things, include a definition of a distribution transformer. (42 U.S.C. 6291(35)) The existing statutory definition establishes the scope of coverage for this rulemaking.

Before the passage of EPACT 2005, stakeholders had submitted comments on the definition of a distribution transformer presented in the ANOPR. These comments are summarized here with discussion on whether or not the new EPCA definition of a distribution transformer, promulgated in EPACT 2005, addresses the issues raised by the stakeholders. For more detail on the definition of a distribution transformer, please see the test procedure final rule notice. 71 FR 24972.

PEMCO and Southern Company commented on exclusions for dimensionally or physically constrained transformers. PEMCO noted that an exclusion for replacement or retrofit transformers is needed because they must have exactly the same physical dimensions as the ones they are replacing. (PEMCO, No. 57 at p. 1) Southern Company agreed, noting that in retrofit installations, size and weight are a factor. Southern commented that, as transformer efficiency increases, the units become larger and obstructions and required minimum clearances are more difficult to achieve. Southern noted that this is true for both liquid-immersed, pad-mounted units and dry-type transformers installed in buildings. It concluded that the increased size is likely to cause both delivery and installation problems in many locations. (Southern, No. 71 at p. 2) At the ANOPR public meeting, Ameren commented that the Department should consider the impact of different size/configurations resulting from increased efficiency on the speed and ease of emergency replacement transformers. (Public Meeting Transcript, No. 56.12 at pp. 255–256) The Department accounted for generally applicable dimensional and physical constraints on transformer installation through the inclusion of size- and weight-dependent installation costs in its LCC model. These costs include potential pole change-out costs for large overhead transformers, and the size- and weight-dependent labor and equipment costs associated with installing larger transformers. The costs estimated by the Department do not include the costs of rehabilitating confined spaces that may have to be modified for the installation of larger transformers. This issue is similar to the situation that arises when utilities and contractors need to increase transformer size due to load growth. One method of modeling such costs would be to include a space-occupancy cost to the cost of transformer operation. The Department invites comment on whether space-occupancy costs should be included in transformer cost estimates and which methods are appropriate for estimating such costs.

Howard and FPT expressed concern about distribution transformers designed for use in specific environments. Howard recommended that underground and subway-style transformers be excluded from the standards. Howard noted that these transformers are often being retrofitted into existing concrete vaults and, in most cases, the whole concrete structure would need to be replaced if DOE mandated a more efficient unit. (Howard, No. 70 at p. 3) FPT recommended that the Department consider exempting mining transformers designed for installation inside equipment with severe space limitations, due to their radically different loss characteristics. FPT noted that efficiency standards could cause problems in applications where these transformers would not fit. (Public Meeting Transcript, No. 56.12 at pp. 54–56; FPT, No. 64 at p. 2) ODOE

commented that it had no objection to the Department excluding specialty transformers for the mining industry, provided that the exclusion can be written so as not to inadvertently create a loophole for other end uses. (ODOE, No. 66 at p. 2) As amended, EPCA does not exclude these types of dimensionally constrained transformers from its definition of distribution transformer. Furthermore, although 42 U.S.C. 6291(35)(B)(iii) authorizes DOE to exclude additional types of distribution transformers, DOE does not have a sufficient basis for excluding dimensionally constrained transformers under this provision. While these transformers apparently are designed for special applications, in line with 42 U.S.C. 6291(35)(B)(iii)(I), DOE lacks specific information on the other two criteria, namely, whether these transformers would be likely to be used in general purpose applications, and whether significant energy savings would result from applying standards to them. Stakeholders have submitted neither data on the energy savings potential of standards for these transformers, nor information as to the likelihood they could be used in general purpose applications. Therefore, the Department is not proposing to exclude any of the transformers discussed in this paragraph under section 321(35)(B)(iii) of EPCA. (42 U.S.C. 6291(35)(B)(iii))

On the issue of harmonic mitigating and harmonic tolerating transformers, most of the comments proposed eliminating the exemption for these types of distribution transformers. At the ANOPR public meeting, both the American Council for an Energy Efficient Economy (ACEEE) and NEMA commented that they supported the elimination of the exemption for harmonic mitigating and harmonic tolerating (or K-rated) transformers. (Public Meeting Transcript, No. 56.12 at p. 27 and p. 35) In written comments, ACEEE, Harmonics Limited, NEMA, and ODOE all recommended eliminating the exemption for harmonic mitigating and harmonic tolerating (or K-rated) transformers. (ACEEE, No. 50 at p. 2 and No. 76 at p. 4; Harmonics Limited, No. 59 at p. 1; NEMA, No. 48 at p. 3 and No. 60 at p. 2; ODOE, No. 66 at p. 2) PEMCO commented that it agrees with including K-factor transformers as covered equipment to stop the current practice of using that exemption to avoid efficiency requirements. (PEMCO, No. 57 at p. 2)

EMS International Consulting (EMSIC) provided a different viewpoint on harmonic tolerating transformers (or K-factor designs); it commented that it believes K-factor and harmonic mitigating transformers (up to a certain level of K-factor) should be subject to standards. (EMSIC, No. 73 at p. 3) FPT went further, proposing a more detailed treatment of K-factor designs. FPT recognizes that some parties are specifying K-factor transformers as a means of getting around State standards requiring TP 1, and that this would probably happen more if DOE exempts K-factor transformers broadly. Therefore, FPT recommended that: (1) Transformers rated up to 300 kVA and having a K-factor of K–13 or less be required to comply with the efficiency standards, and (2) transformers above 300 kVA and having a K-factor of K–4 or less be required to comply with the efficiency standards. (FPT, No. 64 at p. 2)

The definition of a distribution transformer in EPACT 2005 does not contain an explicit exemption for harmonic mitigating or harmonic tolerating (K-rated) transformers. Furthermore, DOE does not have a sufficient basis for excluding them under 42 U.S.C. 6291(35)(B)(iii). While these transformers apparently are designed for special applications, in line with 42 U.S.C. 6291(35)(B)(iii)(I), DOE lacks specific information on the other two criteria, namely, whether these transformers would be likely to be used in general purpose applications, and whether significant energy savings would result from applying standards to them. Therefore, the Department is not proposing to exclude any of the transformers discussed in this paragraph under section 321(35)(B)(iii) of EPCA. 42 U.S.C. 6291(35)(B)(iii).

On the issue of non-ventilated transformers, the Department received a comment from NEMA indicating that it agrees with the Department's exclusion of non-ventilated transformers because of the inherent core losses in such designs. (NEMA, No. 60 at p. 1) This exclusion is now required by EPCA, because EPACT 2005 included an exemption for sealed and non-ventilated transformers.

On the issue of refurbished transformers, the Department received comments representing different viewpoints. Georgia Power commented that DOE's documentation is not clear on the reuse of transformers that have been removed from service for refurbishment. It indicated that it saves approximately 11.5 percent of its total transformer budget by refurbishing and reusing transformers. Georgia Power concluded that, if the Department requires these units to be regulated, it will have a significant financial impact on utilities. (Georgia Power, No. 78 at p. 3)

Manufacturers, on the other hand, appear to be concerned that the increased cost of new, standards-compliant transformers would cause some customers to either purchase rebuilt transformers or refurbish existing ones they own. ERMCO is concerned that if these products are not subject to standards, it may be possible for an end user to avoid the standard by always rewinding failed units. ERMCO stated that there are several independent and utility-owned repair shops that refurbish: Some make minor repairs, others rewind coils. (ERMCO, No. 58 at p. 2) Howard commented that when the final rule is established, it is absolutely essential that it apply to new transformers, used transformers, and repaired transformers. (Howard, No. 70 at p. 3) HVOLT recommended that the Department require any rebuilt transformer that has a winding replaced to meet the new standard, stating that this is necessary to remove a major loophole and would ultimately result in improved energy efficiency for the country. (HVOLT, No. 65 at p. 3 and Public Meeting Transcript, No. 56.12 at p. 59) EMSIC commented that it believes that all refurbished ("repaired") units should be subject to the new standards to close a potential loophole. (EMSIC, No. 73 at p. 3) ODOE agreed that re-wound transformers should be required to meet the new standards. ODOE also commented that some organizations in the Pacific Northwest have been involved in promotion of high-quality rewinding practices. Through these programs, it has become evident that high-quality work in this area can produce a product that meets the same performance specifications as a new product, while poor-quality work can seriously degrade performance. (ODOE, No. 66 at p. 2)

EPACT 2005's definition of a distribution transformer does not mention refurbished or repaired transformers, and therefore no guidance on treatment of these transformers is provided by the statute. Furthermore, the Department's regulatory authority with respect to refurbished equipment is not clearly delineated. EPCA, as amended by EPACT 2005, seems to require that only newly manufactured distribution transformers meet Federal efficiency requirements. (42 U.S.C. 6302, 6316(a) and 6317(a)(1)) Thus, DOE believes it lacks authority to require used and repaired transformers to comply with energy conservation standards. The same may be true for rebuilt transformers, although DOE's authority is an issue. Generally, EPCA provides that products, when

"manufactured," are subject to efficiency standards. (42 U.S.C. 6302 and 6316) It is arguable, but by no means clear, that rebuilt transformers (i.e., those with one or more coils re-wound) could be considered to be "manufactured" again when they are rebuilt, and therefore be classified as new distribution transformers subject to standards. If, however, rebuilt products cannot be classified as newly manufactured, DOE would be subject to the same lack of authority to regulate them as applies to other used and repaired products. In addition, the Department does not have authority to regulate the efficiency of distribution transformers re-wound by their owners (i.e., ownership of the transformer is not transferred or sold to another party), despite the suggestion of some commenters that DOE do so. EPCA provides authority to regulate only products that are sold, imported, or otherwise placed in commerce. (42 U.S.C. 6291, 6311, and 6317(f)(1))

Throughout the history of its appliance and commercial equipment energy conservation standards program, DOE has not sought to regulate used units that have been reconditioned or rebuilt, or that have undergone major repairs. For transformers, regulating this part of the market, including the enforcement of efficiency requirements, would be a complex and burdensome task. By and large, the Department believes EPCA indicates a Congressional intent that DOE focus on the market for new products, and believes this is where the most energy savings can be achieved. For distribution transformers in particular, the Department understands that, at present, rebuilt transformers are only a small part of the market.

For all of these reasons, the Department is proposing not to include energy conservation standards for used, repaired, and rebuilt distribution transformers in this rulemaking. Nevertheless, the Department recognizes the concerns raised by commenters about possible substitution of rebuilt transformers for new transformers. If conditions change—for example, if rebuilt transformers become a larger segment of the transformer market—DOE will reconsider its decision not to subject them to energy conservation requirements. The Department invites comment on this decision.

On the issue of excluding special impedance transformers, the Department received one comment from Howard. In response to the ANOPR table of normal impedance ranges, Howard provided a slightly revised table of "normal" impedance ranges that it believes are more in line with the American National Standards Institute (ANSI) standards with which most utility systems comply. (Howard, No. 70 at p. 3) Howard's table contains slightly narrower bands of "normal" impedance ranges, which would result in fewer transformers being subject to standards and more transformers being classified as exempt. The Department is concerned that some transformers designed for electricity distribution could be manufactured with impedances outside normal ranges so that they would not be subject to otherwise applicable efficiency standards. Such transformers could have a competitive advantage over standards-compliant distribution transformers. If this occurred, it would subvert the standards. The Department also notes that, in NEMA's revised test procedure document, NEMA TP 2–2005, the tables of normal impedance ranges for both liquid-immersed and dry-type transformers are exactly the same as those published by the Department. Thus, in the test procedure final rule notice, the Department retained its tables of "normal" impedance ranges. 71 FR 24972.

B. Engineering Analysis

The purpose of the engineering analysis was to evaluate a range of transformer efficiency levels and associated manufacturing selling prices. The engineering analysis considered technologies and design option combinations that were not screened out by the four criteria in the screening analysis. In the LCC analysis, the Department used the manufacturer selling price-efficiency relationships developed in the engineering analysis when it considered the consumer costs of moving to higher efficiency levels.

For the distribution transformers engineering analysis, the Department learned that manufacturers in both the liquid-immersed and medium-voltage, dry-type sectors commonly use software to design a distribution transformer to fill a customer's order. This software-design approach follows from the actual dynamics in the transformer market, where customers often specify certain performance characteristics and requirements. Manufacturers then compete for the contract based on the customized designs they generate using their software, which takes into account the customer's requirements and current material costs.

Consistent with this approach, the Department used transformer design software to create a database of distribution transformer designs spanning a range of efficiencies, while tracking all the modifications to the core, coil, labor, and other cost components. The software creates transformer designs and cost and performance characteristics associated with those designs that, when compiled, characterize the relationship between cost and efficiency. The Department selected software developed by an independent company, Optimized Program Service (OPS), not associated with any single manufacturer or manufacturer's association. The engineering analysis design runs span a broad range of efficiencies from lowest first cost to maximum technologically feasible. The data used in the engineering analysis is discussed in Chapter 5 of the TSD.

1. Engineering Analysis Methodology

There exist certain fundamental relationships between the kVA ratings of transformers and their physical size and performance. Termed the "0.75 scaling rule," these size-versus-performance relationships arise from equations describing how a transformer's cost and efficiency change with kVA rating. The Department used the 0.75 scaling rule to reduce the number of units that needed to be analyzed for establishing minimum efficiency standards for distribution transformers as a whole. The findings on those units analyzed were later scaled to other kVA ratings using the 0.75 scaling rule. To maintain the accuracy of the 0.75 scaling rule, DOE established engineering "design lines." Each design line consists of distribution transformers that have a full range of kVA ratings and that have similar construction and engineering principles. Some design lines consist of an entire product class, but none spans more than a product class. The Department then selected one representative unit from each of these design lines for analysis. The 0.75 scaling rule was a critical underlying factor in the engineering analysis, since it enabled DOE to reduce the number of units analyzed to 10. Discussion on use of the 0.75 scaling rule can be found in TSD Chapter 5, section 5.2.2. Technical detail on the derivation of the 0.75 scaling rule can be found in TSD Appendix 5B.

In the ANOPR, the Department solicited comments on the use of the 0.75 scaling rule. 69 FR 45416. ASE and ODOE wrote that they support the use of the 0.75 scaling rule, and believe it is the correct and necessary approach to simplify the analysis. (ASE, No. 52 at p. 3 and No. 75 at p. 3; ODOE, No. 66 at p. 4) HVOLT commented at the ANOPR public meeting that the 0.75 scaling rule was used to develop the NEMA TP 1

tables, and there have been no major complaints about it. (Public Meeting Transcript, No. 56.12 at p. 92) PEMCO commented that it routinely uses the 0.75 scaling rule in its business operations, and that the rule works for scaling component costs for consistent construction practice and within reasonable size differences. PEMCO cautioned, however, that the higher the voltage class of the windings and the closer to the lower end of a kVA product range, the greater the error from the 0.75 scaling rule. (PEMCO, No. 57 at p. 1) The Department appreciates this comment from PEMCO, as it had created the engineering design lines to minimize error, particularly with respect to the medium-voltage, dry-type BIL groupings. In addition to the three BIL groupings, the Department also subdivided some of the product classes into two or more engineering design lines, so the kVA rating of the representative unit would not be scaled more than an order of magnitude up or down in any one design line. It took both of these steps to minimize any error from scaling, and to provide a more robust analytic foundation for the proposed standards. Based on these comments and the cautionary note from PEMCO, the Department will continue to apply the 0.75 scaling rule to extrapolate findings to those kVA ratings not specifically analyzed within each of the design lines.

Another critical issue on which stakeholders commented pertained to the use of OPS software in the development of the Department's database of transformer designs. HVOLT commented that the Department's percentage cost increases for the 25 kVA pole-type transformer were not large enough. It believes that the percentage cost difference between the standard levels considered should be greater. (HVOLT, No. 65 at p. 2) The Department appreciates this comment, and looked carefully at all the OPS software inputs and results, and discussed these with individual manufacturers during site visits in 2005. The Department recognizes that the manufacturer selling prices in the ANOPR base case for the 25 kVA unit were too high, and that the percentage increase from a larger base price would be smaller for the same absolute dollar cost increase. Following revisions to the engineering analysis for the 25 kVA liquid-immersed, pole-type transformer, the baseline unit manufacturer selling price decreased from around $800 to approximately $500 and, as a result, the percentage change in manufacturer selling prices between efficiency values has increased.

FPT expressed concern that the manufacturer selling prices for dry-type transformers may rise more rapidly than is represented in the engineering analysis. FPT is concerned that this may skew the decision-making process regarding what efficiency levels are cost-justified. (FPT, No. 64 at p. 2) Similarly, Howard commented that it believes the inputs and outputs of the OPS program are inaccurate, since it found the outputs of the software to be different from its own calculations. Howard expressed concern at the number of compromises, generalizations, and assumptions that could dilute the effectiveness of the results. (Howard, No. 70 at p. 3) NEMA commented that, because LCC results seem to justify standards higher than TP 1, the OPS design software may not be accurately modeling real-world units. (NEMA, No. 48 at p. 2) NEMA also commented that it had tested an actual unit that had a similar technical specification to an OPS design, and found different results than were reported by the Department. NEMA noted that the designs in the Department's database were not built and tested, and therefore are not representative of real transformers. (Public Meeting Transcript, No. 56.12 at p. 35) In a written submission, NEMA provided further detail on this comparison, and again questioned the real-world predictive capabilities of the software used. (NEMA, No. 60 at p. 3)

In response to these comments, the Department reviewed and refined the inputs to the OPS software in consultation with transformer manufacturers, OPS, and the Department's technical experts. It is important to recognize that there are many inputs to both the engineering and the LCC analytical models. For both analytical models, the Department updated its data and cost estimates for the NOPR analysis. These refinements changed the resulting designs and associated manufacturer selling price-efficiency relationships discussed in section IV.B of today's notice and Chapter 5 of the TSD.

The Department appreciates and thanks NEMA and its members for taking the time to locate and test a transformer that was similar to the one published. The Department found two critical problems with the comparison made. First, the design NEMA reviewed was not one DOE used in the ANOPR engineering analysis, but rather a draft design produced for comment two years before the ANOPR, in August 2002. Based on stakeholder feedback on that draft design, DOE modified the inputs to the OPS software when generating the ANOPR engineering database; thus, that design was not included. Second, the two designs NEMA compared, while having the same kVA rating, were not similar transformers. The OPS design and the unit NEMA tested had different BIL ratings and would be grouped in different product classes; therefore, different testing results would be expected.

Concerning the comments on the accuracy of the OPS software, the Department recognizes that differences between the Department's engineering analysis results and those of manufacturers can be caused by a number of factors, including different material prices, labor estimates, modeling parameters (e.g., impedance range, inductance), markups, and the consideration of different non-active transformer components (e.g., gauges, tanks). The Department discussed its inputs both in the ANOPR and during the manufacturer site visits, and revised them as necessary to be the best approximation of real-world practices. In the process of verifying the OPS software, DOE found that, under similar input conditions and modeling parameters, the cost and performance estimates in the Department's database are consistent with real-world transformer designs. This was verified both by comparing designs during manufacturer interviews in May 2005 and through a tear-down analysis of six transformers. The Department purchased six 75 kVA three-phase, low-voltage, dry-type transformers, and had the units tested, disassembled, and analyzed. It then used the OPS software to model the physical designs and generate an electrical analysis report. The OPS software accurately predicted the actual performance of the six transformers. In addition, using the 2000–2004 average material prices, the Department calculated the manufacturer selling prices for each of these six units using the same method as it used for the engineering analysis. The Department found that the cost-efficiency relationship (slope) for these six units tracked the cost-efficiency relationship developed for the NOPR analysis. A description of this tear-down analysis and its results can be found in TSD Chapter 5, section 5.7.

In addition to consulting with manufacturers and conducting a tear-down analysis, the Department arranged for a third-party transformer design engineer to prepare transformer designs based on the same inputs as those used by OPS. The transformer design engineer looked at three of the representative units published in this NOPR, and prepared designs at a low-

first-cost, TP 1, and high-efficiency point. The Department then compared these designs to the OPS output for those same kVA ratings on an efficiency and manufacturer's selling price basis. It found that the transformer engineer's designs tracked the cost and efficiency improvements of the OPS designs. This work is discussed in Chapter 5 of the TSD.

The Department is confident of the accuracy of the OPS software, given the above-mentioned: (1) Comparison of engineering results with manufacturers during interviews; (2) tear-down analysis; (3) comparison of OPS designs with those of a third-party design engineer; and (4) discussions with manufacturers who use the OPS software and consulting services.

The Department received a few comments from stakeholders concerning the design lines and the representative units selected from those design lines. ACEEE commented that additional design lines may be necessary to better represent all transformers and better identify the lowest life-cycle cost points. ACEEE recommended looking at single-phase, liquid-immersed distribution transformers between 50 kVA and 500 kVA and three-phase units below 150 kVA. (ACEEE, No. 76 at p. 1 and Public Meeting Transcript, No. 56.12 at p. 27) In response to this comment, the Department reviewed its design lines and selection of representative units for the NOPR. Concerning an additional representative unit between 50 kVA and 500 kVA, the Department does not believe one is required. The 50 kVA (and 25 kVA pole-mounted) unit scales up to a maximum of 167 kVA—including the 75 kVA, 100 kVA, and 167 kVA rated units. The 500 kVA unit scales down to only two ratings, 250 kVA and 333 kVA. Use of the 0.75 scaling rule within these ranges is reasonable and accurate. Concerning an additional representative unit in the three-phase, liquid-immersed product class below 150 kVA, the Department also does not believe such an addition is necessary or would substantially improve the analysis. The 150 kVA unit is scaled down to 15 kVA, which is the maximum range over which the Department applies the 0.75 scaling rule in its analysis (one order of magnitude). The Department believes the 0.75 scaling rule is reasonable and accurate at this range. Additionally, creating an additional design line and analyzing a representative unit at kVA ratings below 150 kVA for three-phase, liquid-immersed transformers would not significantly improve the analysis. The shipments of three-phase, liquid-immersed transformers below 150 kVA represent just 1.6 percent of all three-phase, liquid-immersed units shipped, and a fraction of a percent of the liquid-immersed product classes. Therefore, the Department did not add any new representative units to the NOPR engineering analysis.

The Department received one comment concerning the treatment of medium-voltage, less-flammable, liquid-immersed transformers in the engineering analysis. Cooper Industries recommended that the Department consider combining these units as design option combinations in product classes 5 through 10 (the medium-voltage, dry-type product classes). Cooper Industries noted that less-flammable, liquid-immersed transformers are used in the same applications as dry-type transformers and are recognized for this application in the National Electrical Code. (Cooper, No. 62 at p. 2) As discussed in the ANOPR, the Department considers liquid-immersed and dry-type transformers as separate product classes. 69 FR 45385. It based this decision on input from several manufacturers during site visits in 2002, a review of industry standards—including those published by the Institute of Electrical and Electronics Engineers, Inc. (IEEE), the NEMA TP 1–2002 voluntary standard, and four comments received from stakeholders on the distribution transformer Framework Document. (Howard, No. 4 at p. 2; NEMA, No. 7 at p. 5; TXU Electric and Gas, No. 12 at p. 5; ACEEE, No. 14 at p. 2) All of these stakeholders advised the Department to treat liquid-immersed and dry-type distribution transformers separately when establishing standards.

Countering the separate treatment of liquid-immersed and dry-type transformers, Cooper asked that less-flammable, liquid-immersed units (a special type of liquid-immersed transformer) be evaluated for standards along with medium-voltage, dry-type units, because they can be used in the same applications. The Department appreciates this comment. However, energy efficiency standards are prescribed on the basis of differences in features that affect energy use. (42 U.S.C. 6295(q)) An example of these different features is the cooling mechanism for a transformer coil, whether it is air-cooled or liquid-cooled. Standards are therefore not classified or organized on the basis of whether they can service the same application. That said, customer applications are taken into consideration for the Department's economic analysis when a standard is developed and proposed (see the LCC analysis, TSD Chapter 8). Thus, due to the fact that the efficiency standard is applied on the basis of product class, not application, the Department did not incorporate less-flammable, liquid-immersed units into the medium-voltage dry-type analysis. The Department invites comment on this issue and on the recommendation from Cooper.

2. Engineering Analysis Inputs

One of the critical issues identified by many stakeholders commenting on the ANOPR analysis was whether DOE used prices that were representative of current material prices. Georgia Power commented that future transformer pricing may be affected by the decreasing number of suppliers of transformer materials—such as mineral oil and core steel—and that those still in business are already operating at full capacity. At present there are only two domestic suppliers of core steel: AK Steel and Allegheny Ludlum Steel Corporation (see TSD Appendix 3A). Georgia Power noted that higher-efficiency transformers will require more of these materials, which may result in material shortages. It is concerned that this situation could have a major impact on future transformer pricing and availability. (Georgia Power, No. 78 at pp. 1–2) HVOLT submitted a similar comment, and mentioned specifically that material prices have risen dramatically in step with higher energy prices. HVOLT noted that virtually all material suppliers now impose surcharges on top of their base material prices to yield the net selling price. HVOLT recommended the Department conduct a more detailed analysis of material prices. (HVOLT, No. 65 at pp. 2–3)

HVOLT and Edison Electric Institute (EEI) commented that material prices at the time of the ANOPR public meeting (September 2004) had increased relative to the material prices the Department used for its ANOPR analysis (2001 prices). (Public Meeting Transcript, No. 56.12 at p. 77; EEI, No. 63 at p. 3) The Southern Company commented that there have been substantial price increases in many of the materials used to build transformers, including copper and steel, and suggested that these increases make high-efficiency transformers less cost-effective. Southern recommended that recent raw material price increases and reasonable projections of future prices be included in the updated cost study produced for the NOPR. (Southern, No. 71 at p. 3) The National Rural Electric Cooperative Association (NRECA) commented that it supports and concurs with EEI's comments on the dramatic increase in

the prices of steel and copper in the last two years. (NRECA, No. 74 at p. 2) In line with these statements, ERMCO commented that the 2004 material prices presented at the ANOPR public meeting looked reasonable, although prices for mineral oil and wire (both aluminum and copper) had increased substantially in the last month. ERMCO recognized that material prices are volatile, and again emphasized the cost increase for mineral oil. (ERMCO, No. 58 at p. 2)

In response to these comments and concerns about the increases in material prices (many of which were also provided to the Department verbally during the 2005 manufacturer site visits), the Department conducted two material pricing scenarios for the NOPR, covering core steel, conductors, insulation, and other key material inputs (see TSD Chapter 5, section 5.4). One, the reference case scenario, uses a five-year average of prices for these materials for the years 2000 through 2004. This scenario averages some of the material price volatility in the market, including low and high material price points that occurred during that time period. The second scenario is a "current" material price analysis, using material prices from the first quarter of 2005. This scenario provides a snapshot in time of material prices that were of concern to the stakeholders who submitted comments to the Department. When establishing a standard that will apply to all distribution transformers manufactured after a date several years in the future (here, January 1, 2010), the Department believes a material price that incorporates average pricing over a time period is a better basis for establishing the standard than using the material prices that manufacturers typically pay in any one year. Thus, DOE used the reference case (five-year average of material prices) as the basis for the standards proposed today. The engineering analysis results based on the material price reference case can be found in TSD Chapter 5. The Department also calculated engineering analysis and LCC analysis results based on the current (first quarter 2005) material price scenario; these are provided in TSD Appendix 5C.

In addition, the Department worked to gain a better understanding of the electrical core steel market, which is the main cost driver behind the construction of distribution transformers. It conducted interviews with both domestic core steel providers, two national steel wholesalers, and two manufacturers of equipment that processes core steel. The Department also reviewed publicly available information on the steel market in general, including trends, pressures, and constraints, such as input substitution opportunities and the supply-demand effects of Chinese economic growth. The findings of the Department's study of the electrical core steel market can be found in TSD Appendix 3A. The Department used the information from this research to improve its understanding of the core steel market and to verify the comments received from stakeholders concerning the recent trend toward increases in material prices, specifically electrical core steel.

During the ANOPR public meeting, ERMCO recommended that the Department consider the impacts of tariffs on the availability (and cost) of speciality steels. (Public Meeting Transcript, No. 56.12 at pp. 243–244) The Department did consider the import duty on raw (un-worked) Japanese core steel, specifically mechanically scribed, deep-domain refined, core steel (ZDMH). For discussion on the treatment of ZDMH core steel in this analysis, see TSD Chapter 5.

The Department also received a comment on the labor inputs used in the engineering analysis. FPT commented that the labor calculations in the ANOPR analysis for cutting and stacking core steel were incorrect. It stated that the labor rates should not be based on hours/inch, because of the different thicknesses of core steel. Stacking thinner laminations of steels takes longer because more pieces of material must be handled for each inch of core stack. (FPT, No. 64 at pp. 1–2) The Department agrees with this comment and modified the methods used in the engineering analysis for calculating the labor costs. The revised method and stacking rates DOE used for the various grades of steel are described in TSD Chapter 5.

3. Engineering Analysis Outputs

DOE received two comments on the energy losses associated with auxiliary devices. During the ANOPR workshop, Ameren commented that the Department should include the impact of losses from accessories in its calculation and determination of national energy savings. (Public Meeting Transcript, No. 56.12 at p. 254) ERMCO also commented on this subject, requesting that an allowance be made for protective devices for transformers (e.g., circuit breakers), which are sometimes specified by utility companies. In its comment, ERMCO suggested two possible approaches: (1) Have a separate table of efficiency ratings for transformers with protective devices, or (2) do not include any losses due to protective devices in the measurement of efficiency of the transformer. (ERMCO, No. 58 at p. 1) The Department notes that the measurement and representation of the efficiency of regulated transformers is prescribed in the test procedures for distribution transformers. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. As published, the test procedure directs manufacturers to provide an efficiency representation for a regulated unit that does not include losses from protective devices. The efficiency standard proposed today only governs the performance of the basic transformer; it would not apply to the protective devices and would not seek to regulate the efficiency of these devices. The test procedure directs manufacturers to either calculate and deduct losses from these protective devices, or to by-pass the protective devices in the load-loss test set-up configuration.

HVOLT, NEMA, and ODOE commented on manufacturer selling prices. HVOLT commented during the ANOPR workshop that the actual selling prices of liquid-immersed units are lower than was reported in DOE's analysis. (Public Meeting Transcript, No. 56.12 at p. 78) HVOLT also later stated that the price for a low-first-cost 25 kVA single-phase, pole-mount transformer was on the order of $400, while the Department's analysis reported $800. (Public Meeting Transcript, No. 56.12 at p. 96) NEMA recommended that the Department contact individual manufacturers and discuss the pricing of their lowest-first-cost transformers to calibrate the engineering analysis. (NEMA, No. 48 at p. 2 and Public Meeting Transcript, No. 56.12 at p. 35) ODOE echoed the comment from NEMA, recommending that the Department check the pricing of transformers sold by manufacturers. (ODOE, No. 66 at p. 3) Following NEMA's and ODOE's recommendations, the Department spoke to individual manufacturers (both NEMA members and non-NEMA members) about material pricing, manufacturers' selling prices, OPS software inputs, and other equipment costs (e.g., tanks, bushings, busbar). The adjustments DOE made following these conversations resulted in a reduction in manufacturer selling prices for some design lines. For example, the low-first-cost design for the 25kVA single-phase, pole-mount transformer went from approximately $800 per unit to around $500 per unit using the five-year, average-material-price scenario.

DOE received two comments about the feasibility of manufacturing the most

efficient designs produced in the engineering analysis. Cooper conducted a design analysis of the 50 kVA pad-mount, the 150 kVA three-phase, and the 1500 kVA three-phase, liquid-immersed units. It found that it was not possible to meet the ANOPR candidate standard level 5 (CSL5) efficiency level. Furthermore, it found that, as the design reaches ANOPR CSL3, the cost to produce the transformer generally increases exponentially. Because of this, Cooper believes that the OPS software does not account for realistic material performance characteristics or realize the cost or productivity impact of these design changes with regard to the manufacturing of a product. (Cooper, No. 62 at p. 1) NRECA also questioned the validity of the highest efficiency levels (ANOPR CSL4 and CSL5). It recommended that the Department verify whether transformers with these efficiencies actually exist or are merely theoretical designs on paper. (NRECA, No. 74 at p. 2)

As discussed in section IV.B.1, the Department took several steps to verify the OPS software and the predictive capability of the software to design transformers. The Department is confident in the accuracy of the OPS software, given the: (1) Comparison of engineering results with manufacturers during interviews; (2) tear-down analysis; (3) comparison of OPS designs with those of a third-party design engineer; and (4) discussions with manufacturers who use the OPS software and consulting services. In response to Cooper's and NRECA's comments on the maximum technologically feasible designs, the Department notes that the design option combinations that achieved the highest efficiencies in a given representative unit used non-traditional materials, such as amorphous material and laser-scribed, high-permeability, grain-oriented electrical steel. The core destruction factors, packing factors, and other real-world adjustments for production floor manufacturing are inputs that OPS has refined over decades in consultation with its clients, some of which have manufactured amorphous material and laser-scribed steel. If the core material, winding, and construction are all built to the design report specification, these are feasible designs. Details of the engineering analysis can be found in TSD Chapter 5 and Appendices 5A, 5B, and 5C.

C. Life-Cycle Cost and Payback Period Analysis

This section describes the LCC and payback period (PBP) analysis and the spreadsheet model DOE used for analyzing the economic impacts on customers. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analysis, are in TSD Chapter 8. The Department conducted the LCC and PBP analysis using a spreadsheet model developed in Microsoft (MS) Excel for Windows 95 or above. When combined with Crystal Ball (a commercially available software program), the LCC and PBP model generates a Monte Carlo simulation to perform the analysis by incorporating uncertainty and variability considerations. While the Department included an annual maintenance cost as part of the LCC and PBP calculation, it assumed that maintenance and repair costs are independent of transformer efficiency.

The LCC is the total customer cost over the life of the equipment, including purchase expense and operating costs (including energy expenditures and maintenance). To compute the LCC, the Department summed the installed price of a transformer and the discounted annual future operating costs over the lifetime of the equipment. The PBP is the change in purchase expense due to an increased efficiency standard divided by the change in first-year operating cost that results from the standard. The Department expresses PBP in years. The data inputs to the PBP calculation are the purchase expense (otherwise known as the total installed consumer cost or first cost) and the annual operating costs for each selected design. The inputs to the transformer purchase expense were the equipment price and the installation cost, with appropriate markups. The inputs to the operating costs were the annual energy consumption and the electricity price. The PBP calculation uses the same inputs as the LCC analysis but, since it is a simple payback, the operating cost is for the year the standard takes effect, assumed to be 2010.

For each efficiency level analyzed, the LCC analysis required input data for the total installed cost of the equipment, the operating cost, and the discount rate. Table IV.2 summarizes the inputs and key assumptions used to calculate the customer economic impacts of various energy efficiency levels. Equipment price, installation cost, and baseline and standard design selection affect the installed cost of the equipment. Transformer loading, load growth, power factor, annual energy use and demand, electricity costs, electricity price trends, and maintenance costs affect the operating cost. The effective date of the standard, the discount rate, and the lifetime of equipment affect the calculation of the present value of annual operating cost savings from a proposed standard. Table IV.2 shows how the Department modified these inputs and key assumptions for the NOPR, relative to the ANOPR.

TABLE IV.2.—SUMMARY OF INPUTS AND KEY ASSUMPTIONS USED IN THE LCC AND PBP ANALYSES

Inputs	ANOPR description	Changes for NOPR
Equipment price	Derived by multiplying manufacturer selling price (from the engineering analysis) by distributor markup and contractor markup plus sales tax for dry-type transformers. For liquid-immersed transformers, DOE used manufacturer selling price plus sales tax. Shipping costs were included for both types of transformers.	Reduced distributor markup for dry-type added small distributor markup for liquid-immersed.
Installation cost	Includes a weight-specific component, derived from *RS Means Electrical Cost Data 2002* and a markup to cover installation labor, and equipment wear and tear.	Added a pole replacement component to design line 2.
Baseline and standard design selection.	The selection of baseline and standard-compliant transformers depended on customer behavior. For liquid-immersed transformers, the fraction of purchases evaluated was 50%, while for dry-type transformers, the fraction of evaluated purchases was 10%. The average A value for evaluators was $5/watt, while the B value depended on expected transformer load.	Increased liquid-immersed transformer evaluation percentage to 75%. Divided dry-types into (1) small-capacity medium-voltage and (2) large-capacity medium-voltage, with evaluation percentages of 50% and 80%, respectively.

TABLE IV.2.—SUMMARY OF INPUTS AND KEY ASSUMPTIONS USED IN THE LCC AND PBP ANALYSES—Continued

Inputs	ANOPR description	Changes for NOPR
Affecting Operating Costs		
Transformer loading	Loading depended on customer and transformer characteristics. The average initial liquid-immersed transformer loading was 30% for 25 dry-type kVA and 59% for 1500 kVA transformers. The average initial dry-type transformer loading was 32% for 25 kVA and 37% for 2000 kVA transformers. The shipment-weighted lifetime average loading was 33.6% for low-voltage, dry and 36.5% for medium-voltage, dry. With load growth, average installed liquid-immersed transformer loading was 35% for 25 kVA and 70% for 1500 kVA transformers with a shipment-weighted lifetime average loading of 52.9%.	Increased average peak loading for medium-voltage, dry-type transformers from 75% to 85%.
Load growth	1% per year for liquid-immersed and 0% per year for dry-type transformers	No change.
Power factor	Assumed to be unity	No change.
Annual energy use and demand.	Derived from a statistical hourly use and demand load simulation for liquid-immersed transformers, and estimated from the 1995 *Commercial Building Energy Consumption Survey* data for dry-type transformers using factors derived from hourly load data. Load losses varied as the square of the load and were equal to rated load losses at 100% loading.	No change.
Electricity costs	Derived from tariff-based and hourly based electricity prices. Capacity costs provided extra value for reducing losses at peak. Average marginal tariff-based retail electricity price: 6.4¢/kWh for no-load losses and 7.4¢/kWh for load losses. Average marginal wholesale utility hourly based costs: 3.8¢/kWh for no-load losses and 4.5¢/kWh for load losses.	Updated tariff-based electricity prices with 2004 tariff data. Adjusted hourly based electricity prices for inflation.
Electricity price trend	Obtained from *Annual Energy Outlook 2003* (*AEO2003*)	Updated to *AEO2005*.†
Maintenance cost	Annual maintenance cost did not vary cost as a function of efficiency	No change.
Affecting Present Value of Annual Operating Cost Savings		
Effective date	Assumed to be 2007	Assumed to be 2010.
Discount rates	Mean real discount rates ranged from 4.2% for owners of pole-mounted, liquid-immersed transformers to 6.6% for dry-type transformer owners.	No change.
Lifetime	Distribution of lifetimes, with mean lifetime for both liquid and dry-type transformers assumed to be 32 years.	No change.
Candidate Standard Levels		
Candidate standard levels	Five efficiency levels for each design line with the minimum equal to TP 1 and the maximum from the most efficient designs from the engineering analysis.	Six efficiency levels with the minimum equal to TP 1 and the maximum from the most efficient designs from the engineering analysis. Intermediate efficiency levels for each design line selected using a redefined set of LCC criteria (see section III.D.1.b).

*The concept of using A and B loss evaluation combinations is discussed in TSD chapter 3, Total Owning Cost Evaluation. Within the context of the LCC analysis, the A factor measures the value to a transformer purchaser, in $/watt, of reducing no-load losses while the B factor measures the value, in $/watt, of reducing load losses. The purchase decision model developed by the Department mimics the likely choices that consumers make given the A and B values they assign to the transformer losses.

† The Department is aware of *AEO2006*, and the electricity price forecast does not differ significantly from *AEO2005*.

The following sections contain brief discussions of the methods underlying each of these inputs and key assumptions in the LCC analysis. Where appropriate, the Department also summarizes stakeholder comments on these inputs and key assumptions and explains how it took these comments into consideration.

1. Inputs Affecting Installed Cost

a. Equipment Price

The equipment price of a transformer reflects the application of supply-chain markups, and the addition of sales tax and shipping costs, to the manufacturer's selling price. The markup is the percentage increase in price as the transformer passes through the distribution channel. Commercial and industrial customers most often purchase dry-type transformers from electrical contractors who purchase the transformers through distributors, whereas many liquid-immersed transformers are purchased by utilities directly from manufacturers and installed directly by utility staff. Therefore, DOE's markups for liquid-immersed transformers are smaller than those for dry-type transformers. In addition to the supply-chain markups, DOE's equipment prices include shipping costs and sales tax for both types of transformers. The Department did not have sufficient data to diversify the distribution channels and markups beyond these two general categories. Details of the installed cost inputs can be found in TSD Chapter 7.

In the ANOPR analysis, the Department assumed that all liquid-immersed transformers were purchased directly from manufacturers by utilities. NEMA commented that distribution channels are more complex than DOE assumed in the ANOPR analysis. It noted that some liquid-immersed units may go through distributors and some dry-type units may be sold directly from the manufacturer. NEMA also indicated that small transformers are more likely to go through distributors and large transformers are more likely to be sold

directly. (NEMA, No. 48 at p. 2) NRECA commented that most, if not all, cooperative utilities purchase liquid-immersed transformers through distributors. (Public Meeting Transcript, No. 56.12 at p. 120) In response to NEMA's comment, the Department discussed distribution channels and markup practices with utility technical staff to obtain additional input for the NOPR analysis. Based on this input, the Department adjusted the distributor markup to 7 percent for liquid-immersed transformers and 15 percent for dry-type transformers. These distributor markup values compare with 0 percent and 35 percent, respectively, for the liquid-immersed and dry-type distributor markups for the more simplified distribution channels that the Department assumed for the ANOPR analysis.

b. Installation Costs

Higher-efficiency distribution transformers tend to be larger and heavier than less efficient designs. The Department therefore included the increased cost of installing larger, heavier transformers as a component of the first cost of efficient transformers. In the ANOPR, the Department presented the installation cost model and solicited comment from stakeholders. For details of the installation cost calculations, see TSD section 7.3.1.

EEI provided substantial comments regarding the installation cost implications of more-efficient transformers that are physically larger and heavier than less-efficient transformers. It asserted that transformer size and weight may require physical modification to pole structure or mounting pads, and that, in severe replacement applications, increased transformer size may require building and structural modifications. (EEI, No. 63 at pp. 4–5) NRECA expressed similar concerns that the size and weight of more energy-efficient transformers may dramatically affect installation cost. (NRECA, No. 74 at p. 2) Tampa Electric Company (TEC) commented that transformer efficiency standards must take into account physical dimension constraints to ensure compatibility with older units that will need to be replaced. (TEC, No. 77 at p. 1) Georgia Power Company commented that, as a result of the expected increase in physical size and weight of higher efficiency transformers, installation costs will be increased in several ways. First, it estimates that pole replacements will be required for 80 percent of the transformer replacement installations that have joint use applications (*e.g.*, telephone line, cable television) on the pole. Second, in addition to the pole replacements at existing locations, Georgia Power projects that numerous larger diameter and taller poles will be required at new transformer installations. Third, it asserts that an increase in the size and weight of pole-mounted and pad-mounted transformers will significantly increase utility costs, and that this impact will be proportional to the percent increase in transformer size and weight resulting from the higher efficiency requirements. (Georgia Power, No. 78 at pp. 2–3) Ameren also commented that it believes the Department should consider the economic impact of transformer weight increases, such as the necessity for using stronger poles, resulting from efficiency improvements. (Public Meeting Transcript, No. 56.12 at pp. 253–254)

Howard commented that higher efficiency transformers will be larger, resulting in increased shipping costs as well as handling problems for the installers. (Howard, No. 70 at p. 3) Comments from EEI included information from utility members of EEI, the American Public Power Association (APPA), and NRECA, who reported that in many cases increased transformer size and weight can affect the cost of new pole-mounted transformer installations; costs vary from utility to utility and depend on the size and weight increase. (EEI, No. 63 at pp. 20–62) Southern Company asserted that increases in installation costs from the weight increases of more-efficient transformers are not adequately covered in the ANOPR analysis. (Southern, No. 71 at p. 2) National Grid (NGrid) commented that high-efficiency transformers present utilities with logistical and financial challenges, but they have found that the benefits outweigh the costs when analyzed using a life-cycle cost analysis method employed in the industry. (NGrid, No. 80 at p. 1)

While the Department's ANOPR included weight- and size-dependent installation costs associated with the increased shipping, handling, labor, and equipment costs of installing larger and heavier transformers, the ANOPR did not include the costs of stronger poles or pole replacement. In response to stakeholder comments on pole-replacement costs, for the NOPR analysis the Department added a pole-replacement-cost function to the installation cost equation for design line 2, which covers pole-mounted transformers. This analysis assumed that a pole change-out cost of $2,000 occurs for up to 25 percent of pole-mounted transformers when the weight of the transformer exceeds 1,000 pounds. Because not all transformer installations require a change-out of existing equipment even in the most extreme case, the Department assumed a maximum change-out fraction. The Department selected 25 percent as the maximum change-out fraction estimate based on stakeholder input. (EEI No. 63 at p. 25)

c. Baseline and Standard Design Selection

A major factor in estimating the economic impact of a proposed standard is the selection of transformer designs in the base case and standards case scenarios. A key issue in the selection process is the degree to which transformer purchasers take into consideration the cost of transformer losses (A and B factors) when choosing a transformer—both before and after the implementation of a standard. The purchase-decision model in the LCC spreadsheet selects which of the hundreds of designs in the engineering database are likely to be selected by transformer purchasers. The LCC transformer selection process is discussed in detail in TSD Chapter 8, section 8.2.

The Department received three types of comments on the design selection and purchase behavior modeled in the LCC spreadsheets: (1) Applicability of values used, (2) actual values that stakeholders have observed in the market, and (3) percent of customers who use the evaluation formulae. Concerning the applicability of values used, NRECA questioned whether the B factors relative to the A factors used in the LCC spreadsheet accurately represent the A and B factors for rural cooperatives. (NRECA, No. 74 at pp. 2–3) Ameren asserted that the A and B values used by the Department for the ANOPR analysis were not representative of Midwestern electric utilities. (Public Meeting Transcript, No. 56.12 at p. 113) NEMA said that both manufacturers and utilities indicated at the public meeting that the A and B values assumed by the Department to characterize the base case were higher than those in current use, leading to a DOE base case that may reflect higher transformer efficiencies than marketplace reality. (NEMA, No. 60 at p. 2) ODOE also commented that the method the Department used to characterize the base case may result in higher average efficiencies than are actually found in the current market. ODOE believes that the value of losses is seldom a significant factor in purchase decisions for transformers. (ODOE, No. 66 at p. 5)

Regarding the actual values observed in the market, HVOLT commented that, for the 80 percent of electric utilities that currently evaluate losses when purchasing a liquid-immersed transformer, the A factor is between $2.00 and $2.50 and the B factor is approximately $0.75. HVOLT noted that these evaluation formulae are higher than the A factor ($1.57) and B factor ($0.57) used to develop the TP 1 standard. (Public Meeting Transcript, No. 56.12 at p. 107) AK Steel Corporation observed that some transformer customers evaluate with an A value of between $1.50 and $2.00. (Public Meeting Transcript, No. 56.12 at p. 109)

Relating to the percent of customers who use the evaluation formulae, BBF & Associates (BBF&A) said its market study in the early 1990s indicated that 90 percent or more of transformers were evaluated using A and B factors in the traditional approach. It pointed out that a subsequent survey in 2001–2002 showed that less than 50 percent were evaluated. (Public Meeting Transcript, No. 56.12 at p. 110) In the context of a discussion on liquid-immersed transformers, HVOLT said that around 80 percent of the market evaluates losses today. (Public Meeting Transcript, No. 56.12 at p. 107) For dry-type transformers, HVOLT suggested that there is probably less purchase evaluation than the Department assumed in the analysis, but that an estimate of 10 percent evaluators is probably accurate. (Public Meeting Transcript, No. 56.12 at p. 156) ACEEE stated that the efficiency of liquid-immersed transformers is dropping as utilities move away from evaluation of purchase decisions, due to regulatory uncertainty caused by restructuring of the electric utility industry. (ACEEE, No. 76 at pp. 1–2) Similarly, the Copper Development Association (CDA) observed that at the ANOPR public meeting, stakeholders commented that 62 percent of the smaller-kVA distribution transformers sold in 2002 were lowest-cost versions and several utility personnel indicated that A and B evaluation values were zero. CDA commented that it believes these statements illustrate that many transformers currently being purchased are lowest-first-cost, low-efficiency units. (CDA, No. 69 at p. 4)

The Department responded to these stakeholder comments regarding A and B values and the percent evaluators by using new data provided by stakeholders, and newly collected data from the Internet, to adjust the distributions and parameters it used to model purchase decisions (see TSD Chapter 8, section 8.3.1). It used data provided by NRECA and data collected from the Internet to revise its estimate of the mean A value to $3.85/watt compared to the value of $5/watt used in the ANOPR analysis. This addresses the stakeholder concerns that the A values used in the ANOPR analysis may have been high. With regard to the actual values, the Department characterized transformer loss evaluation with a distribution of A values that includes the lower range of values—$1.50/watt to $2.50/watt—mentioned by AK Steel. However, the data collected by the Department were inconsistent with HVOLT's assertion that 80 percent of electric utilities use an A factor between $2.00 and $2.50.

With respect to the percentage of evaluators, the Department obtained new data from NEMA regarding the percentage of transformers sold that are consistent with the voluntary TP 1 standard. The Department therefore adjusted the percentage of evaluators in its customer choice model to be consistent with the new data provided by NEMA. The Department believes that this method provides the most precise and detailed estimate of the percentage of evaluators that is consistent with actual market data.

The Department received several comments noting that shipments of TP 1-compliant transformers have recently increased, and noting the potential impact of States adopting TP 1 as their transformer standard. NEMA stated that its members' shipments of TP 1-compliant transformers increased in 2002 and 2003 compared to 2001 for all transformers considered in the scope of this rulemaking. (NEMA, No. 48 at p. 3) An EEI survey of nine of its members showed that an average of approximately 65 percent of liquid-immersed transformers purchased are already compliant with NEMA TP 1. (EEI, No. 63 at pp. 7–19) NGrid now purchases energy-efficient, liquid-immersed transformers that meet or exceed NEMA's TP 1 standard throughout its service territory in Massachusetts, Rhode Island, New Hampshire, and New York. This is true despite the fact that only Massachusetts requires TP 1-compliant, liquid-immersed transformers. (NGrid, No. 80 at p. 1) Georgia Power expressed doubt that the Department can accurately account for the number of transformers that are already purchased with NEMA TP 1 efficiencies. (Georgia Power, No. 78 at pp. 1–2)

The Appliance Standards Awareness Project (ASAP) and Northwest Power and Conservation Council (NPCC) commented that the base case should reflect the impact of State-established transformer standards. (Public Meeting Transcript, No. 56.12 at p. 248, Public Meeting Transcript, No. 56.12 at pp. 180–181) ODOE commented that the Department needs to pay careful attention to those States that have TP 1 as an existing standard because, by the time the DOE standard is published, States mandating TP 1 could represent a quarter to a third of transformer shipments. (Public Meeting Transcript, No. 56.12 at p. 185) NEMA said that, of those States that have adopted TP 1, most have done it for low-voltage, dry-type distribution transformers, so the other product classes would not be affected. (Public Meeting Transcript, No. 56.12 at p. 182)

In response to these comments, the Department obtained from NEMA new, detailed data regarding TP 1 compliance of shipped transformers. The Department adjusted the parameters of the customer choice model such that the base case TP 1 compliance in the LCC is consistent with the most recent NEMA data available to the Department.

Southern Company and ODOE requested that the Department provide the efficiency rating for the base case. (Public Meeting Transcript, No. 56.12 at p. 215 and p. 217) ACEEE agreed, noting that this information would enable further independent analysis of the cost and savings data. (ACEEE, No. 50 at p. 2 and No. 76 at p. 3) The Department complied with this request and reported the base case efficiencies for the ANOPR analysis in Supplemental Appendix 8E of the ANOPR TSD. These values have been updated for the NOPR analysis, and can be found in Appendix 8E of the TSD.

2. Inputs Affecting Operating Costs

a. Transformer Loading

Transformer loading is an important factor in determining which types of transformer designs will deliver a specified efficiency, and for calculating transformer losses. Transformer losses have two components: No-load losses and load losses. No-load losses are independent of the load on the transformer, while load losses depend approximately on the square of the transformer loading. Because load losses increase exponentially with loading, there is a particular concern that, during times of peak system load, load losses can impact system capacity costs and reliability. Details of the transformer loading models are presented in TSD Chapter 6.

For the ANOPR analysis, the Department estimated the loading characteristics of transformers by

analyzing the statistics of available load data, and by assuming a distribution of initial annual peak loadings. ASE commented that the Department's analysis of load profiles is largely consistent with data provided by other stakeholders. It also recognized that the Department used publicly available data for utility loads, and commented that the average loadings for liquid-immersed transformers were reasonable. (ASE, No. 52 at p. 3 and No. 75 at p. 3) ODOE agreed with the transformer loads estimated by the Department based on ODOE's examination of loading studies conducted in the Pacific Northwest, which produced lower loading levels than expected by many analysts. (ODOE, No. 66 at p. 4)

HVOLT estimated that the average loading for dry-type, medium-voltage units is about 50 percent, with a daytime average of 60 percent and a nighttime average of 35 percent. (Public Meeting Transcript, No. 56.12 at pp. 131–132) HVOLT estimated that loading for liquid-immersed transformers is about 50 percent, but noted that loads in the residential sector can increase so much that loading can exceed the transformer nameplate rating. (Public Meeting Transcript, No. 56.12 at p. 131 and p. 133) In a written comment, HVOLT endorsed using loading assumptions identical to those for NEMA TP 1. HVOLT is not familiar with any publicly released loading studies that would alter the root mean square (RMS)-equivalent load of 50 percent load for medium-voltage transformers. (HVOLT, No. 65 at p. 3) EEI estimated that, according to three surveyed members, average loading levels range from 30 percent to 58 percent. A survey of eight members yielded a range of high-loading levels from 45 to 100 percent, and a range of low-loading levels from 35 to 75 percent. (EEI, No. 63 at pp. 7–19) TEC said that it strives to load transformers higher than the 50 percent level assumed by DOE, and recommended that the Department give consideration to efficiency ratings at higher loading levels. (TEC, No. 77 at p. 1)

The Department concluded that the ANOPR statistical loading analysis was largely consistent with stakeholder comments, with slight adjustments necessary for the loading levels of medium-voltage, dry-type transformers (see TSD Chapter 6, section 6.3.3.3). The Department increased the loading on medium-voltage, dry-type transformers in response to the comments by HVOLT, to be consistent with the relative difference in loading levels used by NEMA TP 1 between low-voltage and medium-voltage dry-type transformers.

On the issue of peak load coincidence, the Department received two comments. ASE agreed with the Department's peak load coincidence analysis for the ANOPR. (ASE, No. 52 at p. 3 and No. 75 at p. 3) The CDA commented that peak coil losses may have a high coincidence factor with system peaks. (CDA, No. 51 at pp. 3–4) The Department concluded that the statistical model used for peak loading in the ANOPR analysis was consistent with stakeholder comments and did not change peak loading statistics for the NOPR analysis.

b. Load Growth

The LCC takes into account the projected operating costs for distribution transformers many years into the future. This projection requires an estimate of how, if at all, the electrical load on transformers will change over time. For dry-type transformers, the Department assumed no load growth. For liquid-immersed transformers, the Department used as the default scenario a one-percent-per-year load growth. It applied the load growth factor to each transformer beginning in 2010, the expected effective date of the standard. To explore the LCC sensitivity to variations in load growth, the Department included in the model the ability to examine scenarios with zero-percent, one-percent, and two-percent load growth. Load growth is discussed in detail in TSD Chapter 8, section 8.3.6.

The Department received a range of comments on its load growth projections. CDA commented that loading on all transformers increases with time. It stated that, for liquid-immersed transformers, residential consumption per household has increased; for dry-types, commercial and industrial loads grow over time through more energy-intensive use of floor space and plant expansion. (CDA, No. 51 at pp. 1–2) ODOE stated that DOE should select a growth rate of zero, with sensitivity analysis at one-percent growth. (ODOE, No. 66 at p. 6) NEMA agreed with the Department's load growth estimates of zero percent for dry-type and one percent for liquid-immersed transformers. However, to the extent that building owners may defer transformer upgrades because of high unit costs, it noted that there may be some load growth on older, less efficient units. (NEMA, No. 48 at p. 2)

HVOLT commented that, in commercial and industrial complexes, new transformers are added to handle additional loads when there is an expansion, and there is not much information to suggest a substantial load growth on those transformers. (Public Meeting Transcript, No. 56.12 at p. 40) HVOLT also stated that one-percent load growth for liquid-immersed transformers seems too high. (Public Meeting Transcript, No. 56.12 at p. 138) HVOLT also said that there is not much load growth in residential applications, since transformers are installed in a community with a cluster of homes, they come online quickly, and after that, there are few factors producing load growth for the rest of the transformer's life. (Public Meeting Transcript, No. 56.12 at p. 39)

The Department retained its estimate of zero-percent load growth for dry-type transformers and one-percent load growth for liquid-immersed transformers. While some stakeholders disagreed with the Department's estimate of load growth for liquid-immersed transformers, data showing both growth in per-customer electrical loads over time and increasing transformer sizes purchased by utilities support the Department's approach (see TSD Chapter 8).

Regarding another aspect of the issue of load growth over time, EEI stated its concern that, because of load growth, higher efficiency transformers optimized to the loading point prescribed by the test procedure may have higher coil losses after being in service for several years. That is, EEI is concerned that the "balance point" between higher coil losses and lower core losses may not be reached until late in the operating life of a transformer. (EEI, No. 63 at pp. 3–4) Both the ANOPR and NOPR load analyses were responsive to this comment. The Department's estimate of losses tracked losses based on estimates of actual loads rather than test procedure loads. Both near-term and long-term losses were included in LCC estimates, with a weighting determined by the customer discount rate (see TSD Chapter 8).

c. Power Factor

The power factor is real power divided by apparent power. Real power is the time average of the instantaneous product of voltage and current. Apparent power is the product of the RMS voltage and the RMS current. For the ANOPR, the Department used a power factor of 1.0. A detailed discussion of the power factor can be found in TSD Chapter 8, section 8.3.12.

The Department received two comments on power factor. Southern Company commented that the power factor should be less than 1.0. (Public Meeting Transcript, No. 56.12 at p. 164) NEMA, on the other hand, stated that a

power factor assumption of 1.0 is appropriate. (NEMA, No. 60 at p. 2)

While the Department agrees with Southern Company that actual power factors are less than 1.0, they are very close to 1.0, and the Department agrees with NEMA that use of a power factor of 1.0 is appropriate for the analysis of the efficiency standard. Using a power factor less than 1.0 would slightly increase the estimated losses for transformers, but would complicate the Department's analysis and affect all components of the Department's analysis where losses are estimated. The Department determined that the disadvantages of complicating the analysis by using an estimated distribution of slightly lower power factors outweighed the slight increase in analytical accuracy that could result.

d. Electricity Costs

The Department needed estimates of electricity prices and costs to place a value on transformer losses for the LCC calculation. As noted earlier, the Department created two sets of electricity prices to estimate annual energy expenses for its ANOPR: An hourly based estimate of wholesale electricity costs for the liquid-immersed transformer market, and a tariff-based estimate for the dry-type transformer market (see TSD Chapter 8).

Southern Company questioned whether wholesale electricity prices are the correct prices for liquid-immersed transformers, and suggested that the Department consider the availability of very inexpensive electricity generating capacity in some regions. (Public Meeting Transcript, No. 56.12 at p. 125 and pp. 237–238) The Department's analysis for both the ANOPR and the NOPR estimated the marginal, or incremental, wholesale cost of electricity. The Department agrees with Southern Company that inexpensive electricity generating capacity exists in many regions of the country. The Department modeled a national distribution of generation capacity costs by estimating the marginal capacity cost of new generation as a function of the type of plant serving the capacity and the utility cost of capital which the Department obtained from a representative national sample of utilities (see TSD Chapter 8).

e. Electricity Price Trends

For the relative change in electricity prices in future years, DOE relied on price forecasts from the EIA's *Annual Energy Outlook (AEO)*. For its ANOPR, the Department used price forecasts from the *AEO2003*, the most recent price forecasts available at the time. The application of electricity price trends in the NOPR analysis is discussed in detail in TSD Chapter 8, section 8.3.7.

ODOE and HVOLT commented that the price forecasts used by the Department were too low. (ODOE, No. 66 at p. 4; Public Meeting Transcript, No. 56.12 at p. 38) Some stakeholders stated that more volatility should be added to the forecasts. The Natural Resources Defense Council (NRDC) commented that DOE should consider a scenario where electricity prices increase unexpectedly. (Public Meeting Transcript, No. 56.12 at p. 45) The NPCC stated that the Department assumed a monotonic wholesale electricity market and should model forecasted prices with some volatility. (Public Meeting Transcript, No. 56.12 at p. 124) ODOE and ACEEE suggested that the price trends should be updated with the most recent *AEO* forecasts; ACEEE added that DOE should include a high electricity price scenario in the analysis. (ODOE, No. 66 at p. 4; ACEEE, No. 76 at p. 3) Counter to the above stakeholders, CDA and AK Steel thought the Department's price forecasts were reasonable. CDA commented that the Department was correct to assume a moderate rate of energy cost increases, although it also believes a higher rate could be justified given recent experience. (CDA, No. 51 at p. 3) AK Steel added that EIA's long-term electricity price forecasts are good. (Public Meeting Transcript, No. 56.12 at p. 128)

For the NOPR, the Department updated its price forecasts with trends from the *AEO2005* as recommended by stakeholders, and addressed other stakeholder concerns through use of sensitivity analysis. The Department believes that price forecasts from the *AEO* are the most reliable and credible estimates of future electricity prices. As compared to *AEO2003*, the price trends from *AEO2005* actually show slightly lower forecasted prices. During the writing of this notice, the EIA published *AEO2006*, but since the electricity price forecast did not differ significantly from *AEO2005*, the Department did not update its analysis results using *AEO2006*. The Department addresses stakeholder concerns regarding the possibility of higher electricity prices through the sensitivity section of the LCC analysis (see TSD Chapter 8). This analysis estimates LCC results under conditions where electricity prices are 15 percent higher than the Department's medium scenario. However, as in the ANOPR analysis, the Department retained the medium *AEO* forecast as the electricity price trend that is most credible and authoritative with respect to the analysis of the future economic impacts of efficiency standards.

3. Inputs Affecting Present Value of Annual Operating Cost Savings

a. Standards Implementation Date

The Department proposes that the new energy-efficiency standard for distribution transformers apply to all units manufactured three years or more after publication of the final rule. For the NOPR analysis, the Department assumed a 2007 final rule publication; hence a 2010 implementation or compliance date. The Department calculated the LCC for customers as if each new distribution transformer purchase occurs in the year manufacturers must comply with the standard.

Several comments called for acceleration of the rulemaking schedule. ACEEE said the NOPR should be published by July 2005 and the final rule six months later. (ACEEE, No. 76 at p. 4) The National Association of Regulatory Utility Commissioners (NARUC) urged DOE to establish a new standard for distribution transformers as soon as possible. (NARUC, No. 68 at pp. 2–5) NRDC asked DOE to make a commitment to a schedule, with appropriate milestones, that will allow a final rule to be issued no later than January 29, 2006. (NRDC, No. 61 at p. 3) ASE urged the Department to maintain an 18-month schedule to complete the rulemaking. (ASE, No. 52 at p. 1 and No. 75 at p. 1)

The Department understands that the rulemaking schedule impacts the date by which manufacturers of distribution transformers must comply with any new energy-efficiency standard. It is committed to completing the rulemaking in a timely fashion and expects to publish a final rule by September 2007.

b. Discount Rate

The discount rate is the rate at which future expenditures are discounted to estimate their present value. It is the factor that determines the relative weight of first costs and operating costs in the LCC calculation. Consumers experience discount rates in their day-to-day lives either as interest rates on loans or as rates of return on investments. Another characterization of the discount rate is the "time value of money." The value of a dollar today is one plus the discount rate times the value of a dollar a year from now. The Department estimated consumer discount rates by calculating the consumer cost of capital (see TSD Chapter 8).

Discount rates depend on who is borrowing and at what scale. Thus, the discount rates in the LCC analysis are different than those in the national impact analysis. This section discusses consumer discount rates that the Department used in the LCC analysis.

With respect to consumer discount rates in the ANOPR, stakeholders expressed a diversity of views regarding which discount rates are appropriate for the LCC analysis. ASE and ODOE commented that the Department should use a three-percent real discount rate, similar to the discount rate used by the California Energy Commission (CEC) in recent State-level energy efficiency analyses. (ASE, No. 75 at p. 3; ODOE, No. 66 at p. 5) NRDC said that the Department's use of discount rates exceeding 5.5 percent real conflicts with the explicit instructions in *NRDC* v. *Herrington*, because of the court's instruction to consider payback times of less than nine years as economically justified. (NRDC, No. 61 at p. 6) ACEEE commented that the Department's choice of discount rates for utilities was appropriate. (ACEEE, No. 76 at p. 3) HVOLT recommended that the Department set efficiency standards on a three-to five-year consumer investment return, to represent commercial customer preferences. (HVOLT, No. 65 at p. 3)

The Department examined each of these comments to see if any would lead to a more accurate description of consumer economic impacts. In examining the three-percent discount rate recommended by ASE and ODOE, the Department found that the CEC, in its rulemaking, estimated the consumer cost of capital using a method similar to that of the Department. However, the CEC analyzed a different class of consumers and used less detailed data. Therefore, the Department considers its discount rates to be more accurate for the distribution transformer energy-efficiency analysis than the discount rates estimated by the CEC for other products. The Department retained the consumer discount rates that it used in the ANOPR analysis, as shown in Table IV.3. The consumer discount rates shown in the table are based on a detailed analysis of risk-adjusted cost of capital for consumers, as described in TSD Chapter 8.

TABLE IV.3.—WEIGHTED-AVERAGE DISCOUNT RATES BY DESIGN LINE AND OWNERSHIP CATEGORY

		Transformer ownership category					
		Property owners	Industrial companies	Commercial companies	Investor-owned utilities	Publicly owned utilities	Government offices
Mean real discount rate		4.35%	7.55%	7.46%	4.16%	4.31%	3.33%
Design line	Weighted average discount rate (%)	Estimated ownership (%)					
1	4.24	0.4	0.5	0.9	72.0	26.0	0.2
2	4.24	0.4	0.5	0.9	72.0	26.0	0.2
3	4.40	2.1	2.4	4.5	80.0	10.0	1.0
4	4.24	0.4	0.5	0.9	72.0	26.0	0.2
5	5.38	9.5	9.5	27.0	35.0	15.0	4.0
9	6.56	19.0	19.0	54.0	0.0	0.0	7.9
10	6.56	19.0	19.0	54.0	0.0	0.0	7.9
11	6.56	19.0	19.0	54.0	0.0	0.0	7.9
12	6.56	19.0	19.0	54.0	0.0	0.0	7.9
13	6.56	19.0	19.0	54.0	0.0	0.0	7.9

4. Candidate Standard Levels

To conduct the LCC analysis, the Department first selected CSLs. Based on its examination of the CSLs, the Department then selected trial standard levels (TSLs). From those TSLs, it developed today's proposed standards. Cooper Power Industries commented that DOE should use a consistent method for all product classes to determine CSLs. (Cooper, No. 62 at p. 3) ASAP stated that DOE should examine a CSL with the maximum efficiency that maintains a positive economic impact for each product class. (Public Meeting Transcript, No. 56.12 at p. 218) ACEEE recommended that the Department examine TP 1 plus 0.2 percent, 0.3 percent, and 0.4 percent efficiency improvements for all design lines. It encouraged the Department to carefully examine the cost and other economic inputs, since the lowest life-cycle cost point, when compared to TP 1, varies significantly among design lines. (ACEEE, No. 76 at p. 1) ACEEE said that DOE should regroup the CSLs so that CSL 1 is TP 1, CSL 3 is the minimum life-cycle cost point, and CSLs 2 and 4 are slightly above and below the minimum LCC. (ACEEE, No. 50 at p. 1 and No. 76 at p. 2) ACEEE suggested that DOE realign the CSLs so that they have approximately equivalent economic performance. (Public Meeting Transcript, No. 56.12 at p. 26) EEI and NRECA recommended that DOE investigate CSLs that have rated efficiencies below TP 1, since many transformers in the current market have efficiencies below TP 1. (EEI, No. 63 at p. 2; NRECA, No. 74 at p. 2) Howard stated that it is appropriate to round candidate standard efficiency levels to one decimal place. (Howard, No. 70 at p. 3)

For the NOPR analysis, the Department complied with most of the stakeholder recommendations regarding standard levels. As requested by Cooper, DOE developed a consistent method for selecting standard levels for each design line. In response to the request by ASAP, the Department defined a standard level that represented the maximum energy savings with approximately no change in LCC. In response to ACEEE, the Department defined CSL 4 as the efficiency level with minimum LCC for each design line, and realigned CSLs 4 and 5 to have equivalent economic performance for each design line. The Department did not comply with EEI's and NRECA's requests to examine standard levels lower than TP 1 because—as described in this NOPR—the Department has found that efficiencies higher than or equal to TP 1 are economically

justifiable, and thus the Department is obligated to pick a standard level that has efficiencies greater than or equal to TP 1. If the Department had reason to believe that any TP 1 levels were not economically justifiable for a standard, it would have examined efficiency levels below TP 1.

Table IV.4 lists the CSLs evaluated for each design line, expressed in terms of efficiency, and in terms relative to NEMA TP 1 efficiency levels.

TABLE IV.4.—CANDIDATE STANDARD LEVELS EVALUATED FOR EACH DESIGN LINE

Design line	CSL											
	1 TP 1		2 1/3 of diff. between TP 1 and min LCC		3 2/3 of diff. between TP 1 and min LCC		4 Min LCC		5 Max energy savings with no change in LCC		6 Max energy savings	
	TP 1+ %	Effic'y %	TP 1+ %	Effic'y %	TP 1+ %	Effic'y %	TP 1+ %	Effic'y %	TP 1+ %	Effic'y %	TP 1+ %	Effic'y %
1	0.0	98.9	0.14	99.04	0.29	99.19	0.43	99.33	0.59	99.49	0.69	99.59
2	0.0	98.7	0.03	98.73	0.06	98.76	0.09	98.79	0.26	98.96	0.76	99.46
3	0.0	99.3	0.08	99.38	0.16	99.46	0.24	99.54	0.44	99.74	0.45	99.75
4	0.0	98.9	0.18	99.08	0.36	99.26	0.55	99.45	0.68	99.58	0.71	99.61
5	0.0	99.3	0.06	99.36	0.12	99.42	0.17	99.47	0.41	99.71	0.41	99.71
9	0.0	98.6	0.22	98.82	0.44	99.04	0.66	99.26	0.81	99.41	0.81	99.41
10	0.0	99.1	0.12	99.22	0.23	99.33	0.35	99.45	0.41	99.51	0.41	99.51
11	0.0	98.5	0.17	98.67	0.34	98.84	0.51	99.01	0.59	99.09	0.59	99.09
12	0.0	99.0	0.12	99.12	0.23	99.23	0.35	99.35	0.40	99.40	0.40	99.40
13	0.0	99.0	0.15	99.15	0.30	99.30	0.45	99.45	0.55	99.55	0.55	99.55

5. Trial Standard Levels

The TSLs are the efficiency levels considered by the Department for the proposed standard. They are based on the CSLs selected for the LCC analysis. However, because of special considerations concerning manufacturer impacts and design lines (DLs) within the same product class, some efficiency levels for DL1 and DL4 are drawn from the same CSL. See TSD Chapter 10 for a more detailed explanation. Table IV.5 shows the mapping from the design line CSLs to the TSLs. In the LCC and LCC subgroups chapters of the TSD (Chapters 8 and 11), the Department reports results in terms of CSLs. In subsequent analyses (e.g., shipments in Chapter 9, national impacts in Chapter 10, MIA in Chapter 12) and in this NOPR, the Department reports all results in terms of TSLs, mapping the LCC results according to Table IV.5.

TABLE IV.5.—MAPPING OF THE CANDIDATE STANDARD LEVELS TO TRIAL STANDARD LEVELS

	DL1	DL2	DL3	DL4	DL5	DL9	DL10	DL11	DL12	DL13
TSL1	CSL1	CSL1	CSL1	CSL1	CSL1	CSL1	CSL1	CSL1	CSL1	CSL1
TSL2	CSL1	CSL2	CSL2	CSL2	CSL2	CSL2	CSL2	CSL2	CSL2	CSL2
TSL3	CSL1	CSL3	CSL3	CSL3	CSL3	CSL3	CSL3	CSL3	CSL3	CSL3
TSL4	CSL2	CSL4	CSL4	CSL3	CSL4	CSL4	CSL4	CSL4	CSL4	CSL4
TSL5	CSL3	CSL5	CSL5	CSL5	CSL5	CSL5	CSL5	CSL5	CSL5	CSL5
TSL6	CSL6	CSL6	CSL6	CSL6	CSL6	CSL6	CSL6	CSL6	CSL6	CSL6

Georgia Power asked whether the efficiency values shown in Table II.d of the ANOPR apply only to the representative transformer for each design line, or if that efficiency is applicable to all of the kVA sizes represented by that design line. It noted that the latter would be too restrictive. (Georgia Power, No. 78 at pp. 3–4) The ANOPR document did not provide efficiency levels for all kVA ratings in a product class or design line. For the NOPR, the Department provides a complete specification of the efficiency levels for all kVA ratings. Tables II.1 and II.2 of this NOPR express the efficiency ratings for all specific kVA ratings covered by today's proposed standard. This additional information also responds to a comment by ACEEE. ACEEE asked that the Department provide efficiency values for all the kVA ratings in between the representative units analyzed. (ACEEE, No. 50 at p. 2) The Department provides this information in TSD Chapter 8.

6. Miscellaneous Life-Cycle Cost Issues

In response to the ANOPR analysis, DOE examined several additional issues relating to the LCC. These issues are grouped for organizational clarity and completeness, and are discussed below.

a. Tax Impacts

The Department did not include the impact of income taxes in the LCC analysis for the ANOPR. The Department understands that there are two ways in which taxes affect the net impacts attributed to purchasing equipment that is more energy-efficient than baseline equipment: (1) Energy-efficient equipment typically costs more to purchase than baseline equipment, which lowers net income and may lower company taxes; and (2) more-efficient equipment typically costs less to operate than baseline equipment, which increases net income and may increase company taxes.

In general, the Department believes that the net impact of taxes on the LCC analysis depends on firm profitability and expense practices (i.e., how firms expense the purchase cost of equipment). In the ANOPR, the Department sought input on whether commercial income tax effects are significant enough to warrant inclusion in the LCC analysis. 69 FR 45396. ACEEE commented that income tax should not be included in the analysis, because it would significantly complicate the analysis, and it has found that many businesses do not pay income taxes due to the many credits and deductions that are available in the current tax code. (ACEEE, No. 76 at p. 4) ODOE stated that it believes the number of corporations actually paying income taxes has declined to the point

where the overall impact of including income tax effects should be negligible. (ODOE, No. 66 at p. 6) Southern Company questioned how many firms do not pay income taxes. (Public Meeting Transcript, No. 56.12 at p. 164) NPCC stated that the analysis should be based on after-income-tax data, but also noted that businesses do not necessarily pay income tax. (Public Meeting Transcript, No. 56.12 at p. 158)

The Department agrees with ACEEE that the inclusion of income tax effects would significantly complicate the analysis. In analyzing the available options for including income tax effects, the Department could not find an estimation method where—with the existing data gaps—sufficient accuracy could be obtained to justify the increased analytical complexity. The Department therefore did not include an estimate of income tax impacts in the LCC analysis.

b. Cost Recovery Under Deregulation, Rate Caps

During the ANOPR review, stakeholders expressed mixed concerns regarding the potential impact of distribution transformer efficiency standards under utility deregulation. Southern Company commented that the impact on electric utilities of increasing the cost of transformers will vary depending on the regulatory scheme for the different utilities. It recommended that the Department include this issue in the analysis, especially for the utilities that are under rate cap legislation. (Public Meeting Transcript, No. 56.12 at p. 187) ODOE stated that there is a small likelihood of future electricity market deregulation and recommended that the Department ignore deregulation for the NOPR analysis. (ODOE, No. 66 at p. 5)

For the ANOPR, stakeholders stated many reasons why consumers may not be able to recover the added investment cost of higher efficiency distribution transformers. EEI expressed concern that political and economic risks related to deregulation will force utilities to make uneconomic (non-recoverable) incremental investments in efficient transformers. EEI requested that DOE include the effect of reduced utility earnings in the LCC analysis. (EEI, No. 63 at p. 4) ACEEE noted that utility representatives pointed out that some utilities currently have caps on their rates, which limit their ability to recover additional transformer costs. ACEEE expects that regulators would be supportive of cost recovery for reasonable transformer cost increases. (ACEEE, No. 76 at p. 3) NRDC commented that many utilities believe they cannot recover the additional costs associated with more-efficient transformers, but this will not be a problem because utility regulation throughout the country allows the distribution utility to achieve a regulated rate of return on all reasonable and prudent investment. NRDC noted that some utilities may find today's investments in high-efficiency transformers to be economically troublesome because they are subject to rate caps, but these rate caps all expire before the transformer efficiency standard would go into effect. New rate cases would then result in a new rate structure consistent with the standards-compliant transformer investments. (NRDC, No. 61 at pp. 7–8) ASE looked into the issue of rate caps and found that about 41 percent of electricity sales are in States with restructured electricity rate regulations, with about 27 percent of sales subject to rate caps, but that these caps expire steadily from 2005 to 2010. (ASE, No. 52 at p. 4) Georgia Power also asserted that utility companies cannot raise their prices to make up for the expected rise in transformer prices that will result from higher efficiency requirements without proceeding through the regulatory process. It stated, therefore, that DOE needs to weigh the financial burden this rulemaking may place on electric utilities before issuing a final rule. (Georgia Power, No. 78 at p. 4) NEMA also expressed concern that the entity paying the additional capital cost for a more energy-efficient transformer would frequently not be the beneficiary of the resultant energy cost savings. (NEMA, No. 48 at p. 1)

The concern expressed by stakeholders regarding the potential lack of cost recovery for distribution transformer investments is a classic example of "split incentives" for efficiency investments. A split incentive occurs when the entity that makes an investment is different from the entity that will receive the economic benefits of the investment. Split incentives prevent economically viable investments because, without receiving the benefits of an investment, the investor loses motivation to make investments that otherwise might have good returns. If the Department were to model split incentives in the LCC analysis, it would need to divide ownership of first costs and operating cost savings for a fraction of the transformers in the analysis. If the cost of capital were the same for the owner of the transformer and the owner of the operating cost savings, then the average LCC savings result would actually remain the same, although the spread of LCC savings in the LCC distribution results would increase. Some owners would only incur costs, while others would only receive benefits.

The Department decided not to explicitly model split incentives in the LCC analysis for the NOPR. Such modeling would have little impact on the total net LCC savings for the Nation. While the cost and the benefits would be divided between two different owners in the split incentive case, the sum would produce the same approximate net LCC savings as a model that does not include split incentives. The Department does, however, report the increase in first cost and the decrease in operating cost savings for each design line and efficiency level in TSD Chapter 8. Stakeholders can therefore evaluate the impact of standards under a split-incentive scenario where the increased transformer cost and the operating cost savings are owned by different entities.

c. Other Issues

HVOLT commented that DOE should consider incremental price compared to incremental benefit instead of total price to total benefit, where the increments are taken by comparing the results of one standard level to the results of the next highest standard level under consideration. (Public Meeting Transcript, No. 56.12 at p. 262) ACEEE stated that incremental analysis is not necessary. (Public Meeting Transcript, No. 56.12 at p. 158) The Department does not use incremental analysis in the evaluation of standards because of legal interpretations of the methodology it is required to follow. As described in section V.C of this NOPR, the Department followed its normal approach in selecting a proposed energy conservation standard for distribution transformers. It started by comparing the maximum technologically feasible level with the base case, and determined whether that level was economically justified. If it found the maximum technologically feasible level to be unjustified, the Department then analyzed the next lower TSL to determine whether that level was economically justified. The Department repeated this procedure until it identified a TSL that was economically justified. This procedure that the Department followed for selecting today's proposed standard level is that which the Department has historically determined is consistent with EPCA, as amended.

Georgia Power commented that the Department's calculations for the economic justification of, and energy

savings associated with, higher-efficiency transformers are not applicable to every utility in the Nation. It noted that each utility is different and there are too many variables that cannot be accurately accounted for in such calculations. (Georgia Power, No. 78 at pp. 1–2) For the liquid-immersed design lines (1–5), Georgia Power analyzed the percentage change in price and TOC for several kVA sizes for each of the CSLs beyond TP 1. It found that, for all these cases, the TOC actually increased in contrast to the decrease in LCC found by the Department, indicating that the savings in energy do not economically justify the increase in first cost. (Georgia Power, No. 78 at pp. 4–5)

The Department recognizes that the TOC approach used by utilities can yield results that are substantially different from the Department's LCC analysis. The standard TOC approach used by electric utilities is typically calculated according to the regulatory mandates of cost recovery rate regulation. For cost recovery, the annual expenses associated with an investment in equipment need to be increased (or marked up) to generate revenue for those utility costs that may not be directly related to the equipment investments but still need to be recovered (*i.e.*, operation and maintenance expenses). This is formulated in terms of a fixed charge rate (FCR), which is used to calculate the annual revenue required to cover the expenses of a capital investment such that a utility can stay in business. The FCR used by utilities is generally larger than the revenues required to cover just the cost of capital. In the LCC analysis, DOE only accounted for the capital and investment expenses that are directly related to the purchase of the equipment being analyzed. The factor that represents the annual expenses required to recover capital costs is called the capital recovery factor (CRF) and is generally less than the FCR. The Department therefore recognizes that investments in efficiency that are economically justified under EPCA, as amended, may not be economically justified with respect to utility TOC evaluations that are performed under the assumptions of utility rate-setting regulation.

D. National Impact Analysis—National Energy Savings and Net Present Value Analysis

The national impact analysis evaluates the impact of a proposed standard from a national perspective rather than from the consumer perspective represented by the LCC. When it evaluates a proposed standard from a national perspective, the Department must consider several other factors that are not included in the LCC analysis. One of the primary factors the Department modeled in the national impact analysis was the gradual replacement of existing, less-efficient transformers with more-efficient, standard-compliant transformers over time. This rate of replacement was estimated by an equipment shipments model that describes the sale of transformers for replacement and for inclusion in new electrical distribution system infrastructure. A second major factor included in the national impact analysis was the fact that the national cost of capital may differ from the consumer cost of capital, and thus the discount rate used in the national impact analysis can be different from that used in the LCC. The third factor the Department included in the national impact analysis was the difference between the energy savings obtained by the consumer and the energy savings obtained by the Nation. Because of the effect of distribution and generation losses, the national energy savings from a proposed standard are larger than the sum of the individual consumers' energy savings. The details of the Department's national impact analysis are provided in Chapters 9 and 10 of the TSD.

During the ANOPR review, the Department received stakeholder comments on its approach to two of these three major factors. While it did not receive comments indicating any stakeholder disagreement with its accounting of national versus consumer energy savings, the Department did receive stakeholder comments concerning its shipments model and national discount rates.

Regarding DOE's shipments model, HVOLT commented that DOE considers the dry-type transformer market to have inelastic pricing, but that it actually is quite elastic and DOE should incorporate a price response that allows a shift to liquid-immersed transformers. (Public Meeting Transcript, No. 56.12 at pp. 173–174) NEMA agreed that dry-type transformers have price elasticity of demand, since deferring or foregoing investments may be a viable alternative for some customers. (NEMA, No. 48 at p. 1)

The Department agrees with HVOLT and NEMA that the sales of dry-type transformers are likely to be elastic. Since detailed shipments data that can be used for elasticity estimates are not available for dry-type transformers, the Department estimated elasticities using data from an economically similar commercial appliance—commercial air conditioners. Both commercial air conditioners and distribution transformers are integral elements of building and facilities electro-mechanical design and construction, and are installed during building construction and rehabilitation. The shipments elasticity scenarios the Department examined are provided in Table IV.6, and are explained in more detail in TSD Chapter 9.

TABLE IV.6.—SUMMARY OF SHIPMENTS MODEL INPUTS

Input	ANOPR description	Changes for NOPR
Shipments data	Third-party expert (HVOLT) for the year 2001	No change.
Shipments backcast	For years 1977–2000, used Bureau of Economic Analysis' (BEA) manufacturing data for distribution transformers. Source: *http://www.bea.doc.gov/bea/pn/ndn0304.zip.* For years 1950–1976, used EIA's electricity sales data. Source: *http://www.eia.doe.gov/emeu/aer/txt/stb0805.xls.*	Added three more years of BEA's manufacturing data—for years 2001 through 2003.
Shipments forecast	Years 2002–2035: Based on *AEO2003*	Years 2010–2038: Based on *AEO2005.*
Dry-type/liquid-immersed market shares.	Based on EIA's electricity sales data and *AEO2003*	Based on EIA's electricity sales data and *AEO2005.*
Regular replacement market.	Based on a survival function constructed from a Weibull distribution function normalized to produce a 32-year mean lifetime. Source: ORNL 6804/R1, *The Feasibility of Replacing or Upgrading Utility Distribution Transformers During Routine Maintenance*, page D–1.	No change.

TABLE IV.6.—SUMMARY OF SHIPMENTS MODEL INPUTS—Continued

Input	ANOPR description	Changes for NOPR
Elasticities	For liquid-immersed transformers: • Low: 0.00 • Medium: −0.04 • High: −0.20 For dry-type transformers: • 0.00	For liquid-immersed transformers: No change. For dry-type transformers: • Low: 0.00 • Medium: −0.02 • High: −0.20

A summary of the NES and NPV analytical model inputs are provided in Table IV.7. More detailed discussion on these inputs can be found in TSD Chapter 10.

TABLE IV. 7.—SUMMARY OF NES AND NPV MODEL INPUTS

Input	ANOPR description	Changes for NOPR
Shipments	Annual shipments from shipments model	No change.
Implementation date of standard.	Assumed to be 2007	Assumed to be 2010.
Base case efficiencies	Constant efficiency through 2035. Equal to weighted-average efficiency in 2007.	Constant efficiency through 2038. Equal to weighted-average efficiency in 2010.
Standards case efficiencies.	Constant efficiency at the specified standard level from 2007 to 2035	Constant at the efficiency at the specified standard level from 2010 to 2038.
Annual energy consumption per unit.	Average rated transformer losses are obtained from the LCC analysis, and are then scaled for different size categories, weighted by size market share, and adjusted for transformer loading (also obtained from the LCC analysis).	No change.
Total installed cost per unit.	Weighted-average values as a function of efficiency level (from LCC analysis).	No change.
Electricity expense per unit.	Energy and capacity savings for the two types of transformer losses are each multiplied by the corresponding average marginal costs for capacity and energy, respectively, for the two types of losses (marginal costs are from the LCC analysis).	No change.
Escalation of electricity prices.	*AEO2003* forecasts (to 2025) and extrapolation for 2035 and beyond	Used *AEO2005* forecasts (to 2025) and extrapolation for 2038 and beyond.
Electricity site-to-source conversion.	A time series conversion factor; includes electric generation, transmission, and distribution losses. Conversion varies yearly and is generated by DOE/EIA's National Energy Modeling System (NEMS) program.	Updated conversion factors from NEMS.
Discount rates	3% and 7% real	No change.
Analysis year	Equipment and operating costs are discounted to the year of equipment price data, 2001.	Equipment and operating costs are discounted to year 2004.

E. Commercial Consumer Subgroup Analysis

In analyzing the potential impacts of new or amended standards, the Department evaluates impacts on identifiable groups (i.e., subgroups) of customers, such as different types of businesses, which may be disproportionately affected by a national standard. For this rulemaking, the Department identified rural electric cooperatives and municipal utilities as transformer consumer subgroups that could be disproportionately affected, and examined the impact of proposed standards on these groups. The consumer subgroup analysis is discussed in detail in TSD Chapter 11.

The Department's selection of subgroups responded directly to comments received on the ANOPR. NRECA expressed concern that transformers servicing a single customer on a rural electric system may not be represented in the general LCC analysis. It requested the Department to take steps to include more data from cooperatives serving sparsely populated areas with long radial distribution lines. It commented that costs resulting from the DOE standard could increase to an unjustified level for rural electric cooperatives, which purchase relatively large numbers of transformers compared to their system load. (NRECA, No. 74 at p. 2) Southern Company commented that municipal utilities and rural electric cooperatives should be evaluated separately. (Public Meeting Transcript, No. 56.12 at p. 211) In its commercial consumer subgroup analysis, the Department analyzed municipal utilities and rural electric cooperatives separately, including additional data from cooperatives that serve sparsely populated areas with long radial distribution lines.

The results of the Department's commercial consumer subgroup analysis are summarized in section V.A.1.c below and described in detail in TSD Chapter 11.

F. Manufacturer Impact Analysis

1. General Description

The Department performed an MIA to estimate the financial impact of higher

efficiency standards on distribution transformer manufacturers and to calculate the impact of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (GRIM), an industry-cash-flow model customized for this rulemaking. The GRIM inputs are information regarding the industry cost structure, shipments, and revenues. The key output is the INPV. Different sets of assumptions (scenarios) produce different results. The qualitative part of the MIA addresses factors such as product characteristics, characteristics of particular firms, and market and product trends, and includes assessment of the impacts of standards on subgroups of manufacturers. The complete MIA is outlined in TSD Chapter 12.

The Department outlined the MIA approach in the ANOPR. 69 FR 45412. In section II.C. of the ANOPR, the Department asked stakeholders for comments on significant one-time additional costs manufacturers would incur if efficiency standards were introduced. 69 FR 45393. The MIA approach was also discussed at the September 28, 2004, ANOPR public meeting.

The Department conducted the MIA in three phases. Phase 1, "Industry Profile," consisted of the preparation of an industry characterization. Phase 2, "Industry Cash Flow," focused on the industry as a whole. In this phase, DOE used the GRIM to prepare an industry cash-flow analysis. The Department used publicly available information developed in Phase 1 to adapt the GRIM structure to facilitate the analysis of distribution transformer standards. In Phase 3, "Subgroup Impact Analysis," the Department conducted structured, detailed interviews with six manufacturers. Two of the six manufacturers are small businesses (750 or fewer employees). Three of the manufacturers produce medium-voltage, dry-type transformers, collectively representing more than 70 percent of the U.S. medium-voltage, dry-type market. Four of the manufacturers produce liquid-immersed transformers, collectively representing more than 70 percent of the U.S. liquid-immersed market. The purpose of the interviews was to gather information about the financial impacts of standards on manufacturers, as well as the impacts of standards on employment and manufacturing capacity. The interviews provided valuable information that the Department used to evaluate the impacts of an energy conservation standard on manufacturers' cash flows, manufacturing capacities, and employment levels.

In addition to the six structured, detailed interviews, the Department conducted telephone interviews with four additional small businesses. The Department based the small-business interviews on an interview guide that was significantly different from that used for the structured, detailed interviews. Three of the small businesses interviewed produce medium-voltage, dry-type transformers, and one produces liquid-immersed transformers. Finally, in addition to the six detailed interviews and the four short telephone interviews with small businesses, the Department conducted telephone interviews with several companies that supply materials and equipment to the U.S. distribution transformer industry. The material and equipment suppliers included both U.S. firms and foreign suppliers. The Department visited one of the U.S. core steel suppliers. The following paragraphs describe more specifically the steps DOE took in developing the information on which the MIA was based.

2. Industry Profile

Phase 1 of the MIA consisted of preparing an industry profile. Before initiating the detailed impact studies, DOE collected information on the present and past structure and market characteristics of the distribution transformer industry. This activity involved both quantitative and qualitative efforts to assess the industry and equipment to be analyzed. The information collected included (1) manufacturer market shares, characteristics, and financial information; (2) product characteristics; and (3) trends in the number of firms, the market, and product characteristics.

The industry profile included a topdown cost analysis of the distribution transformer manufacturing industry that DOE used to derive cost and financial inputs for the GRIM, *e.g.*, revenues; material, labor, overhead, and depreciation costs; selling, general, and administrative (SG&A) expenses; and research and development (R&D) expenses. The Department used public sources of information to calibrate its initial characterization of the industry, including Securities and Exchange Commission (SEC) 10–K reports, corporate annual reports, the U.S. Census Bureau's Economic Census, Dun & Bradstreet reports, and industry analysis from Ibbotson Associates.

3. Industry Cash-Flow Analysis

Phase 2 of the MIA focused on the financial impacts of standards on the industry as a whole. The analytical tool DOE used for calculating the financial impacts of standards on manufacturers is the GRIM. In Phase 2, the Department used the GRIM to perform a preliminary industry cash-flow analysis. To perform this analysis, DOE used the financial values determined during Phase 1 and the shipment projections used in the NES analysis.

4. Subgroup Impact Analysis

In Phase 3 of the MIA, the Department established two distinct subgroups of distribution transformer manufacturers that could be affected by efficiency standards: Liquid-immersed and medium-voltage, dry-type. The Department also evaluated the impact of the energy conservation standards on small businesses. Small businesses, as defined by the Small Business Administration (SBA) for the distribution transformer manufacturing industry, are manufacturing enterprises with 750 or fewer employees.

5. Government Regulatory Impact Model Analysis

An energy conservation standard can affect a manufacturer's cash flow in three distinct ways: (1) It may require increased investment; (2) it may result in higher production costs per unit; and (3) it may alter revenue by virtue of higher per-unit prices and changes in sales volumes. As mentioned, the Department uses the GRIM to quantify the changes in cash flow that result in a higher or lower industry value. The GRIM analysis for this NOPR used a number of inputs—annual shipments; prices; material, labor, and overhead costs; SG&A expenses; taxes; and capital expenditures—to arrive at a series of annual net cash flows beginning in 2004 and continuing to 2038. The Department collected this information from a number of sources, including publicly available data; structured, detailed interviews with six manufacturers; and short telephone interviews with an additional four small manufacturers. The Department calculated INPV by discounting and summing the annual net cash flows. Chapter 12 of the TSD contains additional information about the GRIM analysis.

For the MIA, the Department considered two distinct markup scenarios: (1) The preservation-of-gross-margin-percentage scenario, and (2) the preservation-of-operating-profit scenario. Under the "preservation-of-gross-margin-percentage" scenario, DOE

applied a single, uniform "gross margin percentage" markup across all efficiency levels. This scenario implies that, as production cost increases with efficiency, the absolute dollar markup will increase. The Department assumed that the non-production cost markup, which includes SG&A expenses, R&D expenses, interest, and profit, was 1.25. This markup is consistent with the one that the Department assumed in the engineering analysis and the base case of the GRIM.

The implicit assumption behind the "preservation-of-operating-profit" scenario is that the industry can maintain or preserve its operating profit (in absolute dollars) after the standard. The industry would do so by passing its increased costs on to its customers without increasing its operating profits in absolute dollars. The Department implemented this markup scenario in the GRIM by setting the non-production cost markups at each TSL to yield approximately the same operating profit in both the base case and the standard case in the year after standard implementation (2011).

The Department received several comments concerning the one-time expenditures that industry would incur in order to manufacture transformers that comply with energy conservation standards. The Department refers to such one-time expenditures as conversion capital expenditures and product conversion expenses, where the latter includes research, development, testing, and marketing expenditures related to achieving compliance. NEMA commented that the Department should contact individual manufacturers to learn about additional one-time conversion capital costs. (NEMA, No. 48 at p. 2) PEMCO Corporation made a similar comment, noting that mandatory energy conservation standards would cause small manufacturers to make new capital investments above and beyond those already made to improve transformer efficiency. (PEMCO, No. 57 at p. 1) Finally, ODOE urged the Department to consider the costs of transition to a standards-compliant industry. (ODOE, No. 66 at p. 3) The Department considers conversion capital expenditures, and also product conversion expenses, in setting energy conservation standards for any product, recognizes the importance of these issues to distribution transformer manufacturers, and explicitly considered such expenditures in its MIA. The Department gathered information pertaining to conversion expenditures by interviewing both transformer manufacturers and equipment suppliers to the distribution transformer industry.

EMSIC commented that investments will not cause a significant impact on manufacturers of liquid-immersed transformers if the energy conservation standard is set below a certain threshold. EMSIC asserted that liquid-immersed transformers can be made more efficient primarily by using better materials, without the need for significant investment. (EMSIC, No. 73 at p. 2) The Department concurs that conversion capital expenditures would be relatively modest for TSLs 1 through 4, which are the trial standard levels that would not involve partial or full conversion to amorphous core technology. TSLs 5 and 6 would require partial and full conversion to amorphous core technology, respectively, and the conversion capital expenditures necessary at these TSLs would be significant.

EMSIC commented that an energy conservation standard would positively affect liquid-immersed transformer manufacturer revenue (through higher prices), while also limiting product diversity and thereby dampening the cost increases at higher efficiencies. EMSIC suggested that one mechanism by which an energy conservation standard would limit product diversity would be the elimination of lower-grade materials. (EMSIC, No. 73 at p. 2) In the GRIM analysis, the Department explicitly considered the positive impact of standards on manufacturer revenue. While the Department recognizes that production cost increases in moving to higher TSLs could be dampened by limited product diversity, the Department believes that this effect will be small compared to the other effects explicitly considered in its analysis.

The final MIA-related comment received by the Department pertained to the Nation's import tariff on raw core steel. ZDMH is a mechanically scribed, deep-domain refined, core steel that survives the annealing process without negatively impacting the low loss properties of the steel. Since ZDMH core steel is available from only one foreign country, U.S. transformer manufacturers would have to purchase ZDMH subject to this tariff. This would give foreign transformer manufacturers that do not impose this tariff (*e.g.*, in Mexico) an advantage in producing transformers using ZDMH core steel, since finished cores or transformers would not be subject to the tariff. ERMCO asked the Department to keep this issue in mind when choosing the standard, to avoid putting domestic manufacturers at a disadvantage. (ERMCO, No. 58 at p. 2) The Department addressed the ZDMH issue in its engineering analysis by modeling Mexican-made transformers, because this would be the expected production scenario for ZDMH transformers. Since, according to the Department's analysis, ZDMH design option combinations would not be the most cost-effective at any trial standard level, DOE did not explicitly address the impact of the U.S. core steel tariff on transformer manufacturing capacity in the MIA. To review the cost-effectiveness findings of ZDMH in comparison to other transformer core steels, see TSD Chapter 5.

G. Employment Impact Analysis

The Process Rule includes employment impacts among the factors that DOE considers in selecting a proposed standard. Employment impacts include direct and indirect impacts. Direct employment impacts are any changes in the number of employees for distribution transformer manufacturers, their suppliers, and related service firms. Indirect impacts are those changes of employment in the larger economy that occur due to the shift in expenditures and capital investment that is caused by the purchase and operation of more efficient transformer equipment. The MIA addresses direct employment impacts; this section describes indirect impacts.

Indirect employment impacts from distribution transformer standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, as a consequence of: (1) Reduced spending by end users on energy (electricity, gas—including liquefied petroleum gas—and oil); (2) reduced spending on new energy supply by the utility industry; (3) increased spending on the purchase price of new distribution transformers; and (4) the effects of those three factors throughout the economy. The Department expects the net monetary savings from standards to be redirected to other forms of economic activity. The Department also expects these shifts in spending and economic activity to affect the demand for labor.

In developing this proposed rule, the Department estimated indirect national employment impacts using an input/output model of the U.S. economy, called IMBUILD (impact of building energy efficiency programs). The Department's Office of Building Technology, State, and Community Programs (now the Building Technologies Program) developed the model. IMBUILD is a personal-computer-based, economic-analysis

model that characterizes the interconnections among 35 sectors of the economy as national input/output structural matrices, using data from the U.S. Bureau of Labor Statistics. The IMBUILD model estimates changes in employment, industry output, and wage income in the overall U.S. economy resulting from changes in expenditures in the various sectors of the economy. The Department estimated changes in expenditures using the NES spreadsheet. IMBUILD then estimated the net national indirect employment impacts of potential distribution transformer efficiency standards on employment by sector.

While both the IMBUILD input/output model and the direct use of BLS employment data suggest the proposed distribution transformer standards could increase the net demand for labor in the economy, the gains would most likely be very small relative to total national employment. The Department therefore concludes only that the proposed distribution transformer standards are likely to produce employment benefits that are sufficient to offset fully any adverse impacts on employment in the distribution transformer or energy industries.

For more details on the employment impact analysis, *see* TSD Chapter 14. The Department did not receive stakeholder comments on these indirect employment impact methods, which it proposed in the ANOPR for use in the NOPR analysis.

H. Utility Impact Analysis

The proposed distribution transformer energy-efficiency standards have the distinct feature of regulating a product that also has electric utilities as one of the major product consumers. The Department therefore analyzed one portion of the impacts on utilities from the consumer perspective and another portion of impacts from the utility sector perspective. Those impacts that the Department analyzed in the utility impact analysis are from the utility sector perspective and include the impacts on the number of power plants constructed and the fuel consumption of the sector. Financial impacts on the utility sector are described in the LCC analysis.

The Department analyzed the effects of proposed standards on electric utility industry generation capacity and fuel consumption using a variant of the EIA's National Energy Modeling System (NEMS).[3] NEMS, which is available in the public domain, is a large, multi-sectoral, partial-equilibrium model of the U.S. energy sector. The EIA uses NEMS to produce its *Annual Energy Outlook*—a widely recognized baseline energy forecast for the U.S. The Department used a variant known as NEMS–BT.[4]

The Department conducted the utility analysis as policy deviations from the AEO2005, applying the same basic set of assumptions. The utility analysis reported the changes in installed capacity and generation, by fuel type, that result for each TSL, as well as changes in end-use electricity sales.

Details of the utility analysis methods and results are reported in TSD Chapter 13. The Department did not receive stakeholder comments on the utility impact analysis methods proposed in the ANOPR.

I. Environmental Analysis

The Department determined the environmental impacts of the proposed standards. Specifically, DOE calculated the reduction in power plant emissions of CO_2, sulfur dioxide (SO_2), NO_X , and mercury (Hg), using the NEMS–BT computer model. The environmental assessment published with the TSD, however, does not include the estimated reduction in power plant emissions of SO_2 because, as discussed below, any such reduction resulting from an efficiency standard would not affect the overall level of SO_2 emissions in the U.S. Like SO_2, future emissions of NO_X and Hg will be subject to emissions caps. The Department calculated a forecast of emissions reductions for these two types of emissions reductions, for emissions under an uncapped scenario. Under emissions-cap regulation, the Department assumes that the uncapped emissions reduction estimate corresponds to the generation of emissions allowance credits under an emissions-cap scenario.

The NEMS–BT is run similarly to the *AEO2005* NEMS, except that distribution transformer energy usage is reduced by the amount of energy (by fuel type) saved due to the trial standard levels. The Department obtained the input of energy savings from the NES spreadsheet. For the environmental analysis, the output is the forecasted physical emissions. The net benefit of the standard is the difference between emissions estimated by NEMS–BT and the *AEO2005* Reference Case.

The NEMS–BT tracks CO_2 emissions using a detailed module that provides robust results because of its broad coverage of all sectors and inclusion of interactive effects. In the case of SO_2, the Clean Air Act Amendments of 1990 set an emissions cap on all power generation. The attainment of this target, however, is flexible among generators and is enforced by applying market forces, through the use of emissions allowances and tradable permits. As a result, accurate simulation of SO_2 trading tends to imply that the effect of efficiency standards on physical emissions will be near zero because emissions will always be at, or near, the ceiling. Thus, there is virtually no real possible SO_2 environmental benefit from electricity savings as long as there is enforcement of the emissions ceilings. Though there may not be an actual reduction in SO_2 emissions from electricity savings, there still may be an economic benefit from reduced emissions demand. Electricity savings decrease the need to generate SO_2 emissions from power production, and consequently can decrease the need to purchase or generate SO_2 emissions allowance credits. This decreases the costs of complying with regulatory caps on emissions. *See* the environmental assessment, a separate report within the TSD, for a discussion of these issues.

Regarding the environmental assessment, ASAP stated that DOE should report other emissions impacts in addition to NO_X and CO_2, such as Hg and particulates. (Public Meeting Transcript, No. 56.12 at p. 247) The Department responded to this comment by adding Hg to the emissions reported in the environmental assessment. Particulates are a special case because they arise not only from direct emissions, but also from complex atmospheric chemical reactions that result from NO_X and SO_2 emissions. Because of the highly complex and uncertain relationship between particulate emissions and particulate concentrations that impact air quality, the Department did not report particulate emissions.

[3] For more information on NEMS, please refer to the U.S. Department of Energy, Energy Information Administration documentation. A useful summary is National Energy Modeling System: An Overview 2003, DOE/EIA–0581 (2003), March, 2003.

[4] DOE/EIA approves use of the name NEMS to describe only an official version of the model without any modification to code or data. Because this analysis entails some minor code modifications and the model is run under various policy scenarios that are variations on DOE/EIA assumptions, the Department refers to it by the name NEMS–BT (BT is DOE's Building Technologies Program, under whose aegis this work has been performed). NEMS–BT was previously called NEMS–BRS.

V. Analytical Results

A. Economic Justification and Energy Savings

1. Economic Impacts on Commercial Consumers

a. Life-Cycle Cost and Payback Period

The Department's LCC and PBP analyses provided five key outputs for each TSL that are reported in Tables V.1 through V.10 below. The first three outputs are the proportion of transformer purchases where the purchase of a standard-compliant design creates a net life-cycle cost, no impact, or a net life-cycle savings for the consumer. The fourth output is the average net life-cycle savings from a standard-compliant design. Finally, the fifth output is the average payback period for the consumer investment in a standard-compliant design. The payback period is the number of years it would take for the customer to recover, as a result of energy savings, the increased costs of higher-efficiency equipment, based on the operating cost savings from the first year of ownership. The payback period is an economic benefit-cost measure that uses benefits and costs without discounting. Detailed information on the LCC and PBP analyses can be found in TSD Chapter 8.

Table V.1 presents the summary of the LCC and PBP analysis for the representative unit from design line 1, a 50 kVA, liquid-immersed, single-phase, pad-mounted distribution transformer. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 98.97 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.56 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, and taxes) was $1,382.00.

TABLE V.1.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 1 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	98.9	98.9	98.9	99.04	99.19	99.59
Transformers with Net LCC Increase (%)	4.9	4.9	4.9	16.6	52.8	90.5
Transformers with No Change in LCC (%)	65.2	65.2	65.2	50.9	14.7	0.0
Transformers with Net LCC Savings (%)	29.9	29.9	29.9	32.5	32.5	9.5
Mean LCC Savings ($)	93	93	93	98	5	−688
Mean Payback Period (years)	11.4	11.4	11.4	21.9	36.0	45.0

Table V.2 presents the summary of the LCC and PBP analysis for the representative unit from design line 2, a 25 kVA, liquid-immersed, single-phase, pole-mounted distribution transformer. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 98.74 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.23 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, and taxes) was $737.00.

TABLE V.2.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 1 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	98.7	98.73	98.76	98.79	98.96	99.46
Transformers with Net LCC Increase (%)	1.4	3.0	5.2	8.6	43.9	98.9
Transformers with No Change in LCC (%)	66.6	64.3	60.8	56.3	25.4	0.0
Transformers with Net LCC Savings (%)	32.0	32.7	34.0	35.1	30.7	1.1
Mean LCC Savings ($)	69	70	72	71	7	−953
Mean Payback Period (years)	4.8	6.8	8.8	12.0	31.7	66.6

Table V.3 presents the summary of the LCC and PBP analysis for the representative unit from design line 3, a 500 kVA, liquid-immersed, single-phase distribution transformer. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 99.36 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 99.07 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, and taxes) was $5,428.00.

TABLE V.3.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 3 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	99.3	99.38	99.46	99.54	99.74	99.75
Transformers with Net LCC Increase (%)	0.2	1.4	6.1	39.9	66.3	70.8

TABLE V.3.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 3 REPRESENTATIVE UNIT—Continued

	Trial standard level					
	1 TP 1	2	3	4	5	6
Transformers with No Change in LCC (%)	73.7	65.2	49.5	4.0	0.1	0.0
Transformers with Net LCC Savings (%)	26.1	33.4	44.4	56.1	33.6	29.2
Mean LCC Savings ($)	1,746	2,267	2,775	2,876	627	−410
Mean Payback Period (years)	1.4	4.3	10.4	19.8	29.3	32.3

Table V.4 presents the summary of the LCC and PBP analysis for the representative unit from design line 4, a 150 kVA, liquid-immersed, three-phase distribution transformer. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 98.91 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.42 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, and taxes) was $3,335.00.

TABLE V.4.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 4 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	98.9	99.08	99.26	99.26	99.58	99.61
Transformers with Net LCC Increase (%)	3.3	16.8	41.0	41.0	64.4	75.5
Transformers with No Change in LCC (%)	63.7	40.8	11.3	11.3	0.8	0.0
Transformers with Net LCC Savings (%)	33.0	42.4	47.7	47.7	34.8	25.5
Mean LCC Savings ($)	556	629	450	450	56	−572
Mean Payback Period (years)	8.5	18.1	21.5	21.5	29.2	34.9

Table V.5 presents the summary of the LCC and PBP analysis for the representative unit from design line 5, a 1500 kVA, liquid-immersed, three-phase distribution transformer. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 99.36 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 99.13 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, and taxes) was $11,931.00.

TABLE V.5.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 5 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	99.3	99.36	99.42	99.47	99.71	99.71
Transformers with Net LCC Increase (%)	0.3	1.5	10.2	15.9	57.1	57.2
Transformers with No Change in LCC (%)	71.7	62.8	40.0	24.2	0.0	0.1
Transformers with Net LCC Savings (%)	28.0	35.7	49.8	59.9	42.9	42.7
Mean LCC Savings ($)	3,957	5,463	6,504	7,089	4,431	3,902
Mean Payback Period (years)	3.4	6.1	12.7	14.1	25.6	26.1

Table V.6 presents the summary of the LCC and PBP analysis for the representative unit from design line 9, a 300 kVA, medium-voltage, dry-type, three-phase distribution transformer with a 45kV BIL. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 98.77 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.41 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, contractor markup, and taxes) was $7,510.00.

TABLE V.6.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 9 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	98.6	98.82	99.04	99.26	99.41	99.41
Transformers with Net LCC Increase (%)	0.6	1.1	5.3	25.7	56.3	55.0

TABLE V.6.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 9 REPRESENTATIVE UNIT—Continued

	Trial standard level					
	1 TP 1	2	3	4	5	6
Transformers with No Change in LCC (%)	57.8	46.3	29.7	0.5	0.0	0.0
Transformers with Net LCC Savings (%)	41.6	52.6	65.0	73.8	43.7	45.0
Mean LCC Savings ($)	988	1,968	3,103	3,532	1,181	1,274
Mean Payback Period (years)	1.5	2.4	5.4	12.4	21.7	21.5

Table V.7 presents the summary of the LCC and PBP analysis for the representative unit from design line 10, a 1500 kVA, medium-voltage, dry-type, three-phase distribution transformer with a 45 kV BIL. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 99.17 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.79 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, contractor markup, and taxes) was $33,584.00.

TABLE V.7.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 10 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	99.1	99.20	99.30	99.39	99.51	99.51
Transformers with Net LCC Increase (%)	4.4	5.1	8.9	21.0	66.3	66.2
Transformers with No Change in LCC (%)	63.3	56.9	44.4	23.2	0.0	0.0
Transformers with Net LCC Savings (%)	32.3	37.6	46.7	55.8	33.7	33.8
Mean LCC Savings ($)	4,041	5,227	6,818	7,699	1,279	1,124
Mean Payback Period (years)	7.7	8.3	10.0	13.4	28.7	29.4

Table V.8 presents the summary of the LCC and PBP analysis for the representative unit from design line 11, a 300 kVA, medium-voltage, dry-type, three-phase distribution transformer with a 95 kV BIL. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 98.42 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.05 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, contractor markup, and taxes) was $10,945.00.

TABLE V.8.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 11 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	98.5	98.67	98.84	99.01	99.09	99.09
Transformers with Net LCC Increase (%)	2.4	3.9	9.8	22.0	34.2	33.2
Transformers with No Change in LCC (%)	42.5	34.6	18.7	2.3	0.0	0.0
Transformers with Net LCC Savings (%)	55.1	61.5	71.5	75.7	66.8	66.8
Mean LCC Savings Period ($)	2,491	3,621	4,313	4,845	4,186	4,289
Mean Payback (years)	3.8	4.9	7.9	11.8	15.1	14.8

Table V.9 presents the summary of the LCC and PBP analysis for the representative unit from design line 12, a 1500 kVA, medium-voltage, dry-type, three-phase distribution transformer with a 95 kV BIL. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 99.18 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.81 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, contractor markup, and taxes) was $33,590.00.

TABLE V.9.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 12 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	99.0	99.12	99.23	99.35	99.51	99.51
Transformers with Net LCC Increase (%)	1.4	1.5	5.8	18.2	70.6	70.1

TABLE V.9.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 12 REPRESENTATIVE UNIT—Continued

	Trial standard level					
	1 TP 1	2	3	4	5	6
Transformers with No Change in LCC (%)	75.1	71.9	56.9	28.2	0.0	0.0
Transformers with Net LCC Savings (%)	23.5	26.6	37.3	53.6	29.4	29.9
Mean LCC Savings ($)	2,600	3,973	5,485	6,812	−650	−655
Mean Payback Period (years)	4.6	4.7	8.3	12.7	29.3	29.3

Table V.10 presents the summary of the LCC and PBP analysis for the representative unit from design line 13, a 2000 kVA, medium-voltage, dry-type, three-phase distribution transformer with a 125 kV BIL. For this unit, the average efficiency of the baseline transformers selected during the LCC analysis was 99.26 percent, the minimum efficiency of the baseline transformers selected during the LCC analysis was 98.97 percent, and the consumer equipment cost before installation (which includes manufacturer selling price, shipping costs, distributor markup, contractor markup, and taxes) was $41,873.00.

TABLE V.10.—SUMMARY LCC AND PBP RESULTS FOR DESIGN LINE 13 REPRESENTATIVE UNIT

	Trial standard level					
	1 TP 1	2	3	4	5	6
Efficiency (%)	99.0	99.15	99.30	99.45	99.55	99.55
Transformers with Net LCC Increase (%)	3.8	1.5	4.4	42.6	75.7	75.7
Transformers with No Change in LCC (%)	76.0	72.9	58.9	5.4	0.0	0.0
Transformers with Net LCC Savings (%)	20.2	25.6	36.7	52.0	24.3	24.3
Mean LCC Savings ($)	662	3,125	5,430	6,435	−5,303	−5,218
Mean Payback Period (years)	9.7	5.8	8.0	19.5	32.5	32.4

b. Rebuttable-Presumption Payback

As set forth in section 325(o)(2)(B)(iii) of EPCA, 42 U.S.C. 6295(o)(2)(B)(iii), there is a rebuttable presumption that an energy conservation standard is economically justified if the increased installed cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. However, while the Department examined the rebuttable-presumption criteria, the Department determined economic justification for the proposed standard levels through a more detailed analysis of the economic impacts of increased efficiency pursuant to section 325(o)(2)(B)(i) of EPCA. (42 U.S.C. 6295(o)(2)(B)(i))

The Department calculated a rebuttable-presumption payback period for each trial standard level, to determine if DOE could presume that a standard at that level is economically justified. Rather than using distributions for input values, DOE used discrete values and based the calculation on the DOE distribution-transformer-test-procedure assumptions. As a result, the Department calculated a single rebuttable-presumption payback value for each standard level, and not a distribution of payback periods.

To evaluate the rebuttable presumption, the Department estimated the additional cost of purchasing a more efficient, standard-compliant product, and compared this cost to the value of the energy savings during the first year of operation of the product as determined by the applicable test procedure. The Department interpreted the increased cost of purchasing a standard-compliant product to include the cost of installing the product for use by the purchaser. The Department then calculated the rebuttable-presumption payback period, or the ratio of the value of the first year's energy savings to the increase in purchase price. When the rebuttable-presumption payback period is less than three years, the rebuttable presumption is satisfied; when the payback period is equal to or more than three years, the rebuttable presumption is not satisfied.

The rebuttable-presumption payback period may differ from payback periods presented in other parts of this NOPR in at least two important ways:

- The rebuttable-presumption payback period uses test procedure loading levels to evaluate losses, rather than the Department's estimate of in-service loading conditions.
- Other payback periods may consider total operating costs, whereas the rebuttable-presumption payback period considers only the value of energy savings. In the case of distribution transformers, however, the Department estimates that the change in operating costs is solely due to energy savings.

There are three key inputs into the rebuttable-presumption payback calculation: (1) The average efficiency; (2) the average installed cost; and (3) the cost of electricity. Given the average efficiency of the baseline and standard-compliant transformers, the Department calculated the energy savings by taking the difference in the annual losses between the baseline and standard-compliant transformers, assuming the loading conditions from the test procedure. Multiplying the energy savings times the cost of electricity provided the value of the energy savings. Dividing the value of the energy savings into the installed-cost increase for a standard-compliant transformer provided the estimate of the rebuttable-presumption payback period. More detailed discussion on the rebuttable presumption is contained in TSD Chapter 8, section 8.7.

Table V.11 shows the rebuttable-presumption payback period as a function of design line and standard level.

TABLE V.11.—REBUTTABLE-PRESUMPTION PAYBACK IN YEARS

Design line	Rated capacity kVA	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
1	50	7.0	7.0	7.0	10.1	16.0	27.2
2	25	2.1	3.6	4.3	5.2	15.2	42.4
3	500	0.5	2.2	5.1	9.7	22.7	25.1
4	150	3.9	7.4	12.0	12.0	17.2	20.7
5	1,500	2.6	4.5	6.5	9.0	20.0	20.0
9	300	0.7	1.3	2.5	5.6	11.3	11.3
10	1,500	3.2	3.8	4.8	6.1	12.4	12.4
11	300	2.0	2.6	3.8	5.3	7.0	7.0
12	1,500	2.3	2.5	3.3	5.3	13.6	13.6
13	2,000	5.0	3.3	4.1	8.2	16.7	16.7

c. Commercial Consumer Subgroup Analysis

In analyzing the potential impacts of new or amended standards, the Department evaluates impacts on identifiable groups (i.e., subgroups) of customers, such as different types of businesses, which may be disproportionately affected by a national standard. For this rulemaking, the Department identified rural electric cooperatives and municipal utilities as transformer consumer subgroups that could be disproportionately affected, and examined the impact of today's proposed standards on these groups.

The Department's analysis indicated that, for municipal utilities, the economics are similar to those of the national sample of utilities, but found significant differences in the results for rural cooperatives. Rural cooperatives have lower transformer loading levels than the average utility, and so their operating cost savings from higher standards would be smaller than those for the average utility. Chapter 11 of the TSD explains the Department's method for conducting the consumer subgroup analysis and presents the detailed results of that analysis.

Table V.12 shows the fraction of transformers that are impacted by different standard levels for the two commercial consumer subgroups. A transformer is impacted by a standard if the transformer design has to change in order to meet the performance requirements of the standard. Table V.13 shows the mean LCC savings from proposed energy-efficiency standards, and Table V.14 shows the mean payback period (in years) for the two commercial subgroups. Only the liquid-immersed design lines are included in this analysis since those types dominate the transformers purchased by electric utilities.

TABLE V.12.—FRACTION OF TRANSFORMERS PURCHASED BY COMMERCIAL CONSUMER SUBGROUPS IMPACTED BY ENERGY-EFFICIENCY STANDARDS

[Percent]

Design line	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
Municipal Utility Subgroup						
1	35.3	35.3	35.3	48.6	84.8	100.0
2	33.9	34.7	39.3	44.1	74.9	100.0
3	26.1	35.2	50.4	96.0	99.9	100.0
4	35.9	60.2	88.3	88.3	99.2	100.0
5	27.9	36.0	59.1	75.6	99.9	99.9
Rural Cooperative Subgroup						
1	35.6	49.8	88.7	98.0	99.0	100.0
2	35.6	38.0	42.8	48.1	81.1	100.0
3	27.6	35.1	50.6	97.7	99.9	100.0
4	36.9	61.5	94.3	93.9	99.4	100.0
5	29.1	37.6	60.4	79.2	99.9	100.0

TABLE V.13.—MEAN LIFE-CYCLE COST SAVINGS FOR TRANSFORMERS PURCHASED BY COMMERCIAL CONSUMER SUBGROUPS

[Dollars]

Design line	Rated capacity kVA	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
Municipal Utility Subgroup							
1	50	95	95	95	120	64	−594
2	25	69	66	70	73	17	−926
3	500	2,109	2,765	3,607	3,693	1,745	1,102

TABLE V.13.—MEAN LIFE-CYCLE COST SAVINGS FOR TRANSFORMERS PURCHASED BY COMMERCIAL CONSUMER SUBGROUPS—Continued

[Dollars]

Design line	Rated capacity kVA	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
4	150	608	808	512	512	435	−165
5	1,500	4,853	6,649	8,128	9,013	7,680	7,453
Rural Cooperative Subgroup							
1	50	79	79	79	58	−91	−861
2	25	69	66	67	63	−25	−1,040
3	500	1,288	1,525	1,669	1,579	−1,630	−2,573
4	150	412	370	183	183	−599	−1,320
5	1,500	2,243	3,013	3,084	3,239	−3,617	−3,775

TABLE V.14.—MEAN PAYBACK PERIOD FOR TRANSFORMERS PURCHASED BY COMMERCIAL CONSUMER SUBGROUPS

[Years]

Design line	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
Municipal Utility Subgroup						
1	11.1	11.1	11.1	19.9	33.2	43.0
2	4.8	7.0	8.8	12.0	30.6	65.4
3	1.2	3.8	8.7	19.2	27.4	29.9
4	7.7	15.0	21.5	21.5	27.1	32.5
5	2.9	5.1	11.0	12.9	23.7	23.7
Rural Cooperative Subgroup						
1	12.4	12.4	12.4	25.2	41.2	49.3
2	5.4	7.6	9.9	14.0	35.6	72.5
3	1.6	5.7	13.7	22.5	33.9	37.7
4	10.8	22.2	25.4	25.4	31.4	37.7
5	4.9	8.4	16.9	17.4	29.4	29.4

The LCC results for the municipal utilities subgroup are quite similar to the results for the national sample of utilities. Transformers purchased by municipal utilities tend to serve more diverse, urban loads than transformers that serve more rural areas. The increased load diversity increases the load factor and the transformer loading, thus increasing the potential savings from reduced load losses. Thus, compared to the other subgroup (rural cooperatives), the benefits from efficiency improvements are, on average, greater.

In contrast to the results for municipal utilities, the LCC savings tends to be lower for rural cooperatives, and the payback times tend to be longer. The LCC and PBP results for the rural cooperatives subgroup are mostly a reflection of the fact that the loading on rural transformers is lower, and thus the savings from reduced load losses are more modest. Distribution transformers purchased by rural cooperatives have lower loading than transformers that serve urban areas, primarily because the need to mitigate voltage flicker often results in the purchase of transformers of higher capacities, and because transformers purchased by rural cooperatives tend to serve isolated loads with lower load factors. The lower loading decreases the potential savings from reduced load losses, so the benefits from efficiency improvements are, on average, less than the municipal utility case per affected transformer.

2. Economic Impacts on Manufacturers

The Department performed an MIA to estimate the impact of higher efficiency standards on distribution transformer manufacturers. Chapter 12 of the TSD explains the methodology, analysis, and findings of this analysis in detail.

a. Industry Cash-Flow Analysis Results

Based on a real corporate discount rate of 8.9 percent, the Department estimated the distribution transformer industry impacts at each TSL. Table V.15 and Table V.16 show the estimated impacts for the liquid-immersed and medium-voltage, dry-type industries, respectively. The primary metric from the MIA is the change in INPV. These tables also present the investments that the industry would incur at each TSL. Product conversion expenses include engineering, prototyping, testing, and marketing expenses incurred by a manufacturer as it prepares to come into compliance with a standard. Capital investments are the one-time outlays for equipment and buildings required for the industry to come into compliance (i.e., conversion capital expenditures).

TABLE V.15.—MANUFACTURER IMPACT ANALYSIS FOR LIQUID-IMMERSED INDUSTRY

	Units	Base case	Trial standard level					
			1	2	3	4	5	6
Preservation-of-Gross-Margin-Percentage Scenario								
INPV	($ millions)	526	532	537	553	561	549	552
Change in INPV	($ millions)		5.8	10.7	27.0	34.9	22.3	25.8
	(%)		1.1	2.0	5.1	6.6	4.2	4.9
Product Conversion Expenses.	($ millions)		0	0	0	0	109.2	161.2
Capital Investments	($ millions)		2.5	5.0	7.8	8.0	94.1	326.5
Total Investment Required	($ millions)		2.5	5.0	7.8	8.0	203.3	487.7
Preservation-of-Operating-Profit Scenario								
INPV	($ millions)	526	521	513	496	490	323	27
Change in INPV	($ millions)		−5.7	−12.9	−30.0	−36.9	−203.8	−499.6
	(%)		−1.1	−2.4	−5.7	−7.0	−38.7	−94.9
Product Conversion Expenses.	($ millions)		0	0	0	0	109.2	161.2
Capital Investments	($ millions)		2.5	5.0	7.8	8.0	94.1	326.5
Total Investment Required	($ millions)		2.5	5.0	7.8	8.0	203.3	487.7

TABLE V.16.—MANUFACTURER IMPACT ANALYSIS FOR MEDIUM-VOLTAGE, DRY-TYPE INDUSTRY

	Units	Base case	Trial standard level				
			1	2	3	4	5/6
Preservation-of-Gross-Margin-Percentage Scenario							
INPV	($ millions)	32	30	29	27	28	30
Change in INPV	($ millions)		−1.8	−3.3	−5.1	−3.8	−2.0
	(%)		−5.5	−10.1	−15.7	−11.8	−6.1
Product Conversion Expenses	($ millions)		0	0	3.3	3.6	5.0
Capital Investments	($ millions)		3.2	5.6	7.3	7.5	15.0
Total Investment Required	($ millions)		3.2	5.6	10.6	11.1	20.0
Preservation-of-Gross-Margin-Percentage Scenario							
INPV	($ millions)	32	30	28	25	24	15
Change in INPV	($ millions)		−2.5	−4.3	−6.9	−7.8	−17.0
	(%)		−7.7	−13.4	−21.5	−24.3	−52.8
Product Conversion Expenses	($ millions)		0	0	3.3	3.6	5.0
Capital Investments	($ millions)		3.2	5.6	7.3	7.5	15.0
Total Investment Required	($ millions)		3.2	5.6	10.6	11.1	20.0

b. Impacts on Employment

The Department expects no significant, discernable direct employment impacts among liquid-immersed transformer manufacturers under TSL1 through TSL4, but potentially large increases in employment for TSL5 and TSL6 (35 percent and 99 percent, respectively). These conclusions—which are separate from any conclusions regarding employment impacts on the broader U.S. economy—are based on modeling results that address neither the possible relocation of domestic transformer manufacturing employment to lower labor-cost countries, nor the possibility of outsourcing amorphous core production under TSL5 and TSL6 to companies in other countries. The Department discussed this scenario of outsourcing amorphous core production to other countries during several liquid-immersed manufacturer interviews, and it appears that outsourcing would be a serious consideration for the liquid-immersed industry under TSL5 or TSL6.

Liquid-immersed manufacturers expressed concern during the MIA interviews that establishing an energy conservation standard would "commoditize" the liquid-immersed transformer market, making it easier for foreign manufacturers who specialize in low-cost mass production of one design to enter the U.S. market. If foreign producers were to capture significant market share, U.S. transformer-manufacturing employment would be negatively affected. As a point related to "commoditization," but separate from employment impacts, manufacturers also warned the Department about a potential backsliding effect, whereby the average efficiency of liquid-immersed transformers could potentially decrease under standards, since transformer customers may stop evaluating and instead simply purchase minimally compliant designs. Manufacturers reported having observed such a backsliding phenomenon in customer orders from Massachusetts, where TP1 is a mandatory standard.

The Department expects no significant, discernable employment impacts among medium-voltage, dry-type transformer manufacturers for any TSL compared to the base case. The Department's conclusion regarding employment impacts in the medium-voltage, dry-type transformer industry is separate from any conclusions regarding

employment impacts on the broader U.S. economy. Increased employment levels are not expected at higher TSLs because the core-cutting equipment typically purchased by the medium-voltage, dry-type industry is highly automated and includes core-stacking equipment.

Another concern conveyed by some medium-voltage, dry-type manufacturers during the interviews is the potential impact stemming from the cast-coil transformer competitiveness at higher TSLs. These manufacturers claim that setting a standard above a certain threshold may trigger a market switch from open-wound ventilated transformers to cast-coil transformers. Manufacturers suggest that this crossover point likely occurs at TSL3 and higher. If the market does shift to cast-coil transformers, there is a risk of imported pre-fabricated cast coils dominating the market in the long term. This would have a significant impact on domestic industry value and domestic employment in the medium-voltage, dry-type industry.

c. Impacts on Manufacturing Capacity

For the liquid-immersed distribution transformer industry, the Department believes that there are only minor production capacity implications for a standard at TSL4 and below. At TSL6, all liquid-immersed design lines would have to convert to amorphous technology, the most efficient core material. At TSL5, three design lines would have to convert to amorphous core designs. Conversion to amorphous core designs would render obsolete a large portion of the equipment used in the liquid-immersed industry today (e.g., annealing furnaces, core-cutting and winding equipment). Based on the manufacturer interviews, DOE believes that TSL5 and TSL6 would cause liquid-immersed transformer manufacturers to decide whether they would tool for amorphous technology, attempt to purchase pre-fabricated amorphous cores, or exit the industry. Manufacturers also indicated that, if they were to choose to produce amorphous cores themselves, they would face a critical decision about whether or not to relocate outside of the U.S., since much of their equipment would become obsolete. As mentioned above, if manufacturers choose to purchase pre-fabricated amorphous cores, they might purchase them from foreign manufacturers.

Energy conservation standards will affect the medium-voltage, dry-type industry's manufacturing capacity because the core stack heights (or core steel piece length) will increase and laminations will become thinner. Thinner laminations require more cuts and are more cumbersome to handle. Therefore, manufacturers would have to invest in additional core-mitering machinery or modifications and improvements to recover any losses in productivity, and these factors might also contribute to a need for more plant floor space. Because more-efficient transformers tend to be larger, this could also contribute to the need for additional manufacturing floor space.

d. Impacts on Manufacturers That Are Small Businesses

Converting from a company's current basic product line involves designing, prototyping, testing, and manufacturing a new product. These tasks have associated capital investments and product conversion expenses. Small businesses, because of their limited access to capital and their need to spread conversion costs over smaller production volumes, may be affected more negatively than major manufacturers by an energy conservation standard. For these reasons, the Department specifically evaluated the impacts on small businesses of an energy conservation standard.

The Small Business Administration defines a small business, for the distribution transformer industry, as a business that has 750 or fewer employees. The Department estimates that, of the approximately 25 U.S. manufacturers that make liquid-immersed distribution transformers, about 15 of them are small businesses. About five of the small liquid-immersed transformer businesses have fewer than 100 employees. The liquid-immersed distribution transformer industry largely produces customized transformers. Often, small businesses can compete in this industry because a typical customer order can involve unique designs produced in relatively small volumes. Small manufacturers in the liquid-immersed industry tend not to compete on the higher-volume products and often produce transformers for highly specific applications. This strategy allows small manufacturers in the liquid-immersed transformer industry to be competitive in certain product markets. Implementation of an energy conservation standard would have a relatively minor differential impact on small manufacturers (versus large manufacturers) of liquid-immersed distribution transformers. Disadvantages to small businesses, such as having little leverage over suppliers (e.g., core steel suppliers), are present with or without an energy conservation standard.

For medium-voltage, dry-type manufacturers, the situation is different. The Department estimates that, of the 25 U.S. manufacturers that make medium-voltage, dry-type distribution transformers, about 20 of them are small businesses. About one-half of the medium-voltage, dry-type small businesses have fewer than 100 employees. Medium-voltage, dry-type transformer manufacturing is more concentrated than liquid-immersed transformer manufacturing; the top three companies manufacture over 75 percent of all transformers in this category. The entire medium-voltage, dry-type transformer industry has such low shipments that no designs are produced at high volume. There is little repeatability of designs, so small businesses can competitively produce many medium-voltage, dry-type, open-wound designs. The medium-voltage, dry-type industry as a whole primarily has experience producing baseline transformers and transformers that would comply with TSL1. In addition, the industry produces a significant number of units that would comply with TSL2, but approximately one percent or less of the market would comply with TSL3 or higher (today). Therefore, all manufacturers, including small businesses, would have to develop designs to enable compliance with TSL3 or higher. For these small manufacturers, the R&D costs would be more burdensome, as product redesign costs tend to be fixed and do not scale with sales volume. Thus, small businesses would be at a relative disadvantage at TSL3 and higher, because their R&D efforts would be on the same scale as those for larger companies, but these expenses would be recouped over smaller sales volumes.

At TSL3 and above, DOE estimates that net cash flows for the medium-voltage, dry-type industry would go negative during the compliance period. At these TSLs, the impacts on the industry as a whole are large and affect businesses of all sizes, but there would be some differential, increased impacts on small businesses. For example, at TSL3 and above, the use of grain-oriented silicon steel of M3 grade would be necessary. Cutting M3 core steel on the core-mitering equipment typically purchased by smaller businesses can be problematic because of the thinness of the material.

At TSL2, all medium-voltage, dry-type designs would have to be mitered. (Mitering means the transformer core's joints intersect at 45 degree angles, rather than at 90 degree angles as is true for "butt-lap" designs; buttlap designs are less energy efficient.) The mitered

core construction technique could constrain the core-mitering resources of small businesses that share core-cutting capacity with production lines for other transformers that are not covered by this rulemaking (e.g., low-voltage, dry-type distribution transformers). At TSL1, many kVA ratings could still be constructed using butt-lap joints, alleviating the constraint on core-mitering resources. Thus, TSL1 is less capital-intensive for small businesses than TSL2 (large businesses would likely miter nearly all medium-voltage cores, even at TSL1). In the medium-voltage, dry-type transformer industry, which is heavily consolidated already, there is the risk that TSL2 could lead to further advantage for the largest manufacturers and thus further concentrate the industry's production.

3. National Impact Analysis

a. Amount and Significance of Energy Savings

The Department estimated the energy savings from a proposed energy-efficiency standard in its NES analysis. The amount of energy savings depends not only on the potential decrease in transformer losses due to a standard, but also on the rate at which the stock of existing, less efficient transformers will be replaced over time after the implementation of a proposed energy-efficiency standard.

Another factor that affects national energy savings estimates is the efficiency of the power plants and the transmission and distribution system that supplies electricity to transformers. The factor that relates energy savings at the transformer to fuel savings at the power plant is the site-to-source conversion factor. The NES analysis takes as an input estimates of the energy savings per transformer resulting from proposed energy-efficiency standards that are calculated in the LCC model. The NES model then accounts for transformer stock replacement and site-to-source energy conversion to estimate annual national energy savings through an extended forecast period ending in 2038. The replacement of existing transformer stocks by new, more efficient transformers is described by the Department's shipments model, described in TSD Chapter 9. The Department calculated the site-to-source conversion factor that relates transformer loss reduction to fuel savings at the power plant using NEMS–BT, a variant of the EIA's NEMS, which is described in TSD Chapter 13 (Utility Impact Analysis).

Table V.17 summarizes the Department's NES estimates, which are described in more detail in TSD Chapter 10. The Department reports both undiscounted and discounted values of energy savings. The undiscounted energy savings estimates increase steadily from 1.77 to 9.77 quads for TSLs 1 through 6, where there are increasing energy savings as the standard level increases. Discounted energy savings represent a policy perspective where energy savings farther in the future are less significant than energy savings closer to the present. The discounted energy savings estimates are approximately one half and one fourth of the undiscounted values for the three- and seven-percent discount rates, respectively.

b. Energy Savings and Net Present Value

While the NES provides estimates of the energy savings from a proposed energy-efficiency standard, the NPV provides estimates of the national economic impacts of a proposed standard. The NPV calculation for this rulemaking used first-cost data from the LCC analysis to estimate the equipment and installation costs associated with purchase and installation of higher efficiency transformers. The LCC analysis also provided the marginal electricity cost data that the Department used to estimate the economic value of energy savings associated with lower transformer losses.

One key factor in the NPV calculation that was not obtained from the LCC analysis is the discount rate. The Department discounted transformer purchase costs, installation expenses, and operating costs using a national average discount rate for policy evaluation that the Department determined consistent with Office of Management and Budget (OMB) guidance.

In accordance with the OMB guidelines on regulatory analysis (OMB Circular A–4, section E, September 17, 2003), DOE calculated NPV using both a seven-percent and a three-percent real discount rate. The seven-percent rate is an estimate of the average before-tax rate of return to private capital in the U.S. economy, and reflects returns to real estate and small business capital as well as corporate capital. The Department used this discount rate to approximate the opportunity cost of capital in the private sector, since recent OMB analysis has found the average rate of return to capital to be near this rate. In addition, DOE used the three-percent rate to capture the potential effects of standards on private consumption (e.g., through higher prices for equipment and purchase of reduced amounts of energy). This rate represents the rate at which "society" discounts future consumption flows to their present value. This rate can be approximated by the real rate of return on long-term government debt (e.g., yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about three percent on a pre-tax basis for the last 30 years. Table V.17 provides an overview of the NES and NPV results. See TSD Chapter 10 for more detailed NES and NPV results.

TABLE V.17.—TSL RESULTS SUMMARY: NATIONAL ENERGY SAVINGS (QUADS, 2010–2038) AND NET PRESENT VALUE

[Billion 2004$, at 3% and 7% discount rates, 2010–2073]

	TSL1 (TP 1)	TSL2	TSL3	TSL4	TSL5	TSL6
Sum of all Product Classes						
Energy Savings (quads)	1.77	2.39	3.15	3.63	6.90	9.77
Discounted Energy Savings (quads):						
3%	0.90	1.21	1.58	1.82	3.47	4.91
7%	0.40	0.54	0.71	0.82	1.54	2.19
NPV (billion 2004$):						
3%	7.43	9.43	10.11	11.07	10.88	−9.41
7%	2.15	2.52	2.28	2.26	−1.13	−14.09

c. Impacts on Employment

The Process Rule includes employment impacts among the factors DOE considers in selecting a proposed standard. Employment impacts include direct and indirect impacts. Direct employment impacts are any changes in the number of employees for distribution transformer manufacturers. Indirect impacts are those changes of employment in the larger economy that occur due to the shift in expenditures and capital investment that is caused by the purchase and operation of more efficient equipment. The MIA addresses direct employment impacts; this section describes indirect impacts.

In developing this proposed rule, the Department estimated indirect national employment impacts using an input/output model of the U.S. economy, called IMBUILD (impact of building energy efficiency programs). Indirect employment impacts from distribution transformer standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, as a consequence of: (1) Reduced spending by end users on energy (electricity, gas—including liquefied petroleum gas—and oil); (2) reduced spending on new energy supply by the utility industry; (3) increased spending on the purchase price of new distribution transformers; and (4) the effects of those three factors throughout the economy. The Department expects the net monetary savings from standards to be redirected to other forms of economic activity. The Department also expects these shifts in spending and economic activity to affect the demand for labor.

As shown in table V.18, the Department estimates that net indirect employment impacts from a proposed transformer energy-efficiency standard are positive. According to the Department's analysis, the number of jobs that may be generated through indirect impacts ranged from 5,000 to 20,000 by 2038 for the proposed standard levels of TSL1 through TSL6 respectively. For shorter forecast periods, indirect employment impacts are correspondingly smaller. While the Department's analysis suggests that the proposed distribution transformer standards could increase the net demand for labor in the economy, the gains would most likely be very small relative to total national employment. The Department therefore concludes only that the proposed distribution transformer standards are likely to produce employment benefits that are sufficient to offset fully any adverse impacts on employment that might occur in the distribution transformer or energy industries. For details on the employment impact analysis methods and results, see TSD Chapter 14.

TABLE V.18.—NET NATIONAL CHANGE IN INDIRECT EMPLOYMENT, THOUSANDS OF JOBS IN 2038

	Trial standard level					
	TSL1	TSL2	TSL3	TSL4	TSL5	TSL6
Liquid-Immersed	4.7	6.4	7.7	8.7	18.2	19.4
Dry-Type, Medium-Voltage	0.3	0.5	0.7	1.0	1.4	1.4

4. Impact on Utility or Performance of Equipment

In establishing classes of products, and in evaluating design options and the impact of potential standard levels, the Department has tried to avoid having new standards for distribution transformers lessen the utility or performance of these products (see TSD Chapter 7, section 7.3.1). The proposed standard level (TSL2) does not lessen the performance of any of the distribution transformers being regulated.

The standard level could, however, potentially affect utility through the larger size and weight of an energy-efficient distribution transformer. The Department accounted for dimensionally or physically constrained transformers in its LCC model by including the cost of dealing with physical constraints in the installation cost estimate. For all types of transformers, the Department included extra labor and equipment costs that may be incurred in the installation of larger, heavier, more efficient transformers. Design line 2 includes pole-mounted transformers and presents a special case because of the extra cost of installing or replacing electrical distribution poles on which such transformers may be mounted by utilities. For single-phase, pole-mounted, liquid-immersed transformers, the LCC spreadsheet model includes an estimate of the additional installation costs for those designs that would require an upgrade to the pole (see TSD Chapter 7, section 7.3.1). Having accounted for this constraint on utility in its economic model, the Department concludes that TSL2 does not reduce the utility or performance of distribution transformers.

5. Impact of Any Lessening of Competition

The Department considers any lessening of competition that is likely to result from standards. The Attorney General determines the impact, if any, of any lessening of competition likely to result from a proposed standard, and transmits such determination to the Secretary, not later than 60 days after the publication of a proposed rule, together with an analysis of the nature and extent of such impact. (See 42 U.S.C. 6295(o)(2)(B)(i)(V) and (B)(ii)).

To assist the Attorney General in making such a determination, the Department has provided the Department of Justice (DOJ) with copies of this notice and the TSD for review. At DOE's request, the DOJ reviewed the MIA interview questionnaire to ensure that it would provide insight concerning any lessening of competition due to any proposed TSLs.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts or costs of energy production. The energy savings from distribution transformer standards result in reduced emissions of CO_2, and reduced power sector demand for NO_X, and Hg emissions reduction investments. Reduced electricity demand from energy-efficiency standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, the Department expects the proposed standard to eliminate the need for the construction of approximately 11 new 400-megawatt power plants by 2038 and to save 2.39 quads of electricity (cumulative, 2010–2038).

Table V.19 provides the Department's estimate of cumulative CO_2, NO_X, and Hg emissions reductions for an uncapped emissions scenario for the six

TSLs considered in this rulemaking. In actuality, present and/or future regulations will place caps on the emissions of NO_X, and Hg for the power sector, and thus the emissions reductions provided in the table represent the Department's estimate of the potential reduced demand for emissions reduction investments in future cap and trade emissions markets. The expected energy savings from distribution transformer standards will reduce the emissions of greenhouse gases associated with energy production and household use of fossil fuels, and it may reduce the cost of maintaining system-wide emissions standards and constraints.

TABLE V.19.—CUMULATIVE EMISSIONS REDUCTIONS FROM TRIAL STANDARD LEVELS BY PRODUCT TYPE, 2010–2038

	Trial standard level					
	TSL1	TSL2	TSL3	TSL4	TSL5	TSL6
Emissions reductions for liquid-immersed transformers:						
CO_2 (Mt)	117.4	158.2	205.4	232.8	451.2	647.6
NO_X (kt)	31.7	42.7	55.5	62.8	121.7	174.8
Hg (t)	2.9	3.5	4.1	4.5	5.8	5.9
Emissions reductions for medium-voltage, dry-type transformers:						
CO_2 (Mt)	5.6	8.9	12.8	19.5	31.2	31.2
NO_X (kt)	2.3	3.7	5.3	8.1	12.9	12.9
Hg (t)	0.10	0.17	0.24	0.36	0.58	0.58

The cumulative CO_2, NO_X, and Hg emissions reductions range up to 678.8 Mt, 187.7 kt, and 6.48 t, respectively, in 2038 (sum of liquid-immersed and medium-voltage dry-type at TSL6). Total CO_2 and NO_X emissions reductions for each TSL are reported in the environmental assessment, a separate report in the TSD.

In the ANOPR, the Department stated that, for its NOPR analysis, it would calculate discounted values for future emissions. 69 FR 45376. Accordingly, the Department here presents its results for discounted emissions of CO_2 and NO_X. When NO_X emissions are subject to emissions caps, the Department's emissions reduction estimate corresponds to incremental changes in emissions allowance credits in cap and trade emissions markets rather than the net physical emissions reductions that will occur. The Department used the same discount rates that it used in calculating the NPV (seven percent and three percent real) to calculate discounted cumulative emission reductions. Table V.20 shows the discounted cumulative emissions impacts for both liquid-immersed and dry-type, medium-voltage transformers.

The seven-percent and three-percent real discount rate values are meant to capture the present value of costs and benefits associated with projects facing an average degree of risk. Other discount rates may be more applicable to discount costs and benefits associated with projects facing different risks and uncertainties. The Department seeks input from interested parties on the appropriateness of using other discount rates in addition to seven percent and three percent real to discount future emissions reductions.

TABLE V.20.—DISCOUNTED CUMULATIVE EMISSIONS REDUCTIONS, LIQUID-IMMERSED AND DRY-TYPE, MEDIUM-VOLTAGE TRANSFORMERS, 2010–2038

	Discounted cumulative emissions reduction					
	TSL 1 (TP 1)	TSL 2	TSL 3	TSL 4	TSL 5	TSL 6
Liquid-Immersed, 3% discount, CO_2 (Mt)	58.2	78.4	101.9	115.5	223.5	321.1
Dry-Type, 3% discount, CO_2 (Mt)	2.8	4.4	6.4	9.7	15.5	15.5
Liquid-Immersed, 7% discount, CO_2 (Mt)	25.3	34.0	44.3	50.1	96.9	139.4
Dry-Type, 7% discount, CO_2 (Mt)	1.2	1.9	2.8	4.2	6.7	6.7
Liquid-Immersed, 3% discount, NO_X (kt)	16.3	21.9	28.6	32.4	62.6	90.0
Dry-Type, 3% discount, NO_X (kt)	1.2	1.8	2.7	4.0	6.5	6.5
Liquid-Immersed, 7% discount, NO_X (kt)	7.5	10.1	13.2	15.0	28.9	41.6
Dry-Type, 7% discount, NO_X (kt)	0.5	0.8	1.2	1.8	2.9	2.9

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, considers any other factors that the Secretary deems to be relevant. (See 42 U.S.C. 6295(o)(2)(B)(i)(VII)) For today's proposed standard, the Secretary took into consideration transformer-manufacturing-material price volatility—a factor that received several comments at the ANOPR public meeting, during the comment period following the meeting, and in the MIA interviews. Stakeholders expressed concern about the increasing cost of raw materials for building transformers, the volatility of material prices, and the cumulative effect of material price increases on the transformer industry (see section IV.B.2, Engineering Analysis Inputs). The Department conducted supplemental engineering and LCC analyses using first-quarter 2005 material prices, and considered the impacts on LCC savings and payback periods when evaluating the appropriate standard levels for liquid-immersed and medium-voltage, dry-type distribution transformers. The results of the engineering and LCC analyses for the first-quarter 2005 material price analysis are in the TSD Appendix 5C.

B. Stakeholder Comments on the Selection of a Final Standard

During the public comment period on the ANOPR, the Department received numerous comments from stakeholders relating to the selection of the appropriate standard level for distribution transformers. Stakeholders expressed a range of opinions on what efficiency levels the Department should select for a standard, some relating specifically to liquid-immersed transformers and others to both liquid-immersed and medium-voltage, dry-type units.

Concerning liquid-immersed distribution transformers, Cooper Industries recommended that NEMA TP 1 be adopted for design lines 1, 2, and 4. For design lines 3 and 5, Cooper recommended CSL2, which is one level higher than the TP 1 level. (Note that for the ANOPR, the CSLs were slightly different from the levels considered for the NOPR; for the ANOPR, CSL2 for design line 3 was 99.40 percent and CSL2 for design line 5 was 99.40 percent.) For design line 5, Cooper stated that the majority of users are industrial customers, who would typically require the value of annual energy savings resulting from efficiency level increases to pay back the cost of those increases in two to four years, or provide a 15 to 30 percent annual rate of return on such cost. (Cooper, No. 62 at pp. 4–6) EMSIC commented that mandatory efficiency standards can be set at TP 1 + 0.4 percent for all liquid-immersed products without undue burden on any stakeholders. (EMSIC, No. 73 at p. 2) The Department considered these comments from Cooper Industries and EMSIC while reviewing the analytical results and selecting a proposed standard level for liquid-immersed distribution transformers.

Howard stated that it does not believe the Department should establish mandatory efficiency standards for liquid-immersed distribution transformers because, through TOC evaluation, the market already drives these transformers to cost-effective efficiency levels. Howard participates in the Energy Star program, and believes the Department should take a voluntary approach to standards. (Howard, No. 70 at p. 2) As discussed earlier in this notice, the Department is charged with determining whether standards for distribution transformers are technologically feasible and economically justified and would result in significant energy savings. (42 U.S.C. 6317(a)) Based on the analysis and information available to date, it appears that standards for liquid-immersed distribution transformers would be technologically feasible and economically justified, and would result in significant energy savings. Thus, the Department will continue to evaluate minimum efficiency standards for liquid-immersed transformers.

Howard continued by stating that if DOE must mandate efficiency levels for liquid-immersed transformers, then it recommends the Department use specific efficiency levels provided in its comment. For single-phase transformers, the levels proposed by Howard start at 98.8 percent for 10 kVA transformers and rise to 99.4 percent for 75 kVA transformers, above which the proposed level is constant. For three-phase transformers, the levels proposed by Howard start at 98.5 percent for 15 kVA transformers and rise to 99.4 percent for 225 kVA transformers, above which the proposed level is constant. (Howard, No. 70 at pp. 3 and 5) The Department considered these recommended levels from Howard while reviewing the analytical results and selecting a proposed standard level for liquid-immersed distribution transformers.

The Department also received several cross-cutting comments that pertained to the appropriate standard level for all product classes being evaluated. HVOLT, NGrid, and Southern provided comments in support of NEMA TP 1. HVOLT stated that, based on its involvement in the development of NEMA TP 1, it recommends setting the new DOE standard at NEMA TP 1 levels, which have a 3–5-year payback period at the nationwide average cost of energy. It noted that this level would guarantee wide support for the standard. (HVOLT, No. 65 at p. 3) NGrid stated that a standard that encourages utilities to install transformers that meet the efficiency levels outlined in NEMA TP 1–1996 is in the best interests of the company and its customers. (NGrid, No. 80 at p. 2) Similarly, Southern Company commented that the minimum efficiency standard should be no higher than NEMA TP 1. It added that the choice of transformers with efficiencies higher than TP 1 should be left to the customer. (Southern, No. 71 at p. 3) The Department included TP 1 in its analysis but determined that a higher efficiency level was economically justified for the liquid-immersed and medium-voltage, dry-type super classes, and would result in significant energy savings.

EEI and NRECA commented that the Department should select a standard level based on the percentage of transformer consumers with positive LCC savings, and that the standard should result in net positive LCC savings for at least 90 percent of affected consumers. (EEI, No. 63 at p. 3; NRECA, No. 74 at p. 2) The Department considered the percentage of transformer users with positive LCC savings in identifying the proposed standard level but not did set a specific threshold for users with positive LCC savings. Discussion of this and other factors DOE considered in selecting the proposed standard level appears in section V.C of this notice.

The Department also received comments encouraging consideration of standard levels higher than TP 1. ASE recommended that efficiency standard levels be set at the levels with maximum LCC savings. (ASE, No. 52 at p. 4 and No. 75 at p. 4) LCC savings is one of several criteria EPCA considers when determining whether a standard is economically justified, and therefore it is one of the criteria the Department used to select today's proposed standard level.

CDA stated that the standard level should be set at higher efficiencies than TP 1 because actual loading exceeds the 35 percent and 50 percent loading assumptions used in the TP 1 analysis. (CDA, No. 69 at p. 3) CDA urged the Department to set a minimum efficiency level that represents a challenge to the industry, beyond a minimal standard that all can achieve. It noted that it does not believe TP 1 is challenging enough to transformer manufacturers. (CDA, No. 51 at p. 4 and No. 69 at p. 4) The Department selected the highest efficiency level that its analysis identified as justified under EPCA's criteria. The selected standard will impact the industry, but the Department did not specifically use "industry challenge" as a decision criterion.

Today's proposed standard is not based on any one factor or criterion as some commenters suggested. Rather, the Department arrived at its decision by weighing the costs and benefits of the trial standard levels using the seven factors described in section II.B of this notice. The proposed standard is set at the highest level that is technologically feasible and economically justified (and would result in significant energy savings).

C. Proposed Standard

The Department evaluated whether its TSLs for distribution transformers achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified (and would result in significant energy savings). In determining whether a standard is economically justified, DOE

determines whether the benefits of the standard exceed its costs. Any new or amended standard for distribution transformers must result in significant energy savings.

In selecting a proposed energy conservation standard for distribution transformers, the Department followed its normal approach. It started by comparing the maximum technologically feasible level with the base case, and determined whether that level was economically justified. Upon finding the maximum technologically feasible level not to be justified, the Department analyzed the next lower TSL to determine whether that level was economically justified. The Department repeated this procedure until it identified a TSL that was economically justified. The Department made its determination of economic justification on the basis of the NOPR analysis results published today and the comments that were submitted by stakeholders. Beginning with the most efficient level, this section discusses each TSL for liquid-immersed transformers and then each TSL for medium-voltage, dry-type transformers.

The following two tables summarize DOE's analytical results. They will aid the reader in the discussion of costs and benefits of each TSL. Each table presents the results or, in some cases, a range of results, for the underlying design lines for liquid-immersed (Table V.21) and medium-voltage, dry-type (Table V.22) distribution transformers. The range of values reported in these tables for LCC, payback, and average increase in consumer equipment cost before installation encompass the range of results calculated for either the liquid-immersed or medium-voltage, dry-type representative units. The range of values for the manufacturer impact represents the results for the preservation-of-operating-profit scenario and preservation-of-gross-margin scenario at each TSL for liquid-immersed and medium-voltage, dry-type transformers.

TABLE V.21.—SUMMARY OF LIQUID-IMMERSED DISTRIBUTION TRANSFORMERS ANALYTICAL RESULTS

Criteria	Trial standard level					
	TSL1	TSL2	TSL3	TSL4	TSL5	TSL6
Energy saved (quads)	1.70	2.28	2.99	3.38	6.51	9.38
Generation Capacity Offset (GW)	3.1	4.3	5.5	6.2	12.1	17.3
Discounted energy saved, 7% (quads)	0.38	0.51	0.67	0.76	1.45	2.10
NPV ($ billions):						
@ 7% discount	2.02	2.31	2.01	1.92	(1.14)	(14.10)
@ 3% discount	7.02	8.78	9.20	9.83	9.94	(10.31)
Emission reductions:						
CO_2 (Mt)	117.4	158.2	205.4	232.8	451.2	647.6
NO_X (kt)	31.7	42.7	55.5	62.8	121.7	174.8
Life-Cycle Cost:						
Net Savings (%)	26.1–32.0	32.5–42.4	32.5–49.8	35.1–67.7	30.7–42.9	1.1–42.7
Net Increase (%)	0.2–4.9	1.4–16.8	5.2–52.8	8.6–39.9	43.9–66.3	57.2–98.9
No Change (%)	63.7–73.7	40.8–65.2	11.3–60.8	4.0–56.3	0.0–25.4	0.0–0.1
Payback (years)	1.4–11.4	4.3–18.1	8.8–21.5	12.0–21.9	25.6–36.0	25.6–67
Average increase in consumer equipment cost before installation (%) * †	1.4–4.2	2.7–12.8	3.0–38.3	4.2–40.6	15.5–141.9	106.9–160
Manufacturer Impact:						
INPV ($ millions)	(5.7)–5.8	(12.9)–10.7	(30.0)–27.0	(36.9)–34.9	(203.8)–22.3	(499.6)–25.8
INPV change (%)	(1.1)–1.1	(2.4)–2.0	(5.7)–5.1	(7.0)–6.6	(38.7)–4.2	(94.9)–4.9

*Percent increase in consumer equipment cost before installation, five-year average material pricing.

†The Department recognizes that these cost changes are the average changes for the Nation, and that some individual customers will experience larger changes, particularly if these customers are not evaluating losses when purchasing transformers.

TABLE V.22.—SUMMARY OF MEDIUM-VOLTAGE, DRY-TYPE DISTRIBUTION TRANSFORMERS ANALYTICAL RESULTS

Criteria	Trial standard level					
	TSL1	TSL2	TSL3	TSL4	TSL5	TSL6
Energy saved (quads)	0.07	0.11	0.16	0.25	0.39	0.39
Generation Capacity Offset (GW)	0.1	0.2	0.3	0.4	0.6	0.6
Discounted energy saved, 7% (quads)	0.02	0.03	0.04	0.06	0.09	0.09
NPV ($ billions):						
@ 7% discount	0.13	0.21	0.28	0.34	0.03	0.03
@ 3% discount	0.44	0.68	0.95	1.29	1.05	1.05
Emission reductions:						
CO_2 (Mt)	5.6	8.9	12.8	19.5	31.2	31.2
NO_X (kt)	2.3	3.7	5.3	8.1	12.9	12.9
Life-Cycle Cost:						
Net Savings (%)	20.2–55.1	25.6–61.5	36.7–71.5	52.0–75.7	24.3–66.8	24.3–66.8
Net Increase (%)	0.6–4.4	1.1–5.1	4.4–9.8	18.2–42.6	34.2–75.7	33.2–75.7
No Change (%)	42.5–76.0	34.6–72.9	18.7–58.9	0.5–28.2	0.0	0.0
Payback (years)	1.5–9.7	2.4–8.3	5.4–10.0	11.8–19.5	15.1–32.5	14.8–32.4
Increase in consumer equipment cost before installation (%) * †	0.7–4.4	2.2–7.2	5.4–13.6	13.5–30.4	36.4–78.5	36.4–78.4
Manufacturer Impact:						

TABLE V.22.—SUMMARY OF MEDIUM-VOLTAGE, DRY-TYPE DISTRIBUTION TRANSFORMERS ANALYTICAL RESULTS—Continued

Criteria	Trial standard level					
	TSL1	TSL2	TSL3	TSL4	TSL5	TSL6
INPV ($ millions)	(2.5)–(1.8)	(4.3)–(3.3)	(6.9)–(5.1)	(7.8)–(3.8)	(17.0)–(2.0)	(17.0)–(2.0)
INPV change (%)	(7.7)–(5.5)	(13.4)–(10.1)	(21.5)–(15.7)	(24.3)–(11.8)	(52.8)–(6.1)	(52.8)–(6.1)

* Percent increase in consumer equipment cost before installation, five-year average material pricing.
† The Department recognizes that these cost changes are the average changes for the Nation, and that some individual customers will experience larger changes, particularly if these customers are not evaluating losses when purchasing transformers.

1. Results for Liquid-Immersed Distribution Transformers

a. Liquid-Immersed Trial Standard Level 6

First, the Department considered the most efficient level (max tech), which would save an estimated total of 9.4 quads of energy through 2038, a significant amount of energy. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 2.1 quads. For the Nation as a whole, TSL6 would have a net cost of $14 billion at a seven-percent discount rate. At this level, the majority of customers would experience an increase in life-cycle costs. As shown in Table V.21, only about 1 to 43 percent of customers would experience lower life-cycle costs, depending on the design line. The payback periods at this standard level are between 26 and 67 years, some of which exceed the anticipated operating life of the transformer. The impacts on manufacturers would be very significant because TSL6 would require a complete conversion to amorphous core technology. These costs would reduce the INPV by as much as 95 percent under the preservation-of-operating-profit scenario. The Department estimates that $59 million of existing assets would be stranded (i.e., rendered useless) and $327 million of conversion capital expenditures would be required to enable the industry to manufacture compliant distribution transformers. The energy savings at TSL6 would reduce the installed generating capacity by 17.3 gigawatts (GW), or roughly 40 large, 400 MW powerplants.[5] The estimated emissions reductions through this same time period are 647.6 Mt of CO_2 and 174.8 kt of NO_X. The Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, and emission reductions would be outweighed by the potential multi-billion dollar negative net economic cost to the Nation, the economic burden on customers as indicated by large payback periods, and the stranded asset and conversion capital costs that could result in the large reduction in INPV for manufacturers. Consequently, the Department concludes that TSL6, the max tech level, is not economically justified.

[5] DOE estimates 18 coal-fired power plants and 22 gas-fired power plants can be avoided. See TSD Chapter 13.

b. Liquid-Immersed Trial Standard Level 5

Next, the Department considered TSL5, which would save an estimated total of 6.5 quads of energy through 2038, a significant amount of energy. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 1.45 quads. For the Nation as a whole, TSL5 would have a net cost of $1.1 billion at a seven-percent discount rate. At this level, about 31 to 43 percent of customers would experience lower life-cycle costs, depending on the design line. At this level, 44 to 66 percent of customers would have increased life-cycle costs. The payback periods at this standard level are between 26 and 36 years, some of which exceed the anticipated operating life of the transformer. The impacts on manufacturers would be very significant because TSL5 would require partial conversion to amorphous core technology. The resulting costs would contribute to as much as a 39 percent reduction in the INPV under the preservation-of-operating-profit scenario. The Department estimates that $16 million of existing assets would be stranded and approximately $94 million in conversion capital expenditures would be required to enable the industry to manufacture compliant transformers. The energy savings at TSL5 would reduce the installed generating capacity by 12.1 GW, or roughly 30 large, 400 MW powerplants. The estimated emissions reductions through this same time period are 451.2 Mt of CO_2 and 121.7 kt of NO_X. The Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, and emission reductions would be outweighed by the potential negative net economic cost to the Nation, the economic burden on customers as indicated by large payback periods, and the stranded asset and conversion capital costs that could result in the large reduction in INPV for manufacturers. Consequently, the Department concludes that TSL5 is not economically justified.

c. Liquid-Immersed Trial Standard Level 4

Next, the Department considered TSL4, which would save an estimated total of 3.4 quads of energy through 2038, a significant amount of energy. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.76 quads. For the Nation as a whole, TSL4 would result in a net savings of $1.9 billion at a seven-percent discount rate. For customers, lower life-cycle costs would be experienced by between 35 and 68 percent, depending on the design line, meaning that for some design lines, more than half of the customers would be better off, while for others less than half would benefit. The payback periods for three of the five liquid-immersed design line representative units would be more than half the anticipated operating life of the transformer. For one design line, the payback period is as long as 22 years. The consumer equipment cost before installation would increase by 41 percent for one design line, a significant increase for transformer customers. The energy savings at TSL4 would reduce the installed generating capacity by 6.2 GW, or roughly 16 large, 400 MW powerplants. The estimated emissions reductions through this same time period are 232.8 Mt of CO_2 and 62.8 kt of NO_X. The Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, emission reductions and national NPV would be outweighed by the economic burden on some customers as indicated by long payback periods and significantly greater first costs. Consequently, the Department

concludes that TSL4 is not economically justified.

d. Liquid-Immersed Trial Standard Level 3

Next, the Department considered TSL3, which would save an estimated total of 3 quads of energy through 2038, a significant amount of energy. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.67 quads. For the Nation as a whole, TSL3 would have a net savings of $2 billion at a seven-percent discount rate. At this level, lower life-cycle costs would be experienced by between 32 and 50 percent of customers, depending on the design line, meaning that for all the design lines, one-half or less of customers are better off. One of the payback periods is 22 years, exceeding half the anticipated operating life of a transformer. Additionally, the consumer equipment cost before installation increases by 38 percent for one design line, a significant increase for customers. The energy savings at TSL3 would reduce the installed generating capacity by 5.5 GW, or roughly 14 large, 400 MW powerplants. The estimated emission reductions through this same time period are 205.4 Mt of CO_2 and 55.5 kt of NO_X. The Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, emission reductions and national NPV would be outweighed by the economic burden on some customers as indicated by long payback periods and significantly greater first costs. Consequently, the Department concludes that TSL3 is not economically justified.

e. Liquid-Immersed Trial Standard Level 2

Next, the Department considered TSL2, which would save an estimated total of 2.3 quads of energy through 2038, a significant amount of energy. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.51 quads. For the Nation as a whole, TSL2 would have the highest NPV of all the TSLs for liquid-immersed distribution transformers, an estimated $2.3 billion at the seven-percent discount rate. At this level, as shown in Table V.21, between 32 and 42 percent of customers would experience lower life-cycle costs, depending on the design line. The payback periods under TSL2 are between 4 and 18 years, which at most is approximately half the anticipated operating life of the transformer. The energy savings at TSL2 would reduce the installed generating capacity by 4.3 GW, or roughly 11 large, 400 MW powerplants. The estimated emissions reductions through this same time period are 158.2 Mt of CO_2 and 42.7 kt of NO_X. At TSL2, the relatively low costs are outweighed by the benefits, including significant energy savings, generating capacity reductions, emission reductions, maximum national NPV, and benefits to a majority of those customers affected by the standard. After considering the costs and benefits of TSL2, the Department finds that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Therefore, the Department today proposes to adopt the energy conservation standards for liquid-immersed distribution transformers at TSL2.

2. Results for Medium-Voltage, Dry-Type Distribution Transformers

a. Medium-Voltage, Dry-Type Trial Standard Level 6

First, the Department considered the most efficient level (max tech), which would save an estimated total of 0.4 quads of energy through 2038. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.09 quads. For the Nation as a whole, TSL6 would result in a $30 million benefit at a seven-percent discount rate. However, at this level, the percentage of customers experiencing lower life-cycle costs would be less than 35 percent for the majority of the units analyzed, with one representative unit as low as 24 percent. This means that more than three-quarters of transformer customers making purchases in that design line would experience increases in life-cycle cost. Customer payback periods at this standard level for the majority of units analyzed are 28 years or greater, with one representative unit as high as 32 years, which is approximately the operating life of a transformer. The impacts on manufacturers would be significant, with TSL 6 contributing to a 53-percent reduction in the INPV under the preservation-of-operating-profit scenario. The Department projects that manufacturers will experience negative net annual cash flows during the compliance period, irrespective of the markup scenario. The magnitude of the peak, negative, net annual cash flow would be more than twice that of the positive-base-case cash flow. The energy savings at TSL6 would reduce installed generating capacity by 0.6 GW, or roughly 1.5 large, 400 MW powerplants. The Department estimates the associated emissions reductions through 2038 of 31.2 Mt of CO_2 and 12.9 kt of NO_X. The Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, emission reductions and national NPV would be outweighed by the economic burdens on customers as indicated by long payback periods and significantly greater first costs, and manufacturers who may experience a drop in INPV of up to 53 percent. Consequently, the Department concludes that TSL6, the max tech level, is not economically justified.

b. Medium-Voltage, Dry-Type Trial Standard Level 5

Next, the Department considered TSL5, which is identical to TSL6 (i.e., for all the representative units, TSL5 and TSL6 have all the same percentage efficiency values). Thus, for the same reasons described above in section V.C.2.a, the Department concludes that TSL5 is not economically justified.

c. Medium-Voltage, Dry-Type Trial Standard Level 4

Next, the Department considered TSL4, which would save a total of 0.3 quads of energy through 2038. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.06 quads. For the Nation as a whole, TSL4 would have a net savings of $0.34 billion at a seven-percent discount rate, the maximum NPV for medium-voltage, dry-type distribution transformers. Because for TSL5 and TSL6 the energy savings comes at a high incremental equipment cost, the national net savings for TSL4 is substantially higher than TSL5/6. The percentage of customers experiencing lower life-cycle costs would range between 52 and 76 percent, depending on the design line. However, payback periods at this standard level are as high as 20 years for one design line, which is more than half the operating life of a transformer. In addition, the consumer equipment cost before installation would increase by as much as 30 percent for one design line, a significant increase for customers. Furthermore, the impacts of TSL4 on manufacturers would be significant, contributing to as much as a 24-percent reduction in the INPV under the preservation-of-operating-profit scenario. Additionally, DOE projects that manufacturers will experience negative net annual cash flows during the compliance period, irrespective of the markup scenario. The magnitude of the peak, negative, net annual cash flow is approximately half of that of the positive-base-case cash flow. The energy savings at TSL4 would

reduce the installed generating capacity by 0.4 GW, or roughly one large, 400 MW powerplant. The Department estimates associated emissions reductions through 2038 of 19.5 Mt of CO_2 and 8.1 kt of NO_X. Thus, the Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, positive national NPV, and emission reductions would be outweighed by the long payback periods and significantly greater first costs for some transformer customers and the economic impacts on manufacturers. Consequently, the Department concludes that TSL4 is not economically justified.

d. Medium-Voltage, Dry-Type Trial Standard Level 3

Next, the Department considered TSL3, which would save an estimated 0.2 quads of energy through 2038. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.04 quads. For the Nation as a whole, TSL3 would have a net savings of $0.3 billion at a seven-percent discount rate. The percentage of transformer customers who would experience lower life-cycle costs ranges between 37 and 71 percent, depending on the design line, with payback periods of 10 years or less. The impacts on manufacturers at TSL3 would be significant, however, contributing to as much as a 22-percent reduction in the INPV under the preservation-of-operating-profit scenario. In addition, DOE projects the net annual cash flows to be negative during the compliance period, irrespective of the markup scenario. The magnitude of the peak negative net annual cash flow would be approximately half of the positive-base-case cash flow. The energy savings at TSL3 would reduce the installed generating capacity by 0.3 GW, or roughly 0.8 of a large, 400 MW powerplant. The Department estimates the associated emissions reductions through 2038 of 12.8 Mt of CO_2 and 5.3 kt of NO_X. Thus, the Department concludes that at this TSL, the benefits of energy savings, generating capacity reductions, positive national NPV, LCC savings, and emission reductions would be outweighed by the economic impacts on manufacturers. Consequently, the Department concludes that TSL3 is not economically justified.

e. Medium-Voltage, Dry-Type Trial Standard Level 2

Next, the Department considered TSL2, which would save an estimated total of 0.1 quad of energy through 2038. Discounted at 7 percent, the energy savings through 2038 would reduce to approximately 0.03 quads. For the Nation as a whole, TSL2 would have a net savings of $0.2 billion at a seven-percent discount rate. The percentage of transformer customers experiencing lower life-cycle costs ranges between 26 and 61 percent, depending on the design line, with payback periods of eight years or less. The Department considers impacts on manufacturers at this standard level (at most a 13-percent reduction in the INPV under the preservation-of-operating-profit scenario) to be reasonable. The energy savings at TSL2 would reduce the installed generating capacity by 0.2 GW, or roughly half of a large, 400 MW powerplant. The Department estimates associated emissions reductions through 2037 of 8.9 Mt of CO_2 and 3.7 kt of NO_X. Thus, the Department concludes that this TSL has positive energy savings, generating capacity reductions, emission reductions, national NPV, benefits to transformer customers, and reasonable impacts on transformer manufacturers. After considering the costs and benefits of TSL2, the Department finds that this trial standard level will offer the maximum improvement in efficiency that is technologically feasible and economically justified, and will result in significant conservation of energy. Therefore, the Department today proposes to adopt the energy conservation standards for medium-voltage, dry-type distribution transformers at TSL2.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Department has determined today's regulatory action is a "significant regulatory action" under section 3(f)(1) of Executive Order 12866, "Regulatory Planning and Review." 58 FR 51735 (October 4, 1993). Accordingly, today's action required a regulatory impact analysis (RIA) and, under the Executive Order, was subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The Department presented to OIRA for review the draft proposed rule and other documents prepared for this rulemaking, including the RIA, and has included these documents in the rulemaking record. They are available for public review in the Resource Room of DOE's Building Technologies Program, 1000 Independence Avenue, SW., Washington, DC, (202) 586–9127, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Regarding the Department's preparation of a regulatory alternatives analysis, ASE said the Department should fully describe non-regulatory alternatives, including penetration rates, in the NOPR analysis. (Public Meeting Transcript, No. 56.12 at pp. 252–253) The Department followed the examples established by prior rulemakings in regulatory impact reporting. The RIA, formally entitled, "Regulatory Impact Analysis for Proposed Energy Conservation Standards for Electrical Distribution Transformers," is contained in the TSD prepared for the rulemaking. The RIA consists of: (1) A statement of the problem addressed by this regulation, and the mandate for government action; (2) a description and analysis of the feasible policy alternatives to this regulation; (3) a quantitative comparison of the impacts of the alternatives; and (4) the national economic impacts of the proposed standard.

The RIA calculates the effects of feasible policy alternatives to distribution transformer standards, and provides a quantitative comparison of the impacts of the alternatives. The Department evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs, and compared it to the effectiveness of the proposed rule. The Department analyzed these alternatives using a series of regulatory scenarios as input to the NES/shipments model for distribution transformers, which it modified to allow inputs for voluntary measures.

The Department identified the following major policy alternatives for achieving increased distribution transformer energy efficiency:

- No new regulatory action
- Consumer rebates
- Consumer tax credits
- Manufacturer tax credits
- Voluntary energy-efficiency targets
- Early replacement
- Bulk government purchases

The Department evaluated each alternative in terms of its ability to achieve significant energy savings at reasonable costs (see Table VI.1), and compared it to the effectiveness of the proposed rule.

TABLE VI.1.—NON-REGULATORY ALTERNATIVES AND THE PROPOSED STANDARD

Policy alternatives	Type	Primary energy savings (quads)	Net present value (billion $2004)	
			7% discount rate	3% discount rate
No New Regulatory Action		0.0	0.0	0.0
Consumer Rebates	Liquid	0.0	0.0	0.0
	MV* Dry	0.007	0.013	0.042
	Total	0.007	0.013	0.042
Consumer Tax Credits	Liquid	0.058	0.058	0.218
	MV Dry	0.004	0.008	0.025
	Total	0.06	0.07	0.24
Manufacturer Tax Credits	Liquid	0.029	0.028	0.108
	MV Dry	0.002	0.004	0.013
	Total	0.03	0.03	0.12
Proposed Standards at TSL2	Liquid	2.28	2.31	8.78
	MV Dry	0.113	0.207	0.683
	Total	2.40	2.52	9.47

*MV = medium-voltage.

Table VI.1 shows the NES and NPV of each of the applicable non-regulatory alternatives. The results are reported for liquid-immersed and medium-voltage, dry-type transformers as well as in total. The case in which no regulatory action is taken with regard to distribution transformers constitutes the base case (or "No Action") scenario. Since this is the base case, energy savings and NPV are zero by definition. For comparison, the table includes the impacts of the proposed energy conservation standards. The NPV amounts shown in Table VI.1 refer to the NPV based on two discount rates (seven percent and three percent real). DOE did not consider three of the policy alternatives, voluntary energy-efficiency targets, early replacement, and bulk government purchases, because, as discussed in the RIA, DOE believes they would not significantly impact the distribution transformers covered by this NOPR.

None of the alternatives DOE examined would save as much energy or have an NPV as high as the proposed standards. Also, several of the alternatives would require new enabling legislation, such as consumer or manufacturer tax credits, since authority to carry out those alternatives does not presently exist. Additional detail on the regulatory alternatives is found in the RIA report of the TSD.

B. Review Under the Regulatory Flexibility Act/Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. The Department has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov*.

Small businesses, as defined by the Small Business Administration (SBA) for the distribution transformer manufacturing industry, are manufacturing enterprises with 750 employees or fewer. The Department reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. On the basis of the foregoing, DOE determined that it cannot certify that the proposed rule (trial standard level 2, or TSL2), if promulgated, would have no significant economic impact on a substantialnumber of small entities. The Department made this determination because of the potential impacts that the proposed standard levels for medium-voltage, dry-type distribution transformers would have on the small businesses that manufacture them. However, the Department notes that it explicitly considered the impacts on small medium-voltage, dry-type businesses in selecting TSL2, rather than selecting a higher trial standard level.

The revenue attributable to the medium-voltage, dry-type superclass represents only about six percent of the total revenues of the industry affected by this rulemaking (i.e., the sum of revenues from the liquid-immersed superclass and the medium-voltage, dry-type superclass). Because of the potential impacts of today's proposed rule on small, medium-voltage, dry-type manufacturers, DOE has prepared an initial regulatory flexibility analysis (IRFA) for this rulemaking. The IRFA divides potential impacts on small businesses into two broad categories: (1) Impacts associated with transformer design and manufacturing, and (2) impacts associated with demonstrating compliance with the standard using DOE's test procedure. The Department's test procedure rule does not require manufacturers to take any action in the absence of final energy conservation standards for distribution transformers, and thus any impact of that rule on small businesses would be triggered by the promulgation of the standard proposed today.

The Department believes that there will be no significant economic impact on a substantial number of small liquid-immersed manufacturers because the

transformers in the liquid-immersed superclass are largely customized, and small businesses can compete because many of these transformers are unique designs produced in relatively small quantities for a given order. Small manufacturers of liquid-immersed transformers tend not to compete on the higher-volume products and often produce transformers for highly specific applications. This strategy allows small manufacturers of liquid-immersed units to be competitive in certain liquid-immersed product markets. Implementation of an energy conservation standard would have a relatively minor differential impact on small manufacturers of liquid-immersed distribution transformers. Disadvantages to small businesses, such as having little leverage over suppliers (e.g., core steel suppliers), are present with or without an energy conservation standard. Due to the purchasing characteristics of their customers, small manufacturers of liquid-immersed transformers currently produce transformers at TSL2, the proposed level. Thus, conversion costs (e.g., research and development costs, capital investments) and the associated manufacturer impacts on small businesses are expected to be insignificant at the proposed level, TSL2.

The potential impacts on medium-voltage, dry-type manufacturers (and also the compliance demonstration cost for liquid-immersed manufacturers) are discussed in the following sections. The Department has transmitted a copy of this IRFA to the Chief Counsel for Advocacy of the Small Business Administration for review.

1. Reasons for the Proposed Rule

Part C of Title III of the Energy Policy and Conservation Act (EPCA) provides for an energy conservation program for certain commercial and industrial equipment. (42 U.S.C. 6311–6317) In particular, section 346 of EPCA states that the Secretary of Energy must prescribe testing requirements and energy conservation standards for those distribution transformers for which the Secretary determines that standards would be technologically feasible and economically justified, and would result in significant energy savings, although section 325(v) of EPCA in effect modifies this provision by specifying standards for low voltage, dry-type distribution transformers. (42 U.S.C. 6295(v) and 6317(a))

On October 22, 1997, the Secretary of Energy issued a determination that "based on its analysis of the information now available, the Department has determined that energy conservation standards for transformers appear to be technologically feasible and economically justified, and are likely to result in significant savings." 62 FR 54809. Recognizing that fact, EPACT 2005 set minimum efficiency levels for low-voltage dry-type distribution transformers and allowed the Department to continue its analysis and rulemaking for liquid-immersed and medium-voltage dry-type distribution transformers.

2. Objectives of, and Legal Basis for, the Proposed Rule

The Department selects any new or amended standard to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (See 42 U.S.C. 6295(o)(2)(A), 6313(a), and 42 U.S.C. 6317(a) and (c)) If a proposed standard is not designed to achieve the maximum improvement in energy efficiency or the maximum reduction in energy use that is technologically feasible, the Secretary states the reasons for this in the proposed rule. To determine whether economic justification exists, the Department reviews comments received and conducts analysis to determine whether the economic benefits of the proposed standard exceed the costs to the greatest extent practicable, taking into consideration the seven factors set forth in 42 U.S.C. 6295(o)(2)(B)(i) (see Section II.B of this Notice). Further information concerning the background of this rulemaking is provided in Chapter 1 of the TSD.

3. Description and Estimated Number of Small Entities Regulated

By researching the distribution transformer market, developing a database of manufacturers, and conducting interviews with manufacturers (both large and small), the Department was able to estimate the number of small entities that would be regulated under an energy conservation standard. See chapter 12 of the TSD for further discussion about the methodology used in the Department's manufacturer impact analysis and its analysis of small-business impacts.

The liquid-immersed superclass accounts for about $1.3 billion in annual sales and employment of about 4,250 production employees in the United States. The Department estimates that, of the approximately 25 U.S. manufacturers that make liquid-immersed distribution transformers, about 15 of them are small businesses. About five of the small businesses have fewer than 100 employees.

The medium-voltage, dry-type superclass accounts for about $84 million in annual sales and employment of about 250–330 production employees in the United States. The medium-voltage, dry-type market is relatively small compared to that of the liquid-immersed superclass. The Department estimates that, of the 25 U.S. manufacturers that make medium-voltage, dry-type distribution transformers, about 20 of them are small businesses. About ten of these small businesses have fewer than 100 employees.

4. Description and Estimate of Compliance Requirements

Potential impacts on small businesses come from two broad categories of compliance requirements: (1) Impacts associated with transformer design and manufacturing, and (2) impacts associated with demonstrating compliance with the standard using the Department's test procedure.

In regard to impacts associated with transformer design and manufacturing, the margins and/or market share of small businesses in the medium-voltage, dry-type superclass could be hurt in the long term by today's proposed level, TSL2. At TSL2, as opposed to TSL1, small manufacturers would have less flexibility in choosing a design path. However, as discussed under subsection 6 (Significant alternatives to the rule) below, the Department expects that the differential impact on small, medium-voltage, dry-type businesses (versus large businesses) would be smaller in moving from TSL1 to TSL2 than it would be in moving from TSL2 to TSL3. The rationale for the Department's expectation is best discussed in a comparative context and is therefore elaborated upon in subsection 6 (Significant alternatives to the rule). As discussed in the introduction to this IRFA, DOE expects that the differential impact associated with transformer design and manufacturing on small, liquid-immersed businesses would be negligible.

In regard to compliance demonstration, the Department's test procedure for distribution transformers employs an Alternative Efficiency Determination Method (AEDM) which would ease the burden on manufacturers. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. The AEDM involves a sampling procedure to compare manufactured products' efficiencies with those predicted by computer design software. Where the manufacturer uses an AEDM for a basic model, it would not be required to test units of the basic model

to determine its efficiency for purposes of establishing compliance with DOE requirements. The professional skills necessary to execute the AEDM include the following: (1) Transformer design software expertise (or access to such expertise possessed by a third party), and (2) electrical testing expertise and moderate expertise with experimental statistics (or access to such expertise possessed by a third party). The Department's test procedure would require periodic verification of the AEDM.

The Department's test procedure also requires manufacturers to calibrate equipment used for testing the efficiency of transformers. Calibration records would need to be maintained, if the proposed energy conservation standard is promulgated.

The testing, reporting, and recordkeeping requirements associated with an energy conservation standard and its related test procedure would be identical, irrespective of the trial standard level chosen. Therefore, for both the liquid-immersed and medium-voltage, dry-type superclasses, testing, reporting, and recordkeeping requirements have not entered into the Department's choice of trial standard level for today's proposed rule.

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

The Department is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being proposed today.

6. Significant Alternatives to the Rule

The primary alternatives to the proposed rule considered by the Department are the other trial standard levels besides the one being proposed today, TSL2. These alternative trial standard levels and their associated impacts on small business are discussed in the subsequent paragraphs. In addition to the other trial standard levels considered, the TSD associated with this proposed rule includes a report referred to in section VI.A above as the RIA. This report discusses the following policy alternatives: (1) No new regulatory action, (2) consumer rebates, (3) consumer tax credits, and (4) manufacturer tax credits. The energy savings and beneficial economic impacts of these regulatory alternatives are one to two orders of magnitude smaller than those expected from today's proposed rule. Finally, the Department has not considered abbreviated testing requirements for small businesses, but invites stakeholder comment on abbreviating such requirements for small businesses.

The entire medium-voltage, dry-type industry has such low shipments that no designs are produced at high volume. There is little repeatability of designs, so small businesses can competitively produce many medium-voltage, dry-type, open-wound designs. The medium-voltage, dry-type industry as a whole primarily has experience producing baseline transformers and transformers that would comply with TSL1. In addition, the industry produces a significant number of units that would comply with TSL2, but approximately one percent or less of the market would comply with TSL3 or higher. Therefore, all manufacturers, including small businesses, would have to develop designs to enable compliance with TSL3 or higher—such research and development costs would be more burdensome to small businesses. Product redesign costs tend to be fixed and do not scale with sales volume. Thus, small businesses would be at a relative disadvantage at TSL3 and higher because research and development efforts would be on the same scale as those for larger companies, but these expenses would be recouped over smaller sales volumes.

At TSL3 and above, DOE estimates that net cash flows for the medium-voltage, dry-type industry would go negative during the compliance period. At TSL3 and above, the impacts on the industry as a whole are large and affect businesses of all sizes, but there would be some differential, increased impacts on small businesses. For example, at TSL3 and above, the use of grain-oriented silicon core steel of M3 or better will be needed. Cutting M3 core steel on the core-mitering equipment typically purchased by smaller businesses can be problematic because of the extremely thin laminations.

At TSL2, the level proposed today, all medium-voltage, dry-type transformer designs would have to have mitered cores. (Mitering means the transformer core's joints intersect at 45 degree angles, rather than at 90 degree angles as is true for "butt-lap" designs; buttlap designs are less energy efficient.) The mitered core construction technique could constrain the core-mitering resources of small businesses that share core-cutting capacity with production lines for other transformers that are not covered by this rulemaking (e.g., low-voltage, dry-type distribution transformers). At TSL1, many kVA ratings could still be constructed using butt-lap joints, alleviating this constraint on core-mitering resources. Thus, TSL1 is less capital-intensive for small businesses than TSL2 (large businesses would likely miter nearly all medium-voltage cores, even at TSL1). In an industry such as the medium-voltage, dry-type transformer industry, which is heavily consolidated already, there is the risk that TSL2 could lead to further advantage for the largest manufacturers and thus further concentrate the industry's production. The top three manufacturers produce over 75 percent of all the transformers in the medium-voltage, dry-type superclass. Of these three, two of them are small businesses.

The primary difference between TSL1 and TSL2 from the manufacturers' viewpoint is that TSL1 preserves more design pathways, each trading off material for capital. Butt-lap designs would be cost-effective at TSL1 for some kVA ratings, which would allow small businesses to remain more competitive because they would not necessarily have to make large capital outlays. TSL2 cannot be met cost-effectively with butt-lap designs; thus TSL2 could hurt the margins or decrease the market share of small businesses in the long run. Some small businesses might opt to purchase pre-mitered cores at TSL2 rather than investing in core-mitering equipment, which would likely hurt their margins. However, the differential impact on small businesses (versus large businesses) is expected to be lower in moving from TSL1 to TSL2 than in moving from TSL2 to TSL3. Today, the market already demands significant quantities of medium-voltage, dry-type transformers that meet TSL2.

Chapter 12 of the TSD contains more information about the impact of this rulemaking on manufacturers. The Department interviewed six small businesses affected by this rulemaking (see also section IV.F.1 above). The Department also obtained information about small business impacts while interviewing manufacturers that exceed the small business size threshold of 750 employees.

C. Review Under the Paperwork Reduction Act

Adoption of today's proposed rule would have the effect of requiring that manufacturers follow certain record-keeping requirements in the test procedure for distribution transformers, not just for purposes of making representations, but also to determine compliance even in the absence of any representation. As set forth in the test procedure, manufacturers will become subject to the record-keeping requirements when today's proposed energy conservation standard for distribution transformers takes effect. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. Thus, the standard will impose new information or record

keeping requirements, and Office of Management and Budget clearance is required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

The test procedure for distribution transformers requires manufacturers to calibrate equipment used for testing the efficiency of transformers. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. Manufacturers must also document (1) the basis for their calibration of any equipment for which no national calibration standard exists, (2) their calibration procedures, and (3) the date when they calibrated their equipment. The Department drew these provisions from, and in some cases they are identical to, provisions in NEMA TP 2–1998. The Department understands that NEMA, in turn, based them on provisions of the International Standards Organization (ISO) 9000 series documents. These documents are voluntary standards widely recognized throughout industry and internationally as setting forth sound quality assurance methods. The Department incorporated such provisions in its test procedure because it believes that any manufacturer doing testing should employ them to assure sound and accurate results. The Department understands that they are already widely followed by manufacturers, in the interest of assuring they provide to their customers equipment that meets customer specifications. Thus, DOE believes that little or no additional record-keeping burden would be imposed by today's proposed rule.

The test procedure also allows manufacturers, under certain circumstances, to determine the efficiencies of their distribution transformers through use of methods other than testing. The test procedure includes Alternative Efficiency Determination Methods (AEDM) to reduce testing burden. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. Each manufacturer that has used an AEDM must have available for inspection by the Department records showing: The method or methods used; the mathematical model, the engineering or statistical analysis, computer simulation or modeling, and other analytic evaluation of performance data on which the AEDM is based; complete test data, product information, and related information that the manufacturer has used to substantiate the AEDM; and the calculations used to determine the efficiency and total power losses of each basic model to which the AEDM was applied. 10 CFR Part 431, Subpart K, Appendix A; 71 FR 24972. This information must be recorded and maintained for each AEDM the manufacturer uses. This requirement is designed to enable the Department to determine, if necessary, that these mathematical models have been properly used to rate transformer efficiencies.

The Department is submitting to the OMB, simultaneously with the publication of this proposed rule, these record-keeping requirements for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An agency may not impose, and a person is not required to respond to, such a requirement unless it has been reviewed and assigned a control number by OMB. Interested persons may obtain a copy of the Paperwork Reduction Act submission from the contact person named in this notice.

Interested persons are invited to submit comments to OMB addressed to: Department of Energy Desk Officer, Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington DC, 20503. Persons submitting comments to OMB also are requested to send a copy to the DOE contact person at the address given in the addresses section of this notice. OMB is particularly interested in comments on: (1) The necessity of the proposed record-keeping provisions, including whether the information will have practical utility; (2) the accuracy of the Department's estimates of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be maintained; and (4) ways to minimize the burden of the requirements on respondents.

D. Review Under the National Environmental Policy Act

The Department is preparing an environmental assessment of the impacts of the proposed rule and DOE anticipates completing a Finding of No Significant Impact (FONSI) before publishing the final rule on distribution transformers, pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the Department's regulations for compliance with the National Environmental Policy Act (10 CFR part 1021).

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. The Department has examined today's proposed rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition the Department for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" 61 FR 4729 (February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or

more of them. The Department has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov*). The proposed rule published today contains neither an intergovernmental mandate nor a mandate that may result in expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

The Department has determined, under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

J. Review Under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. The OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). The Department has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

While this proposed rule is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated by the Administrator of OIRA as a significant energy action. Thus, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

The Department is required by section 32 of the Federal Energy Administration Act (FEAA) of 1974 to inform the public of the use and background of any commercial standard in a proposed rule. (15 U.S.C. 788) While the Department had considered a commercial voluntary standard (NEMA TP 1–2002) as one of the trial standard levels, it did not choose to regulate either liquid-immersed or medium-voltage dry-type distribution transformers at this efficiency level. Because today's proposed rule adopts more stringent efficiency levels, Section 32 of the FEAA does not apply.

M. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, the Office of Management and Budget (OMB), in consultation with the Office of Science and Technology (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). (70 FR 2664, January 14, 2005) The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the federal government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information.

The Department's Office of Energy Efficiency and Renewable Energy, Building Technologies Program, held formal in-progress peer reviews covering the analyses (e.g., screening/engineering analysis, life-cycle cost analysis, manufacturing impact analysis, and utility impact analysis) used in conducting the energy efficiency standards development process on June 28–29, 2005. The in-progress review is a rigorous, formal and documented evaluation process using objective criteria and qualified and independent reviewers to make a judgment of the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The Building Technologies Program staff is preparing a peer review report which, upon completion, will be disseminated on the Office of Energy Efficiency and Renewable Energy's Web site and included in the administrative record for this rulemaking.

VII. Public Participation

A. Attendance at Public Meeting

The time and date of the public meeting are listed in the DATES section at the beginning of this notice of proposed rulemaking. The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 1E245, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards-Jones at (202) 586–2945. Foreign nationals visiting DOE Headquarters are subject to advance security screening procedures, requiring a 30-day advance notice. Any foreign national wishing to participate in the meeting should advise DOE of this fact as soon as possible by contacting Ms. Brenda Edwards-Jones to initiate the necessary procedures.

B. Procedure for Submitting Requests To Speak

Any person who has an interest in today's notice, or who is a representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation. Such persons may hand-deliver requests to speak, along with a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format to the address shown in the **ADDRESSES** section at the beginning of this notice of proposed rulemaking between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to: *Brenda.Edwards-Jones@ee.doe.gov.*

Persons requesting to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. The Department requests persons selected to be heard to submit an advance copy of their statements at least two weeks before the public meeting. At its discretion, DOE may permit any person who cannot supply an advance copy of their statement to participate, if that person has made advance alternative arrangements with the Building Technologies Program. The request to give an oral presentation should ask for such alternative arrangements.

C. Conduct of Public Meeting

The Department will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA, 42 U.S.C. 6306. A court reporter will be present to record the proceedings and prepare a transcript. The Department reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal, conference style. The Department will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within time limits determined by DOE), before the discussion of specific topics. The Department will permit other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. Department representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

The Department will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, Forrestal Building, Room 1J–018 (Resource Room of the Building Technologies Program), 1000 Independence Avenue, SW., Washington, DC, (202) 586–9127, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

The Department will accept comments, data, and information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this notice of proposed rulemaking. Please submit comments, data, and information electronically. Send them to the following e-mail address: *TransformerNOPRComment@ee.doe.gov.* Submit electronic comments in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format and avoid the use of special characters or any form of encryption. Comments in electronic format should be identified by the docket number EE–RM/STD–00–550 and/or RIN number 1904–AB08, and wherever possible carry the electronic signature of the author. Absent an electronic signature, comments submitted electronically must be followed and authenticated by submitting the signed original paper document. No telefacsimiles (faxes) will be accepted.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. The Department of Energy will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to the Department when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

E. Issues on Which DOE Seeks Comment

The Department is particularly interested in receiving comments and views of interested parties concerning:

(1) The proposed tables of efficiency ratings, and specifically areas where the underlying analytical methods followed for developing the efficiency values resulted in discontinuities.

(2) The Department's treatment of rebuilt or refurbished transformers in this rulemaking and the potential impact on consumers, manufacturers, and national energy use if they were excluded.

(3) Whether less-flammable, liquid-immersed distribution transformers

should be included in the same product class as medium-voltage, dry-type transformers. Currently the Department considers dry-type transformers and liquid-immersed transformers as members of separate product classes.

(4) Whether stakeholders believe a minimum efficiency standard for liquid-immersed distribution transformers would contribute to design standardization, and encourage manufacturers to move to countries with lower labor costs.

(5) The appropriateness of using discount rates of seven percent and three percent real to discount future energy savings and emissions reductions.

(6) Whether the Department should include space occupancy costs in the cost of transformers as a means of accounting for space constraints.

(7) The IRFA and the potential impacts on small businesses affected by this rulemaking. Although the Department is expressly inviting comments related to the medium-voltage, dry-type superclass, the Department also welcomes comment on its understanding that there would be no significant economic impact on a substantial number of small entities within the liquid-immersed superclass alone.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's notice of proposed rulemaking.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Reporting and record keeping requirements.

Issued in Washington, DC, on July 20, 2006.

Alexander A. Karsner,

Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, Chapter II of Title 10, Code of Federal Regulations, Subpart K of Part 431 is proposed to be amended to read as set forth below.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

2. Section 431.196 is amended by revising paragraphs (b) and (c) to read as follows:

§ 431.196 Energy conservation standards and their effective dates.

* * * * *

(b) *Liquid-Immersed Distribution Transformers.* Liquid-immersed distribution transformers manufactured on or after January 1, 2010, shall have an efficiency no less than:

Single-phase		Three-phase	
kVA	Efficiency (%) *	kVA	Efficiency (%) *
10	98.40	15	98.36
15	98.56	30	98.62
25	98.73	45	98.76
37.5	98.85	75	98.91
50	98.90	112.5	99.01
75	99.04	150	99.08
100	99.10	225	99.17
167	99.21	300	99.23
250	99.26	500	99.32
333	99.31	750	99.24
500	99.38	1000	99.29
667	99.42	1500	99.36
833	99.45	2000	99.40
		2500	99.44

* Efficiencies are determined at the following reference conditions: (1) For no-load losses, at the temperature of 20 °C, and (2) for load-losses, at the temperature of 55°C and 50 percent of nameplate load.

(c) *Medium-Voltage Dry-Type Distribution Transformers.* Medium-voltage dry-type distribution transformers manufactured on or after January 1, 2010, shall have an efficiency no less than:

Single-phase				Three-phase			
BIL kVA	20–45 kV efficiency (%) *	46–95 kV efficiency (%) *	≥96 kV efficiency (%) *	BIL kVA	20–45 kV efficiency (%) *	46–95 kV efficiency (%) *	≥96 kV efficiency (%) *
15	98.10	97.86	.....	15	97.50	97.19	.....
25	98.33	98.12	.....	30	97.90	97.63	.....
37.5	98.49	98.30	.....	45	98.10	97.86	.....
50	98.60	98.42	.....	75	98.33	98.12	.....
75	98.73	98.57	98.53	112.5	98.49	98.30	.....
100	98.82	98.67	98.63	150	98.60	98.42	.....
167	98.96	98.83	98.80	225	98.73	98.57	98.53
250	99.07	98.95	98.91	300	98.82	98.67	98.63
333	99.14	99.03	98.99	500	98.96	98.83	98.80
500	99.22	99.12	99.09	750	99.07	98.95	98.91
667	99.27	99.18	99.15	1000	99.14	99.03	98.99
833	99.31	99.23	99.20	1500	99.22	99.12	99.09
				2000	99.27	99.18	99.15

Single-phase				Three-phase			
BIL kVA	20–45 kV efficiency (%) *	46–95 kV efficiency (%) *	≥96 kV efficiency (%) *	BIL kVA	20–45 kV efficiency (%) *	46–95 kV efficiency (%) *	≥96 kV efficiency (%) *
				2500	99.31	99.23	99.20

* Efficiencies are determined at the following reference conditions: (1) For no-load losses, at the temperature of 20 °C, and (2) for load-losses, at the temperature of 75 °C and 50 percent of nameplate load.

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Federal Register

Friday,
August 4, 2006

Part III

Federal Credit Administration

12 CFR Part 611
Organization; Termination of System Institution Status; Final Rule

FARM CREDIT ADMINISTRATION

12 CFR Part 611

RIN 3052–AC29

Organization; Termination of System Institution Status

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, Agency, we or our) issues this final rule amending our regulations that allow a Farm Credit System (FCS, Farm Credit, or System) bank or association to terminate its FCS charter and become a financial institution under another Federal or State chartering authority. The final rule updates the termination procedures for System banks and associations under sections 7.9, 7.10 and 7.11 of the Farm Credit Act of 1971, as amended, ensures that interested parties have sufficient time and opportunities to be fully informed about a termination proposal, and ensures that a significant proportion of equity holders are engaged in the termination process.

DATES: *Effective Date:* This regulation will be effective 30 days after publication in the **Federal Register** during which either or both Houses of Congress are in session. We will publish a notice of the effective date in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Thomas Dalton, Senior Staff Accountant, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4414; TTY (703) 883–4434; or Rebecca S. Orlich, Senior Counsel, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Objectives

Through this rulemaking it is our objective to:

- Update the termination procedure for FCS banks and associations under sections 7.9, 7.10 and 7.11 of the Farm Credit Act of 1971, as amended (Act);
- Ensure that the FCA, an institution's board of directors, and the institution's equity holders have sufficient time and opportunities to be fully informed about a termination proposal before deciding whether to approve the termination;
- Provide that we may require a terminating institution to obtain independent analyses and rulings regarding a proposed termination;
- Ensure that a significant proportion of stockholders are engaged in the termination process; and
- Clarify existing requirements and ensure that stockholder disclosure materials are informative and easy to understand.

II. Background

The Agricultural Credit Act of 1987,[1] among other things, amended the Act expressly to permit System institutions to terminate their Farm Credit status and become another type of financial institution. We first issued regulations governing terminations in 1991. At that time, the regulations covered only "small" FCS associations. Our current termination rule, published on April 12, 2002, covers all associations and banks.[2] Since 1991, no FCS bank or association has terminated its charter under FCA regulations. However, in 2004 one System association adopted a commencement resolution to terminate its Farm Credit charter and subsequently be acquired by the subsidiary of a non-System bank. Ultimately, the association decided not to be acquired and not to terminate Farm Credit status. Although the association never submitted a termination application to us, the experience presented us with an actual event to evaluate the effectiveness and efficiency of our existing termination regulations. We found that, while the existing regulations provide the basic requirements to comply with the Act and effect a termination, certain revisions to the regulations would ensure a more orderly process for a FCS bank or association to terminate its charter.

On January 11, 2006, we published a proposed termination regulation[3] to update the existing termination regulations to clarify our requirements. Our proposals included: (1) Separating our review of a terminating institution's disclosure information, as required by section 7.11 of the Act (12 U.S.C. 2279e), from our approval of the termination itself, as set forth in section 7.10 of the Act (12 U.S.C. 2279d), (2) giving a terminating institution more flexibility in communicating with stockholders and the public during the termination process, (3) providing that we may require a terminating institution to obtain independent analyses of and rulings on matters related to the proposed termination, as well as to hold convenient informational meetings for stockholders, (4) strengthening protections for directors to obtain independent legal and financial advice and allow public or private expressions of their opinions about the termination, and (5) ensuring sufficient equity holder representation in voting processes by imposing a quorum requirement of 30 percent of voting stockholders that must be present in person or by proxy at the stockholder meetings for the termination and reconsideration votes.

[1] Public Law 100–233, 101 Stat. 1568 (January 6, 1988).

[2] *See* 67 FR 17907.

[3] *See* 71 FR 1704.

III. Comments

We received 51 comment letters on the proposed rule. Eight comment letters were from the Farm Credit Council (FCC) and seven System institutions (U.S. AgBank, CoBank, AgriBank, and four FCS associations) (collectively, System commenters). We also received 43 comment letters from non-System entities including Rabobank International (Rabobank), a cooperatively owned bank and financial services provider based in the Netherlands; the Independent Community Bankers of America (ICBA); the Independent Community Bankers of North Dakota; the American Bankers Association (ABA) and from 39 commercial bankers. In its letter, Rabobank identified itself as the bank that attempted unsuccessfully to acquire a System institution in 2004 and stated that its comments were based on that experience. In general, System commenters supported the rule, whereas non-System commenters expressed opposition to portions of the rule that they believed would create barriers to the termination process and would be burdensome and costly.

A. General Comments

System commenters stated that:

- They support revising the termination regulation to more properly reflect the conditions and circumstances that exist when an institution's board votes to terminate. The facts and circumstances of any particular termination request must be carefully evaluated, and an independent analysis of various issues raised by the request may be appropriate. They encouraged FCA to require those studies as needed.
- They are concerned about the impact of any proposed termination on the System while the matter is pending and encouraged timely action by the Agency. They encouraged FCA to begin substantive review of a proposed termination as soon as possible after receipt of a plan of termination.
- They support the elimination of the termination authority from the Act.

Non-System commenters stated that:

- The proposal creates obstacles and impediments that make termination difficult to achieve.
- They support giving the terminating institution permission to communicate with equity holders and the public during the termination process.
- The proposal restricts the institutions' right to terminate which leads to diminished performance, weak or entrenched management, and inefficient operations.
- The proposed amendments are complicated due to the fact that there are multiple requirements that are either redundant and/or unnecessary.
- The proposal demonstrates a bias toward protecting the overall System by proposing unnecessary and unjustifiable burdens for an institution seeking to leave the System, to the detriment of its members-owners.
- It is the right of the shareholders of a terminating institution to make this decision, not other institutions within the FCS or the FCA itself.
- There is a contradiction between making termination nearly impossible and maintaining the status quo, and expanding System authorities to serve a broader market, as System institutions are currently promoting through their Horizons Project.
- The proposal should be withdrawn because it is anti-termination, overwhelmingly complicated, and has provisions that are redundant, unnecessary, and arbitrary.

B. Our Consideration of the Comments Received

Upon consideration of all comments, the FCA Board has decided to make a number of changes to the regulations. We note that some of the comments are beyond the scope of this regulatory project.

It is not our intention to put up barriers or create undue burden for an institution wanting to exit the System. The proposed changes are meant only to ensure that all important interests, including the interests of borrower/stockholders, are protected and to ensure that the Agency has all the information needed to make a decision about whether or not to approve the termination request.

One commenter suggested that restricting the right of an institution to exit the System and "compete in the private sector" could lead to a weakened financial condition, entrenched management and inefficient operations in that institution. We do not believe that the rule restricts an institution from exiting the System. Rather, it provides for a deliberative process to achieve a termination of System status by taking into consideration the interests of the institution, its stockholders, and the System. After careful consideration, we do not find that our regulatory framework for termination of System status has been detrimental to the financial well-being of the System and its member institutions. We note that System institutions continue to operate in a safe and sound manner under the authorities provided by the Act and FCA Regulations.

In addition to the specific comments received on the proposed termination regulation, some non-System entities provided comments on areas outside of the proposed rule, including the objectives of the Horizons Project, the mission of the System, and certain FCS institutions' patronage practices. Although these comments will be considered by the Agency generally, we will not respond to them in this final rule because they are beyond the scope of this rulemaking project.

IV. Section-by-Section Analysis

Section 611.1200—Applicability of This Subpart

We did not propose any changes to this section and we received no comments. We adopt this section as final without changes.

Section 611.1205—Definitions That Apply in This Subpart

We proposed to define "days" to mean calendar days and "business days" to mean days on which the FCA is open for business. We also proposed to define "equity holders" to mean holders of stock, participation certificates, or other equities such as allocated equities.

We did not receive any comments on this section and adopt § 611.1205 as final without changes.

Section 611.1210—Advance Notices—Commencement Resolution and Notice to Equity Holders

We proposed requiring a terminating institution to send us a draft of its notice to equity holders before the notice is sent. If we do not request modifications to the draft notice within 2 business days of receiving it, the terminating institution may mail the notice to its equity holders. We also proposed requiring the terminating institution to place the advance notice to equity holders on its Web site and to send us copies of all contracts and agreements related to the termination. The proposed rule also requires the board of the terminating institution to vote on the termination at three separate times during the termination process.

We received comments from Rabobank, the ICBA, the ABA, and two groups of commercial bankers on the three votes required of the terminating institution's board of directors during the termination process. The first two votes are already required by the existing regulations. The first vote is the commencement resolution required by existing § 611.1210(a), when the termination process begins. The second vote, required by existing § 611.1220, specifies that the board must adopt a termination resolution before mailing the disclosure and termination plan to the FCA. The third (the new vote) is required by new § 611.1235(a), which specifies that the board must adopt a reaffirmation resolution no more than 14 days before mailing the plan of termination, including the disclosure information, to its equity holders. All comments received on the three board resolutions are summarized here.

Rabobank commented that the three-vote requirement does not support the stated purposes of the proposed rule, is burdensome, is not explained, and discourages a FCS institution from initiating a request. Rabobank asserted that the requirement is a "de facto prohibition" on exiting the System. The ICBA believed that the three-vote requirement is unreasonable and proves FCA's intent to prevent any entity from leaving the System. The ICBA noted that other procedures will ensure that the terminating institution's board will thoroughly "vet" its decision. The ICBA also pointed out that the regulation is arbitrary and capricious, and contrary to the clear statutory language, as well as unnecessary and inappropriate. The ABA stated that a third vote by the board, after FCA approves the plan, is needless and a potentially costly additional step that is meant to slow or derail the process. The ICBA and two groups of commercial bankers stated that a termination is not such an "extraordinary event" that the board has to vote three times and that our purpose is to create obstacles. Another group of commercial bankers believed that the requirement creates hurdles on voting procedures not found in other businesses, diluting the principle of local control. One group of commercial bankers suggested that a more honest approach would be for FCA to withdraw the proposal and ask Congress to pass legislation preventing terminations from the System, even though it acknowledged it would not support such legislation. It also observed that a burdensome policy does not serve the public interest and reflects efforts on

behalf of the FCC, the System's lobbying organization.

We stated in the preamble to the proposed rule that our objectives were to update the termination procedure and to ensure that an institution's board of directors, as well as FCA and the equity holders, have sufficient time to be fully informed about a termination proposal before deciding whether to approve the termination. The timing of each board resolution in the termination process is to ensure the directors are fully informed before taking the next significant step. A significant amount of time may elapse between adoption of the commencement resolution and submission of the termination plan to FCA for approval and distribution of the plan to stockholders prior to the stockholder vote. We believe that it is important and essential for the terminating board to validate its decision at these critical junctures and demonstrate continued support for the termination. The FCA and the terminating institution's equity holders need reassurance that the board of directors remains fully supportive of and committed to the termination throughout the process because we believe that a termination is an "extraordinary event" in the context of the System's congressionally mandated mission. The concept of local control is reinforced each time the board resolves to proceed with the termination process. The board can easily include its reaffirmation resolution with the disclosure and plan of termination at the time of mailing to its equity holders with a certified copy provided to FCA. For these reasons, we make no changes to the rule and adopt the provisions of §§ 611.1210, 611.1220, and 611.1235(a) as proposed.

A System bank (AgriBank) commented on the advance notice provision in § 611.1210(e) that allows a terminating bank to continue to participate in the issuance of consolidated and System-wide obligations through the termination date. The bank stated that once a System bank announces its intent to exit, the remaining banks should no longer be required to assume the joint and several liability for the debts of that exiting bank and that to do otherwise requires all remaining banks to ignore the reality of the transaction for the sole benefit of the exiting bank. The commenter added that, at a minimum, the exiting bank should be prohibited from issuing joint debt for any purpose other than the refinancing of joint debt that matures during the period prior to the exit.

The FCA did not propose any change to the provision in § 611.1210(e). We believe we must continue to allow funding for a terminating bank because, from a practical standpoint, a System bank does not have other available alternative funding sources until it terminates its System status.

Section 611.1211—Special Requirements

We proposed a new section providing that we may require a terminating institution to obtain independent analyses or studies of and rulings on matters related to the proposed termination. We proposed that if expert analyses, studies, or rulings are needed, we will require a terminating institution to engage experts acceptable to us to perform such work. We further proposed that we may require such analyses, studies, or rulings, or summaries of them, be provided to equity holders as part of the plan of termination, or separately. We also proposed that we may require a terminating institution to hold regional or local informational meetings for equity holders during the time period after they receive notice of the proposed termination and before the stockholder vote on termination. Any meetings would be subject to the plain language requirements of proposed § 611.1217(b) regarding balanced statements of anticipated benefits and potential disadvantages.

System commenters supported the FCA's proposal and encouraged FCA to require studies as needed. They asserted that the facts and circumstances of any particular termination request must be carefully evaluated and that an independent analysis of various issues raised by the request may be appropriate, including the impact on System-wide debt holders, the cost and credit rating of System-wide debt securities, tax aspects of the transaction, the valuation of dissenters' rights, the impact on other System institutions, and all the costs associated with either chartering a new institution to serve the applicable territory or amending the charters of other System institutions to serve it.

A non-System commenter (ICBA) stated that the broad scope of issues the FCA suggests studying are unwarranted and not reflective of the Act's intent. They asserted that the impact of a departure upon the System would be minimal because the System is adequately capitalized, any exit fee would remain with the System, and because the FCA has the necessary authorities to re-charter territory vacated by the terminating institution. Other non-System commenters suggested that the FCA should not be able to impose special requirements, assessments, analyses, rulings or studies before approving a termination plan of a System institution without also having some time limit or limitation on the number of requests that FCA might make of an institution.

Under section 7.10 of the Act, the FCA Board has broad regulatory authority to impose other conditions, as it considers appropriate, upon an institution seeking to terminate its System status. As discussed in the proposed rule, a termination raises issues for the FCA that are both significant and non-routine. Therefore, the FCA believes certain types of additional analysis or studies may be necessary or useful in evaluating a specific termination proposal. However, we believe that any requirements for special studies and analysis can be determined only on a case-by-case basis after considering the nature of the termination request and the extent of any studies already conducted by the terminating institution. The FCA agrees with the commenter's assessment that the System is currently strongly capitalized, as well as the statement that the FCA would act to address any territorial void that may occur as the result of an approved termination. We disagree, however, with the assertion that the System and the terminating institution's stockholders would not be impacted by a termination. While these capitalization and territorial issues are clearly factors that would be considered in any termination request, they are not the only factors that need to be considered or issues that may require additional study in evaluating the impact of a termination on the institution's stockholders, the System and other parties. The FCA will act prudently in determining the nature and extent of any required studies or analyses but believes it is inappropriate to limit, by number or amount, the requirements that we may impose in this area.

Another non-System commenter (Rabobank) objected to this proposal asserting that the additional requirements for studies and analyses and for holding informational meetings for stockholders could delay the termination process for a significant period of time and the requirements would impose substantial costs on the terminating institution. They assert that the FCA has not balanced the costs and benefits of these proposed new requirements or shown that the existing informational requirements are insufficient. The commenter suggested that, to the extent these required studies examine the System and parties other

than the terminating institution, these costs should be borne by the FCA, not by the institution.

It is not the FCA's intention to delay the termination process, nor do we believe that any delays resulting from these requirements would unduly extend the process. To the extent that special studies and analyses and informational stockholder meetings serve to extend the termination process, the FCA believes that this additional time is necessary to ensure that the stockholders of the terminating institution are fully informed as to the impact of the termination on their interests and that the FCA has the information it needs to deliberate appropriately on the issues and make a reasoned decision on the termination request.

The FCA is mindful of the costs of performing certain studies and analyses contemplated by this provision. The FCA concludes that the costs of studies and analyses related specifically to the impact of the termination on the institution and its stockholders are legitimate termination expenses that should be paid for by the institution and should not be deducted from the exit fee. However, there is merit to the commenter's suggestion that costs of studies that address issues regarding the impact of the termination on the System in general should be handled differently than studies that address the impact of the termination on the terminating institution and its stockholders. In response to this comment, in the final rule at §§ 611.1250 and 611.1255, we provide that a terminating institution required by the FCA to engage independent experts to conduct any assessments, analyses, or studies, or to request rulings that examine the impact of the termination on the System and parties other than the terminating institution and its stockholders may exclude such related expenses from the other termination expenses added back to assets under the requirements of existing §§ 611.1250(a)(4)(i) and 611.1255(a)(4)(i) pertaining to associations, and §§ 611.1250(b)(5)(i)(A) and 611.1255(b)(5)(i)(A) pertaining to banks, when calculating the terminating institution's preliminary and final exit fees. This means that the exit fee would be reduced by an amount approximately equal to the cost of such excluded expenses. We believe this change balances the responsibilities of termination expenses for the terminating institution (and the successor institution) with benefits that would be obtained from studies that examine System issues related to the termination request.

Section 611.1215—Communications With the Public and Equity Holders

We proposed a new section on communications. This section would permit a terminating institution to communicate with the public and with its equity holders during the termination process, provided that the written communications contain a legend urging equity holders to read the information statement and are filed with the FCA on the date of first use. If we believed any communications are inaccurate or misleading, we would require corrections to be made. We could also require a terminating institution to file written communications made by other participants in the termination and related transactions, such as a merger partner. The regulation contained a safe harbor for unintentional failures to make timely filings with the FCA and provided that communications that contain no new information from previously filed communications do not need to be filed.

We received comments on this proposed section from Rabobank, the ICBA, and a number of commercial bankers. Both Rabobank and ICBA supported allowing a terminating institution to communicate more freely with the public and equity holders during the termination process. All the commenters on this section recommended that we extend our monitoring of communications to additional parties. Rabobank recommended that the FCA monitor public communications about the termination made by other System institutions. ICBA recommended that we review for accuracy any information sent to the terminating institution's equity holders by parties opposed to the termination. The commercial bankers recommended that other System parties that oppose a termination should not be exempt from a requirement to disseminate accurate information. The FCA considered these recommendations but did not adopt them. While we do not support the dissemination of inaccurate information by any party, we believe that communications by the terminating institution require a higher level of scrutiny because of the disclosure requirements in section 7.11 of the Act, the fiduciary duties owed by the institution's management and directors to the institution's equity holders, and the institution's access to most all of the relevant facts surrounding a proposed termination. If a terminating institution believes other parties are making false and misleading statements, it will now be able to respond to such statements by means of public communications and direct correspondence with its equity holders. In addition, it is unlikely that parties other than the terminating institution's own equity holders would communicate directly with other equity holders. Under section 4.12A of the Act (12 U.S.C. 2184) and § 618.8310(b) of our regulations, the institution's equity holders are the only parties entitled to obtain a stockholder list for communications about the termination. Furthermore, we do not believe it is necessary or practical to monitor communications between equity holders.

The FCA adopts this section as proposed.

Section 611.1216—Public Availability of Documents Related to the Termination

Proposed § 611.1216 provides that we may post on our Web site, or require a terminating institution to post on its Web site, documents related to the termination. Disclosure of the documents will, at an early stage in the termination process, enable equity holders and others to understand the structure and ramifications of the plan of termination. We indicated in the preamble to the proposed rule that we expect the institution to post the board of directors' resolution on its Web site to commence the termination process, in addition to the notice to equity holders. We could require the posting of other documents such as charter documents of the successor institution or contracts entered into with a merger or acquisition partner. In addition, we could require the posting of the results of any special assessments, analyses, studies, and rulings. We stated that it was not our intention to require the posting of confidential information, and the terminating institution could request us to keep specific documents confidential.

The ICBA asserted that our proposal is designed to intimidate institutions from attempting to terminate and that the FCA does not have authority to deny a terminating institution's request to keep documents confidential. A number of commercial bankers also stated they disagreed with publishing sensitive information on the internet at the discretion of the Agency. A System commenter (AgriBank) stated its belief that the FCA, rather than the terminating institution, should determine whether information is confidential, and also that the information should be published on the FCA Web site.

After carefully considering the suggestions of the commenters, the FCA

has decided to adopt the final regulation without changes from the proposed rule. The purpose of this provision is to ensure a broad dissemination of the significant termination documents to equity holders and the public. We intend generally to accord confidential treatment to termination documents to the same extent we accord confidentiality to other documents we receive from System institutions. As for whether the information is on the FCA's Web site or the terminating institution's Web site, our intention is to ensure the availability of termination-related information. We will make the determination of which Web site is most appropriate for stockholders to obtain all relevant information on a case-by-case basis.

Section 611.1217—Plain Language Requirements

We proposed to move the plain language requirements in existing § 611.1223(a) to new § 611.1217 and to apply them to all communications with equity holders required by these regulations, not just to the information statement. To help ensure a balanced presentation of the information, we also provided that communications describing the anticipated benefits of the proposed termination should also give similar prominence to the potential disadvantages of the termination.

We did not receive any comments on this section and adopt it as proposed.

Section 611.1218—Role of Directors

In this proposed new section, we intended to emphasize the importance of directors in the termination process, not only when they take action on behalf of the terminating institution, but also when they act individually. First, we provided that directors could not be prohibited by confidentiality agreements or otherwise from publicly or privately commenting on a termination proposal and related transactions. In our view, such prohibitions would not be in the best interests of the equity holders because they prevent directors from consulting with the persons they represent and prevent equity holders from learning the opinions of those who should have the most detailed knowledge of the proposal. We noted that this provision would not permit directors to reveal trade secrets or confidential financial information that they would be prohibited from revealing in the absence of a confidentiality agreement or similar document.

We further proposed to provide that one or more directors have the right to obtain legal and financial advice on the proposed termination, and that the institution must pay reasonable expenses for such advice. This was intended to ensure that each director has the opportunity to obtain independent advice on the proposed transaction.

We received a number of comments on this proposal. AgriBank supported the provision on confidentiality agreements and suggested expanding it to prohibit curbs on communications by employees of the terminating institution, as well as to prohibit the terminating institution from requiring employees to express support for the termination as a condition of employment. AgriBank also stated that directors who obtain independent financial and legal advice should not be required to prove the reasonableness of their cost. Rabobank opposed permitting individual directors to seek independent legal and financial advice on a proposed termination and asserted that, if directors consulted outside parties for all board decisions, boards could no longer function. The ICBA found "particularly objectionable" our proposal to permit directors to obtain independent counsel and to permit directors to express their opinions about the termination publicly; the association also asserted that the Act does not authorize the FCA to override a legally binding confidentiality agreement. A number of commercial bankers expressed the view that our proposals in this section regarding directors' rights and in § 611.1216 regarding the public availability of information about the termination have the sole purpose of placing hurdles in an institution's way in order to prevent it from leaving the System.

In response to these comments, the FCA has revised its proposal in § 611.1218(b). In the final rule, we continue to provide that one or more directors of a terminating institution may seek independent advice on the termination, but we clarify when the board may deny payment of expenses for such advice. The board, by at least a two-thirds vote of the full board (the total number of current directors), may deny payment of such expenses if it determines that the expenses are unreasonable. If payment is denied, the board must specify why the expenses are unreasonable, notify the FCA within 1 business day of the denial, and explain the reasons for its determination in the disclosure information submitted to equity holders. We believe that this revised procedure more appropriately balances the rights of directors to obtain independent advice with the rights of the institution to avoid using the institution's assets for unreasonable expenses.

We adopt the other provisions of this section as proposed. We disagree with the assertion that the Act does not authorize the FCA to override a "legally binding" confidentiality agreement. On the contrary, section 7.10(a)(7) specifically authorizes FCA to promulgate rules to govern the termination process. In addition, we do not support requiring employees, against their will or as a condition of employment, to express support for a termination to customers (who are also current or prospective equity holders of the institution). However, we are not persuaded that employees are likely to be coerced in that manner, and we note that employees are prohibited under § 611.1219(a) from making misstatements or omissions of a material fact to equity holders. While we agree in principle that boards could not function, or would have difficulty functioning, if directors consulted outside parties for "all board decisions," that is not what we proposed. Terminating status as a System institution is an extraordinary event, and it is likely to be equally extraordinary for the institution's directors, who by and large are farmers and ranchers. In this circumstance, we believe that providing for reimbursement of reasonable expenses for independent advice will help ensure that the board members act with full knowledge and understanding of the termination and its consequences. Similarly, we believe that enabling directors who oppose termination to express their opinions to equity holders and the public is consistent with the directors' duties to stockholders and will contribute to stockholders' more complete understanding of the proposed transaction.

Section 611.1219—Prohibited Acts

We proposed to move existing § 611.1215 to this new § 611.1219. In § 611.1219, we proposed to delete the reference to our preliminary approval of the termination, because we proposed to eliminate the preliminary approval provision. We also proposed to prohibit the institution and any director, officer, employee, and agent from making any untrue or misleading statement of a material fact, or failing to disclose any material fact to the FCA about the proposed termination and any related transactions. This prohibition already applied to statements made to or withheld from current or prospective equity holders.

Rabobank asserted that the FCA should also expressly prohibit untrue or

misleading statements or omissions of a material fact by any System institution and should sanction institutions that violate the prohibition, stating that "anything less would allow an opponent of a termination to galvanize opposition based on falsehoods and deception." Although the FCA strongly opposes the dissemination of misleading and deceptive information by any party, we have decided not to incorporate Rabobank's recommendation in the regulation. The terminating institution's directors, officers, employees and agents have specific legal duties to the terminating institution and, indirectly or directly, to its equity holders; other System institutions do not. Consequently, we will not extend the regulation's prohibition to them. We note that, under the communications provisions, the terminating institution will be free to respond publicly, or in correspondence with equity holders, to statements made by other parties.

We adopt this section in the final rule without any changes from the proposal.

Section 611.1220—Termination Resolution

Proposed § 611.1220 was an expansion of the requirement in existing § 611.1220(a) for the board to adopt a termination resolution. We proposed that the board must adopt a resolution no more than 1 week before submitting the plan of termination to us. The resolution must: Indicate the board's continuing support for termination; authorize submission of the plan of termination to us; and (if we approve or take no action) authorize submission of the plan of termination to voting stockholders.

Except for comments on the three required board resolutions, we did not receive any comments on this specific provision and adopt § 611.1220 as final without changes.

Section 611.1221—Submission to FCA of Plan of Termination and Disclosure Information; Other Required Submissions

Proposed § 611.1221 revised the existing regulation to provide that a terminating institution may not file a plan of termination until at least 30 days after the institution has sent the notice to equity holders under § 611.1210(b). We also proposed to remove references to the Financial Assistance Corporation (FAC) because all outstanding FAC debt has been repaid.

We received one comment from the ICBA on the requirement that the terminating institution may not file its termination plan with FCA until at least 30 days after it mails the advance notice to its equity holders. The ICBA objected to FCA's applying an additional 30-day waiting period and stated this requirement is unnecessary because FCA will determine when the 60-day clock will begin and end for FCA's review and approval of the termination plan for submission to stockholders. The ICBA contended that the additional 30 days shifts the approval process from 60 to 90 days.

We disagree that the 30-day time period is unnecessary. In our experience, it is likely that an institution will take longer than 30 days to assemble a complete plan of termination after a decision is made to terminate. The 30-day waiting period will also encourage an institution to promptly inform us of its intention to terminate. The 30-day time period gives FCA time to prepare for receipt and review of the request. FCA will still be obligated to review and take action on the proposed termination plan and disclosure for submission to stockholders within 60 days of the filing of a complete plan of termination or, if we take no action within 60 days, the institution can submit the plan of termination to its voting stockholders. We adopt § 611.1221 as final without changes from the proposal.

Section 611.1223—Plan of Termination—Contents

We proposed numerous changes to this section including renaming this section "Plan of termination—contents." We proposed a requirement at § 611.1223(b)(7) for a terminating institution to explain in the summary to the plan of termination whether the successor institution expects to engage in a corporate restructuring in the 18 months following termination.

We received comment letters from Rabobank and the ICBA on this section. Rabobank stated that the proposal does not explain why we would need this information or how we would use it, and that the requirement would inappropriately assert FCA oversight of a non-System entity. Rabobank further noted that if the terminating institution did not disclose a possible future restructuring, the successor institution may be discouraged from such a restructuring, despite potential benefits to equity holders, due to fear of interference from the FCA. Rabobank recommended that this requirement be eliminated. Rabobank stated that once an FCS institution has terminated its System charter and becomes a different type of financial institution, the institution is no longer regulated by FCA. The ICBA believed that this provision was without merit and should be deleted from the rule. The ICBA noted that an appropriate Federal or State authority charters the successor institution as a bank, savings and loan association, or other financial institution, so it is likely that this information will already be disclosed to voters. The commenters further stated that FCA is adding another legal roadblock, suggesting the successor institution could be sued after termination if an additional charter conversion was to occur.

We believe that this requirement benefits the equity holders who are entitled to know what the future plans of the terminating institution could include. If the terminating institution's conversion to another financial institution involves its acquisition by another financial services company or corporation, stockholders need to be fully informed before voting on the termination proposal. In addition, FCA could not interfere with the actions of the successor institution because the successor institution will not be subject to FCA oversight and regulation. Our principal concern is the right of stockholders to know if the successor institution, within the space of 18 months or less, will undergo further reorganization based on business planning underway at the time the termination application is filed with FCA. If the terminating institution has no such plans or is unaware of any future events that might result in its subsequent reorganization within the 18-month period following termination, no such disclosure will be required. Consequently, we are not changing this provision of the rule and adopt it as proposed.

We also proposed in paragraph (c)(7) to require a terminating institution to include summaries or copies of termination-related contracts and agreements, including copies of contracts and agreements in connection with the termination and operations of the successor institution; in paragraph (c)(13) to require the institution to disclose employment, retirement, and severance agreements; in paragraph (c)(26) that we may require a terminating institution to disclose assessments, analyses, studies, or rulings that we require the institution to obtain under proposed § 611.1211; in paragraph (c)(29) that we will require the terminating institution to include statements by directors that desire to make individual or group statements regarding the proposed termination and related transactions; and in paragraph (c)(3) that we would require the terminating institution to include a copy

of the reaffirmation resolution, a proposed new requirement set forth in proposed § 611.1235.

We did not receive any comments on these other provisions and adopt them, except for paragraph (c)(30), as final without changes. We have deleted paragraph (c)(30) in the final rule because the institution must send us the disclosure information before the board votes on the reaffirmation resolution.

Section 611.1230—FCA Review and Approval—Plan of Termination

Proposed new § 611.1230 separated our approval of the plan of termination and the related disclosure to stockholders, as required by section 7.11(a)(1) of the Act, from our decision on the termination as required by section 7.10(a)(2) of the Act. We proposed to retain provisions on our section 7.11 approval in this section and to move the section 7.10 approval to proposed § 611.1247. Our review of the disclosure information will precede the submission of the information to equity holders, as in the existing regulation, and we will begin the statutory review period on the date the disclosure information is complete, as determined by us. We proposed to review and approve or disapprove the termination itself after the equity holders have voted to approve the termination.

We received comments on this provision from all commenters. The FCC, three System banks, and four System associations stated they recognized the need for FCA to separate the approval of the termination plan, for purposes of distribution for a stockholder vote, from approval of the termination itself. At the same time, System commenters urged us to begin our substantive review as soon as possible after the application is received and to retain flexibility to make a decision as early as possible in the process so that the matter is not pending for a lengthy period. One bank noted that while improved information, analysis, and transparency are important objectives, FCA must be prepared to act when circumstances warrant, because failure to act could affect the System's investors and customers. One non-System commenter, the ABA, agreed that separating the review of the disclosure information from the review of the termination itself is appropriate. However, it expressed concern about FCA's ability to delay the process by requiring an unending level of information before the plan is deemed complete and argued that we should impose a reasonable cut-off point so that the institution can move forward. Rabobank stated that FCA's two approvals of the termination reduce clarity and impose costs and administrative burdens that outweigh the benefits. Rabobank believed that FCA burdens and encumbers the process to a degree that Congress explicitly did not intend and that we lack the authority to give ourselves intermediate approval steps. Rabobank also stated that requiring preliminary FCA review of the disclosure would delay the termination process without contributing a significant benefit to that process or to the stakeholders. One group of commercial bankers objected to this provision because it specifies no time limit for the conclusion of the process. Another group of commercial bankers argued that we create unnecessary barriers, legal impediments, time delays, and other obstacles for any FCS institution that may want to exit the System and that these obstacles are unparalleled in the financial services industry.

We agree with commenters that we should make a decision on the termination itself as early in the process as possible. Our separation of approval of the termination plan and disclosure for submission to stockholders from our approval (or disapproval) on the termination is not meant to delay unnecessarily the termination decision. We acknowledge that failure to act promptly and decisively may affect stockholders and investors' confidence. We will begin our substantive review as soon as possible and make a decision as early as possible. We disagree with other commenters that we are creating time delays and other obstacles by our process. We have always had the discretion, in our review and approval of other corporate applications (such as mergers and consolidations), to determine whether the application is complete before beginning the 60-day review. We have used our discretion by communicating promptly with institutions whose applications were incomplete and working closely with them to ensure completion. We will follow this approach as well for a termination request in determining whether it is complete and in notifying the terminating institution when the 60-day review period begins. In the alternative, FCA could reject a plan because it was incomplete, but the institution would need to begin the process anew. The proposal permits a more streamlined process. Once FCA notifies the institution that the termination plan and disclosure is complete, we are bound by the statutory requirement of section 7.11(a)(1) to act on the plan within 60 days. Should the FCA Board fail to act within the 60-day period, the institution may submit the plan and related disclosure to its stockholders for a vote. Accordingly, we adopt this provision as proposed.

Section 611.1235—Plan of Termination—Distribution

We proposed requiring the terminating institution's board of directors to adopt a reaffirmation resolution approving the termination not more than 14 days before mailing the plan to stockholders in order to ensure the continuing support of the board for the termination. Comments received on this provision and our response are included with the discussions of required board resolutions under § 611.1210.

We also proposed to require the terminating institution to provide the plan of termination to equity holders at least 45 days (instead of the existing regulation's 30 days) before the stockholder vote will occur.

One non-System commenter, the ABA, disagreed with our extension for the stockholder review period from 30 days in the current rule to 45 days, arguing that it is a needless delay and that 30 days is sufficient for stockholders to review and question any termination plan.

On the contrary, stockholders will need to thoroughly review an expected extensive disclosure and may have a number of questions to ask the institution's board and management. The additional 15 days will permit informational meetings to be held throughout the institution's territory, as proposed in § 611.1211(b), so that stockholders can have their questions answered and can discuss the pros and cons with other member-borrowers and with institution directors. These meetings will also give management an opportunity to explain the termination plan and procedures. We are finalizing this provision as proposed, except that we have made a non-substantive change to paragraph (a) to remove redundant language.

Section 611.1240—Voting Record Date and Stockholder Approval

Except for existing § 611.1240(c), which we proposed to move to § 611.1235, we proposed to retain the remainder of existing § 611.1240 with the following revisions. In paragraph (a), we proposed to require the stockholder vote to take place at least 60 days after we have approved the plan of termination (or 60 days after the end of our review period) instead of no more than 60 days after. We proposed this change to ensure that voters have

enough time to review and evaluate the proposal. In paragraph (c), we proposed a quorum requirement of 30 percent of voting stockholders that must be present (in person or by proxy) at the meeting. This would not require 30 percent of voting stockholders to cast a vote but would require their presence (in person or by proxy) at the meeting. We made this proposal because we believe an issue of such importance to all equity holders should be deliberated upon by a significant number of the voting stockholders, regardless of the number who ultimately vote. In paragraph (d), we restated the requirement in section 7.10(a)(6) of the Act that a majority vote by voting stockholders present and voting in person or by proxy at a duly authorized meeting is needed to approve the termination.

We also proposed to add a reference in new paragraph (e) to § 611.340, to clarify that the voting security regulation applies to this stockholder vote as well as § 611.330, which covers confidentiality in voting.

We received comments on the proposed 30-percent quorum requirement from a number of commenters. The System commenters supported the quorum requirement in this section for the first vote but not for the reconsideration vote in § 611.1245, as discussed below. About half of the commercial bankers recommended a simpler, more convenient voting process, stating that, "in the day of emails and the internet," we should not require 30 percent of stockholders to be physically present for the meeting. The ICBA, ICB of ND, and ABA also objected to requiring 30 percent of stockholders to be physically present during a termination vote because of the difficulty and cost to the stockholders, some of whom live in remote rural areas. In addition, the ABA asserted that requiring at least 60 days between FCA approval of the plan of termination and the stockholder vote caused an unnecessary delay in the termination process.

The proposed rule does not require voting stockholders to be physically present at the stockholders' meeting in order to meet the quorum. As the rule says, voting stockholders must be present "in person or by proxy." Voting stockholders have the option of attending the meeting in person, giving their proxies to another voting stockholder of their choice who will attend the meeting in person, or sending their proxies to the institution with (or without) instructions as to how to vote. Moreover, a voting process that permits voting via the Internet is not prohibited, provided the institution complies with the voting security and confidentiality requirements of the Act and FCA regulations.

As for the 60-day minimum period between FCA approval and the stockholder vote, we disagree that this will cause unnecessary delay in the termination process. We believe that at least 2 months are necessary for scheduling any pre-vote or "information" meetings for stockholders that we require or that the terminating institution wishes to hold, and for printing and distributing the disclosure information for stockholders.

We adopt this section in the final rule without any changes from the proposal.

Section 611.1245—Stockholder Reconsideration

In paragraph (b) of this section, we proposed adding a quorum requirement of at least 30 percent of voting stockholders for the same reasons we proposed a quorum requirement for the first stockholder vote. The stockholder reconsideration vote is provided for in section 7.9 of the Act (12 U.S.C. 2279c–2), which gives stockholders opposing an intra-System merger, transfer of lending authority, or termination the right to petition their institution for a re-vote (reconsideration vote) following any approval of the transaction. The petition must be signed by at least 15 percent of the voting stockholders and must be delivered to the FCA within 35 days after the mailing of the notice to stockholders of the results of the first vote. If a majority of the voting stockholders votes against the transaction in the reconsideration vote, the transaction cannot take place.

All of the System commenters objected to having a 30-percent quorum requirement for the reconsideration vote, even though they supported the 30-percent quorum requirement for the first vote. They asserted that it was unduly burdensome and contrary to the Act. They did not specify how they believed it was contrary to the Act, but they said that the quorum requirement could create an incentive for stockholders supporting termination to boycott the reconsideration vote meeting. Non-System commenters opposed what they believed was a requirement that stockholders be physically present to count towards the quorum for the reconsideration vote; as we explain above, this interpretation is incorrect, and there is no requirement for stockholders to be physically present to make up the quorum for either vote.

We have considered the recommendation to eliminate the quorum requirement for the reconsideration vote and have decided to retain it. The quorum requirements for the reconsideration vote, as well as for the first stockholder vote, are consistent with our authorities under the Act to regulate the termination process. If we were to incorporate the System commenters' recommendation, it would be more difficult for the terminating institution to obtain the first vote than for stockholders to obtain a reconsideration vote. Furthermore, without the same quorum requirement for the reconsideration vote, there would be a possibility that a termination could be blocked by a significantly smaller number of stockholders in a reconsideration vote than the number of stockholders who originally voted in favor of it. We believe this result would be unfair. Under our proposal, it will be no more difficult to achieve a quorum for the reconsideration vote than for the first vote.

We adopt this section in the final rule without any changes from the proposal.

Section 611.1246—Filing of Termination Application and Its Contents

Proposed new § 611.1246 provides that, within 90 days of notifying us that voting stockholders have approved the plan of termination, a terminating institution may submit a termination application containing the information that is required by the termination regulations and any additional information that we request or that the terminating institution's board wishes to submit.

We received no comments that directly relate to the filing of the termination application with FCA following the stockholder vote. We adopt the provision as proposed.

Section 611.1247—FCA Review and Approval—Termination

We proposed new § 611.1247 that would provide for a separate approval of the termination application. As we noted above in the preamble discussion of § 611.1230, we proposed to review the termination application after our review of the plan of termination required by section 7.11(a)(1) of the Act and after a stockholder vote approving the termination. In this proposed new section, paragraph (a) stated that, after we receive the termination application, we will review it and either approve or disapprove the termination. Paragraph (b) stated that we will disapprove the termination if we determine that there are one or more appropriate reasons for disapproval, consistent with our statutory and regulatory authorities. We proposed to delete existing § 611.1230(b), which provides that we

may disapprove a termination if we determine it would have a "material adverse effect on the ability of the remaining System institutions to fulfill their statutory purpose." While we did not rule out disapproval of a termination based on its "material adverse effect" on the remaining System institutions, we stated that we may disapprove a termination for any appropriate reason.

Proposed paragraph (c) set forth conditions required for our approval of the termination. In proposed paragraph (d), we provided that, when we approve a termination, we will also determine an effective date for the termination. Such date could be no earlier than the last to occur of the following events: (1) Fulfillment of the conditions in paragraph (c) of this section; (2) the terminating institution's proposed termination date; (3) 90 days after we received the termination application; or (4) 15 days after any reconsideration vote.

We received 33 comment letters on this provision of the proposed rule. In their comments on proposed § 611.1230, eight System commenters urged FCA to begin our substantive review as soon as possible after the application is received and to retain flexibility to make a decision as early as possible in the process so the matter is not pending for a lengthy period. One System bank noted that while improved information, analysis, and transparency are important objectives, FCA must be prepared to act when circumstances warrant, because failure to act could affect the System's investors and customers. In our response above to the comments on § 611.1230, we agreed on the importance of decisive action as early as possible. One System bank commented that we should approve a termination only if the institution's exit further fulfills the congressionally mandated mission and, at a minimum, any approval of a request should not be detrimental to the remaining institutions' ability to fulfill the mission. Rabobank stated that FCA's second vote, which would follow stockholder approval and three votes by the board of directors, is unfair to stockholders because it would veto the equity holders' mandate and undercut the democratic principles that give the stockholder-owners the right to make decisions governing their institution. Rabobank commented that our failure to impose a timeframe for FCA's vote could delay the process indefinitely. Rabobank also objected to our removal of all references to criteria that we may use or reasons we may give for disapproval, giving System institutions no way to ascertain whether a termination will be approved until an extraordinary amount of time and money has been expended. In particular, Rabobank objected to our removal of the criterion of "material adverse effect" from the regulation that governs our review, and argued that it is the only reason for disapproving a termination request, assuming all regulations were satisfied. It asked that this criterion be preserved from the current rule and that FCA clarify that we will disapprove a termination only based on a determination that the termination would have a material adverse effect. In the alternative, Rabobank asked FCA to identify additional criteria for disapproval and then republish its proposed rule with criteria for public comment. Rabobank stated that FCA owes System institutions greater transparency in how it will evaluate termination requests and recommended that we articulate clear standards for how we would review the request and make the decision after board and stockholder approval. The ICBA commented that the "material adverse effect" criterion should stay in the regulation as it is the one that makes the most sense in directing our approval process, and that all other issues, such as impact on stockholders, would have already been thoroughly vetted during the disclosure review process. The ICBA further noted that the payment of the exit fee and debt obligations will already ensure there is not an adverse effect on System institutions. The ABA noted that FCA retains the right to deny a termination if it has a materially adverse impact on the rest of the System even though the proposed rule eliminated this as a specified reason for denial. Also, the ABA expressed concern that "materially adverse effect" is not quantified in the proposed rule and suggested that FCA set forth a rule for public comment on the level of impact that we would consider material. In addition, the ABA criticized us for setting no time limit for approval or disapproval and establishing no criteria by which we would make the decision, noting that the grounds for rejection, if already approved by the stockholder owners, should be extremely restricted because we have numerous options for maintaining FCS services in the territory. The ABA recommended that FCA set out its potential reasons for rejection of a termination for notice and public comment. One group of commercial bankers commented that FCA may reject any termination plan even after the local institution has followed all procedures. It noted that FCA, as the System's regulator and surety of stockholder rights, should clearly spell out in advance the basis and timeframes for any such determination (of approval or disapproval). A second group of commercial bankers stated that the proposal should set clear deadlines for various stages of the approval process but that the proposal leaves many of the decision deadlines open-ended.

We believe that the System bank's suggestion that we should approve a termination only if the exit furthers fulfillment of the System's mission or, at minimum, approve a termination only if it is *not detrimental* to the remaining System institutions' ability to fulfill the mission is too narrow a reading of our statutory authority. The Act provides FCA with discretion to approve or disapprove a termination application and does not restrict our reasons for disapproving a proposed termination. With respect to our decision on the termination, FCA has statutory authority to approve or disapprove the termination, whether before or after a stockholder vote. Therefore, FCA disapproval would not be a "veto" of a stockholders' "mandate," but would be an exercise of FCA's approval authority. In making our decision, we will consider all relevant factors, including stockholder actions on the termination proposal.

As explained in the preamble to the proposed rule, we have determined that a clear separation of the two approvals will ensure the proper level of scrutiny as to the merits of the proposal apart from the adequacy of the disclosure materials. Termination of System status raises numerous issues for the terminating institution's stockholders, the affiliated funding bank or remaining affiliated associations (as applicable), investors, and the public, all of whom must be considered. Three non-System commenters (Rabobank, ICBA, ABA) stated their belief that the *only* basis for our denial is if the termination has a material adverse effect on the ability of the remaining System institutions to fulfill their statutory purpose. Their intense focus on this one criterion supports our rationale for deleting this language from the rule because it diverts attention from any other reason(s) that we may need to consider. We may still decide that a termination should be denied based on the material adverse effect that it has on the remaining System institutions; however, it may not be the only reason or the principal reason. There are many factors that we will consider, including, but not limited to, the results of any stockholder vote on the termination. Under the law, we are

obligated to provide reasons for any disapproval, and our reasons cannot be arbitrary or capricious. Enumerating specific reasons for disapproval before we know the details of a termination application would not be appropriate and would unnecessarily limit our reasons for disapproval. Thus, we adopt this section as proposed.

Section 611.1250—Preliminary Exit Fee Estimate and § 611.1255—Exit Fee Calculation

We proposed several parallel revisions to these sections, which explain how to calculate the preliminary exit fee estimate that must be included in the plan of termination, and how to calculate the final exit fee. In §§ 611.1250(a)(4)(i) and 611.1255(a)(4)(i) pertaining to associations, and in §§ 611.1250(b)(5)(i)(A) and 611.1255(b)(5)(i)(A) pertaining to banks, we added expenditures for tax services, studies, and equity holder meetings as examples of expenses an institution may incur that are related to a termination. In § 611.1250(c), which contains the 3-year look-back adjustment provision, we expressly include real property and servicing rights as assets that may be undervalued, overvalued, or not recorded on the institution's books. We did not receive any comments on these provisions and adopt the proposed as final without any changes.

We also proposed to require a terminating institution to add to assets any tax benefit that arises due to the termination. The proposed rule noted that we already have discretionary authority under existing § 611.1250(c)(1)(vi) to require such an adjustment, but that we decided to expressly apply it to all terminations. This requirement is intended to balance existing and continuing provisions allowing for the deduction of tax expenses, due to termination, from assets in the preliminary and final exit fee calculations. A non-System commenter (Rabobank) suggested that FCA was attempting to incorporate "all historical tax benefits," however derived, into the exit fee calculation. In proposing this provision, it was not our intention to go back through all the years of the terminating institution's existence and attempt to assess and recapture past tax benefits. Rather, the intent of the provision is only to ensure that any tax benefit that arises as a result of the termination itself be included in assets and in the calculation of the exit fee. FCA believes this would be on par with existing regulations at §§ 611.1250(a)(4)(ii)(B) and 611.1255(a)(4)(ii)(B) pertaining to associations, and in §§ 611.1250(b)(5)(iii)(C) and 611.1255(b)(5)(iii)(C) pertaining to banks, that address adjustments to assets for tax expenses resulting from the termination. The non-System commenter stated that the calculation of the exit fee should be based on financial statements prepared in accordance with generally accepted accounting principles (GAAP). We agree that this should be the starting point for determining the exit fee. However, the FCA has long held the position that strict application of GAAP may not result in the fairest treatment of certain types of transactions. For example, the existing rule provides that the final exit fee must be calculated based on the average daily balances of assets and liabilities for the 12-month period preceding the termination date. In the development of the existing rule, we stated that using average daily balances mitigates the problem of widely fluctuating account balances that occur and the variability that would result from the timing of the exit fee computation date. The FCA has stated that some individual transactions can increase or decrease the exit fee to such a degree that average balances are not sufficient to offset their impact. As such, the existing rule also provides that the FCA may require certain adjustments that we deem necessary to ensure that the terminating institution appropriately values its assets and liabilities. The required adjustments are solely for the purpose of calculating the exit fee, and the institution would not be required to restate its financial statements to reflect these adjustments. The FCA believes that these provisions for adjustments are necessary in order to ensure that the terminating institution does not engage in activities that weaken its capital position in order to diminish or eliminate the exit fee.[4] As a result, we are finalizing this provision as proposed.

In the proposed rule, we solicited comments on whether we should limit the tax expense deductions from, and tax benefit additions to, assets in the exit fee calculation to Federal taxes. We were also interested in whether we should more narrowly draw the tax provision so that it includes only income taxes, or unavoidable tax expenses, or both. We received no comments on these issues. In consideration of this, we have opted not to limit the various types of taxes that may be included in the calculation of the exit fee and, as a result, make no changes in the final rule.

In § 611.1250(c), we proposed to replace references to "tax liability" with the term "tax expense" to clarify that we intend to refer to both current and deferred taxes. In paragraphs (a) and (b) of §§ 611.1250 and 611.1255, we proposed to remove outdated references to the FAC. We received no comments on these provisions and adopt as final the proposed changes.

Section 611.1260—Payment of Debts and Assessments—Terminating Association

Section 611.1265—Retirement of a Terminating Association's Investment in Its Affiliated Bank

Section 611.1270—Repayment of Obligations—Terminating Bank

Section 611.1275—Retirement of Equities Held by Other System Institutions

Section 611.1280—Dissenting Stockholder's Rights

We proposed to remove outdated references to the FAC in all the above sections except § 611.1265, to which we did not propose any changes. We did not receive any comments on the proposed changes and adopt the provisions as proposed.

We also received comments from System commenters on provisions we did not propose to amend. We would not consider adopting any of the commenters' suggestions on these provisions without publishing them for public comment; however, we would like to respond to the comments here. A System bank recommended that, in § 611.1260, we require a terminating association to reimburse its affiliated bank for any termination-related expenses incurred by the bank, so that the remaining associations will not be "burdened" with the costs of the termination. We note that the affiliated bank will keep any unallocated retained earnings attributable to the terminating association, and those earnings will indirectly benefit the remaining associations. The System bank also objected to our existing requirement in § 611.1265 that, if a terminating association's equities in its affiliated bank are not subject to a revolvement plan or an agreement between the association and the bank, those equities must be retired by the bank upon repayment of the direct loan. The bank asserted that the equities in question should be retirable only at the bank's discretion. In our view, such a provision could make it possible for a bank to frustrate the termination plan of an

[4] *See* the preamble discussion of "Section 611.1240—Exit Fee" in our proposed termination rule, 55 FR 28639 (July 12, 1990).

association. Since the Act permits an association to terminate without its bank's approval, we do not believe it would be appropriate to give the bank the power to impede the termination by refusing to retire equities. Of course, should retirement of the association's investment in its bank cause the bank to fall below its minimum capital requirements or to be in an unsafe or unsound condition, we would prohibit the bank from retiring the equities at that time.

The System bank further commented that, under § 611.1270, a terminating bank should be required to enter into an agreement with the remaining System banks for payment of its primary liability on System-wide debt, and also that the terminating bank must make a provision for payment of joint and several liability that is acceptable to the other banks. In previous rulemakings on this issue of repayment of System-wide debt, we proposed for public comment and considered a range of options. We believe the existing regulation is a fair balance of the interests of a terminating bank and the banks remaining in the System and will not give the remaining banks a de facto veto over the terminating bank's termination. In the case of primary liability, the terminating bank must propose a plan after consulting with the other System banks, the Federal Farm Credit Banks Funding Corporation, and the Farm Credit System Insurance Corporation (FCSIC). The FCA must then decide whether the plan is acceptable. In the case of joint and several liability, the FCA will specify how the terminating bank will provide for this only in the event that the terminating bank and the remaining banks are unable to reach agreement.

The FCC and several System institutions suggested that we consider revising § 611.1280, which specifies how to calculate the value of the equities of a dissenting stockholder. One commenter suggested that a dissenting stockholder's interest be calculated without any deduction of the amount of the exit fee from the terminating institution's assets. On November 5, 1999, we published a proposed rule in the **Federal Register** that provided for such a calculation prior to deduction of the exit fee. (*See* 64 FR 60370.) However, the FCA did not adopt the proposal but instead reproposed the rule in 2001. (*See* 66 FR 43536, August 20, 2001.) In the preamble to that reproposal, we stated our view that, under the Act, payment of the exit fee was a prerequisite to a terminating institution's exercise of its authority to terminate. Consequently, the exit fee must be calculated and set aside before the dissenting stockholders' interests are valued. We note that, under this formula, dissenting stockholders will receive approximately the same proportionate value for their equities, whether they dissent or choose to be stockholders of the successor institution.

Section 611.1285—Loan Refinancing by Borrowers

We did not propose any changes to this section and we received no comments.

Section 611.1290—Continuation of Borrower Rights

We did not propose any changes to this section and we received no comments.

V. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies this final rule will not have a significant economic impact on a substantial number of small entities. Each of the Farm Credit banks, considered with its affiliated associations, has assets and annual income over the amounts that would qualify them as small entities. Therefore, System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 611

Agriculture, Banks, Banking, Rural areas.

■ For the reasons stated in the preamble, part 611 of chapter VI, title 12 of the Code of Federal Regulations is amended as follows:

PART 611—ORGANIZATION

■ 1. The authority citation for part 611 is revised to read as follows:

Authority: Secs. 1.3, 1.4, 1.13, 2.0, 2.1, 2.10, 2.11, 3.0, 3.2, 3.21, 4.12, 4.12A, 4.15, 4.20, 4.21, 5.9, 5.10, 5.17, 6.9, 6.26, 7.0–7.13, 8.5(e) of the Farm Credit Act (12 U.S.C. 2011, 2012, 2021, 2071, 2072, 2091, 2092, 2121, 2123, 2142. 2183, 2184, 2203, 2208, 2209, 2243, 2244, 2252, 2278a–9, 2278b–6, 2279a—2279f–1, 2279aa–5(e)); secs. 411 and 412 of Public Law 100–233, 101 Stat. 1568, 1638; secs. 409 and 414 of Public Law 100–399, 102 Stat. 989, 1003, and 1004.

■ 2. Revise subpart P to read as follows:

Subpart P—Termination of System Institution Status

Sec.

Subpart P—Termination of System Institution Status

§ 611.1200 Applicability of this subpart.

The regulations in this subpart apply to each bank and association that desires to terminate its System institution status and become chartered as a bank, savings association, or other financial institution.

§ 611.1205 Definitions that apply in this subpart.

Assets means all assets determined in conformity with GAAP, except as otherwise required in this subpart.

Business days means days the FCA is open for business.

Days means calendar days.

Equity holders means holders of stock, participation certificates, or other equities such as allocated equities.

GAAP means "generally accepted accounting principles" as that term is defined in § 621.2(c) of this chapter.

OFI means an "other financing institution" that has a funding and discount agreement with a Farm Credit bank under section 1.7(b)(1) of the Act.

Successor institution means the bank, savings association, or other financial institution that the terminating bank or association will become when we revoke its Farm Credit charter.

§ 611.1210 Advance notices—commencement resolution and notice to equity holders.

(a) *Adoption of commencement resolution.* Your board of directors must begin the termination process by adopting a commencement resolution stating your intention to terminate Farm Credit status under section 7.10 of the Act. Immediately after you adopt the commencement resolution, send a certified copy by overnight mail to us and to the Farm Credit System Insurance Corporation (FCSIC). If your institution is an association, also send a copy to your affiliated bank. If your institution is a bank, also send a copy to your affiliated associations, the other Farm Credit banks, and the Federal Farm Credit Banks Funding Corporation (Funding Corporation).

(b) *Advance notice.* Within 5 business days after adopting the commencement resolution, you must:

(1) Send us copies of all contracts and agreements related to the termination.

(2) Subject to paragraph (b)(2)(ii) of this section:

(i) Send an advance notice to all equity holders stating you are taking steps to terminate System status. Immediately upon mailing the notice to equity holders, you must also place it in a prominent location on your Web site. The advance notice must describe the following:

(A) The process of termination;

(B) The expected effect of termination on borrowers and other equity holders, including the effect on borrower rights and the consequences of any stock retirements before termination;

(C) The type of charter the successor institution will have; and

(D) Any bylaw creating a special class of borrower stock and participation certificates under paragraph (f) of this section.

(ii) Send us a draft of the advance notice by facsimile or electronic mail before mailing it to your equity holders. If we have not contacted you within 2 business days of our receipt of the draft notice regarding modifications, you may mail the notice to your equity holders.

(c) *Bank negotiations on joint and several liability.* If your institution is a terminating bank, within 10 days of adopting the commencement resolution, your bank and the other Farm Credit banks must begin negotiations to provide for your satisfaction of liabilities (other than your primary liability) under section 4.4 of the Act. The Funding Corporation may, at its option, be a party to the negotiations to the extent necessary to fulfill its duties with respect to financing and disclosure. The agreement must comply with the requirements in § 611.1270(c).

(d) *Disclosure to loan applicants and equity holders after commencement resolution.* Between the date your board of directors adopts the commencement resolution and the termination date, you must give the following information to your loan applicants and equity holders:

(1) For each loan applicant who is not a current stockholder, describe at the time of loan application:

(i) The effect of the proposed termination on the prospective loan; and

(ii) Whether, after the proposed termination, the borrower will continue to have any of the borrower rights provided under the Act and regulations.

(2) For any equity holders who ask to have their equities retired, explain that the retirement would extinguish the holder's right to exchange those equities for an interest in the successor institution. In addition, inform holders of equities entitled to your residual assets in liquidation that retirement before termination would extinguish their right to dissent from the termination and have their equities retired.

(e) *Terminating bank's right to continue issuing debt.* Through the termination date, a terminating bank may continue to participate in the issuance of consolidated and System-wide obligations to the same extent it would be able to participate if it were not terminating.

(f) *Special class of stock.* Notwithstanding any requirements to the contrary in § 615.5230(b) of this chapter, you may adopt bylaws providing for the issuance of a special class of stock and participation certificates between the date of adoption of a commencement resolution and the termination date. Your voting stockholders must approve the special class before you adopt the commencement resolution. The equities must comply with section 4.3A of the Act and be identical in all respects to existing classes of equities that are entitled to the residual assets of the institution in a liquidation, except for the value a holder will receive in a termination. In a termination, the holder of the special class of stock receives value equal to the lower of either par (or face) value, or the value calculated under § 611.1280(c) and (d). A holder must have the same right to vote (if the equity is held on the voting record date) and to dissent as holders of similar equities issued before the commencement resolution. If the termination does not occur, the special classes of stock and participation certificates must automatically convert into shares of the otherwise identical equities.

§ 611.1211 Special requirements.

(a) *Special assessments, analyses, studies, and rulings.* At any time after we receive your commencement resolution, and as we deem necessary or useful to evaluate your proposal, we may require you to engage independent experts, acceptable to us, to conduct assessments, analyses, or studies, or to request rulings, including, but not limited to:

(1) Assessments of fair value;

(2) Analyses and rulings on tax implications; and

(3) Studies of the effect of your proposal on equity holders (including the effect on holders in their capacity as borrowers), the System, and other parties.

(b) *Informational meetings.* After the advance notice, but before the stockholder vote, we may require you to hold regional or local informational meetings in convenient locations, at convenient times, and in a manner conducive to accommodating all equity holders that wish to attend, to discuss equity holder issues and answer questions. These meetings are subject to the plain language requirements of § 611.1217(b) regarding balanced statements.

§ 611.1215 Communications with the public and equity holders.

(a) *Communications after commencement resolution and before termination.* The terminating institution may communicate with equity holders and the public regarding the proposed termination, as long as written communications (other than non-public communications among participants, *i.e.*, persons or entities that are parties to a proposed corporate restructuring involving the successor institution, or their agents) made in connection with or relating to the proposed termination and any related transactions are filed in accordance with paragraph (c) of this section and the conditions in this section are satisfied.

(b) To rely on this section, you must include the following legend in each communication in a prominent location:

Equity holders should read the plan of termination that they have received or will receive (as appropriate) because it contains important information, including an enumerated statement of the anticipated benefits and potential disadvantages of the proposal.

(c) All your written communications and all written communications by your directors, employees, and agents in

connection with or relating to the proposed termination or any related transactions must be filed with us under this section on or before the date of first use.

(d) We will require you to correct communications that we deem are misleading or inaccurate.

(e) In addition to the filings we require under paragraph (c) of this section, we may require you to file timely any written communications you have knowledge of that are made by any other participants or their agents in connection with or related to the proposed termination or to any transaction related to the proposed termination.

(f) An immaterial or unintentional failure to file or a delay in filing a written communication described in this section will not result in a violation of this section, as long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The written communication is filed as soon as practicable after discovery of the failure to file.

(g) Communications that exist in electronic form must be filed electronically with the FCA as we direct. For communications that do not exist in electronic form, you must timely notify us by electronic mail and send us a copy by regular mail.

(h) You do not need to file a written communication that does not contain new or different information from that which you have previously publicly disclosed and filed under this section.

§ 611.1216 Public availability of documents related to the termination.

(a) We may post on our Web site, or require you to post on your Web site:

(1) Results of any special assessments, analyses, studies, and rulings required under § 611.1211;

(2) Documents you submit to us or file with us under § 611.1215; and

(3) Documents you submit to us under section 7.11 of the Act that are related directly or indirectly to the proposed termination, including but not limited to contracts entered into in connection with or relating to the proposed termination and any related transactions.

(b) We will not post confidential information on our Web site and will not require you to post it on your Web site.

(c) You may request that we treat specific information as confidential under the Freedom of Information Act, 5 U.S.C. 552 (*see* 12 CFR part, 602 subpart B). You should draft your request for confidential treatment narrowly to extend only to those portions of a document you consider to be confidential. If you request confidential treatment for information that we do not consider to be confidential, we may post that information on our Web site after providing notice to you. On our own initiative, we may determine that certain information should be treated as confidential and, if so, we will not make that information public.

§ 611.1217 Plain language requirements.

(a) *Plain language presentation.* All communications to equity holders required under §§ 611.1210, 611.1223, 611.1240, and 611.1280 must be clear, concise, and understandable. You must:

(1) Use short, explanatory sentences, bullet lists or charts where helpful, and descriptive headings and subheadings;

(2) Minimize the use of glossaries or defined terms;

(3) Write in the active voice when possible; and

(4) Avoid legal and highly technical business terminology.

(b) *Balanced statements.* Communications to equity holders that describe or enumerate anticipated benefits of the proposed termination should also describe or enumerate the potential disadvantages to the same degree of detail.

§ 611.1218 Role of directors.

(a) *Statements by directors.* Directors may not be prohibited by confidentiality agreements or otherwise from publicly or privately commenting orally or in writing on the termination proposal and related matters.

(b) *Directors' right to obtain independent advice.* One or more directors of a terminating institution or an institution that is considering terminating have the right to obtain independent legal and financial advice regarding the proposed termination and related transactions. The institution must pay for such advice and related expenses as are reasonable in light of the circumstances. A request by a director or directors for the institution to pay such expenses cannot be denied unless the board of directors, by at least a two-thirds vote of the full board (the total number of current directors), denies the request. The institution must act on any request in a timely manner. For any denial of payment, the board must provide notice to the FCA within 1 business day of the denial, fully document the reasons for such a denial, and ensure that the institution discloses the nature of the request and the reasons for any denial to the terminating institution's equity holders in the plan of termination.

§ 611.1219 Prohibited acts.

(a) *Statements about termination.* Neither the institution nor any director, officer, employee, or agent may make any untrue or misleading statement of a material fact, or fail to disclose any material fact, to the FCA or a current or prospective equity holder about the proposed termination and any related transactions.

(b) *Representations regarding FCA approval.* Neither the institution nor any director, officer, employee, or agent may make an oral or written representation to anyone that our approval of the plan of termination or the termination is, directly or indirectly, either a recommendation on the merits of the proposal or an assurance that the information you give to your equity holders is adequate or accurate.

§ 611.1220 Termination resolution.

No more than 1 week before you submit your plan of termination to us, your board of directors must adopt a termination resolution stating its support for terminating your status as a System institution and authorizing:

(a) Submission to us of a plan of termination and other required submissions that comply with § 611.1223; and

(b) Submission of the plan of termination to the voting stockholders if we approve the plan of termination under § 611.1230 or, if we take no action, after the end of our approval period.

§ 611.1221 Submission to FCA of plan of termination and disclosure information; other required submissions.

(a) *Filing.* Send us an original and five copies of the plan of termination, including the disclosure information, and other required submissions. You may not file the plan of termination until at least 30 days after you mail the equity holder notice under § 611.1210(b). If you send us the plan of termination in electronic form, you must send us at least one hard copy with original signatures.

(b) *Plan contents.* The plan of termination must include your equity holder disclosure information that complies with § 611.1223.

(c) *Other submissions.* You must also submit the following:

(1) A statement of how you will transfer assets to, and have your liabilities assumed by, the successor institution;

(2) A copy of the charter application for the successor institution, with any

exhibits or other supporting information; and

(3) A statement, if applicable, whether the successor institution will continue to borrow from a Farm Credit bank and how such a relationship will affect your provision for payment of debts. You must also provide evidence of any agreement and plan for satisfaction of outstanding debts.

§ 611.1223 Plan of termination—contents.

(a) *Disclaimer.* Place the following statement in boldface type in the material to be sent to equity holders, either on the notice of meeting or the first page of the plan of termination:

The Farm Credit Administration has not determined if this information is accurate or complete. You should not rely on any statement to the contrary.

(b) *Summary.* The first part of the plan of termination must be a summary that concisely explains:

(1) Which stockholders have a right to vote on the termination and related transactions;

(2) The material changes the termination will cause to the rights of borrowers and other equity holders;

(3) The effect of those changes;

(4) The anticipated benefits and potential disadvantages of the termination;

(5) The right of certain equity holders to dissent and receive payment for their existing equities; and

(6) The estimated termination date.

(7) If applicable, an explanation of any corporate restructuring that the successor institution expects to engage in within 18 months after the date of termination.

(c) *Remaining requirements.* You must also disclose the following information to equity holders:

(1) *Termination resolution.* Provide a certified copy of the termination resolution required under § 611.1220.

(2) *Plan of termination.* Summarize the plan of termination.

(3) *Benefits and disadvantages.* Provide an enumerated statement of the anticipated benefits and potential disadvantages of the termination.

(4) *Recommendation.* Explain the board's basis for recommending the termination.

(5) *Exit fee.* Explain the preliminary exit fee estimate, with any adjustments we require, and estimated expenses of termination and organization of the successor institution.

(6) *Initial board of directors.* List the initial board of directors and senior officers for the successor institution, with a brief description of the business experience of each person, including principal occupation and employment during the past 5 years.

(7) *Relevant contracts and agreements.* Include copies of all contracts and agreements related to the termination, including any proposed contracts in connection with the termination and subsequent operations of the successor institution. The FCA may, in its discretion, permit or require you to provide a summary or summaries of the documents in the disclosure information to be submitted to equity holders instead of copies of the documents.

(8) *Bylaws and charter.* Summarize the provisions of the bylaws and charter of the successor institution that differ materially from your bylaws and charter. The summary must state:

(i) Whether the successor institution will require a borrower to hold an equity interest as a condition for having a loan; and

(ii) Whether the successor institution will require equity holders to do business with the institution.

(9) *Changes to equity.* Explain any changes in the nature of equity investments in the successor institution, such as changes in dividends, patronage, voting rights, preferences, retirement of equities, and liquidation priority. If equities protected under section 4.9A of the Act are outstanding, the plan of termination must state that the Act's protections will be extinguished on termination.

(10) *Effect of termination on statutory and regulatory rights.* Explain the effect of termination on rights granted to equity holders by the Act and FCA regulations. You must explain the effect termination will have on borrower rights granted in the Act and part 617 of this chapter.

(11) *Loan refinancing by borrowers.*

(i) State, as applicable, that borrowers may seek to refinance their loans with the System institutions that already serve, or will be permitted to serve, your territory. State that no System institution is obligated to refinance your loans.

(ii) If we have assigned the chartered territory you serve to another System institution before the plan of termination is mailed to equity holders, or if another System institution is already chartered to make the same type of loans you make in the chartered territory, identify such institution(s) and provide the following information:

(A) The name, address, and telephone number of the institution; and

(B) An explanation of the institution's procedures for borrowers to apply for refinancing.

(iii) If we have not assigned the territory before you mail the plan of termination, give the name, address, and telephone number of the System institution specified by us and state that borrowers may contact the institution for information about loan refinancing.

(12) *Equity exchanges.* Explain the formula and procedure to exchange equity in your institution for equity in the successor institution.

(13) *Employment, retirement, and severance agreements.* Describe any employment agreement or arrangement between the successor institution and any of your senior officers or directors. Describe any severance and retirement plans that cover your employees or directors and state the costs you expect to incur under the plans in connection with the termination.

(14) *Final exit fee and its calculation.* Explain how the final exit fee will be calculated under § 611.1255 and how it will be paid.

(15) *New charter.* Describe the nature and type of financial institution the successor institution will be and any conditions of approval of the new chartering authority or regulator.

(16) *Differences in successor institution's programs and policies.* Summarize any differences between you and the successor institution on:

(i) Interest rates and fees;

(ii) Collection policies;

(iii) Services provided; and

(iv) Any other item that would affect a borrower's lending relationship with the successor institution, including whether a stockholder's ability to borrow from the institution will be restricted.

(17) *Capitalization.* Discuss expected capital requirements of the successor institution, and the amount and method of capitalization.

(18) *Sources of funding.* Explain the sources and manner of funding for the successor institution's operations.

(19) *Contingent liabilities.* Describe how the successor institution will address any contingent liability it will assume from you.

(20) *Tax status.* Summarize the differences in tax status between your institution and the successor institution, and explain how the differences may affect equity holders.

(21) *Regulatory environment.* Describe briefly how the regulatory environment for the successor institution will differ from your current regulatory environment, and any effect on the cost of doing business or the value of stockholders' equity.

(22) *Dissenters' rights.* Explain which equity holders are entitled to dissenters' rights and what those rights are. The

explanation must include the estimated liquidation value of the stock, procedures for exercising dissenters' rights, and a statement of when the rights may be exercised.

(23) *Financial information.*

(i) Present the following financial data:

(A) A balance sheet and income statement for each of the 3 preceding fiscal years;

(B) A balance sheet as of a date within 90 days of the date you send the plan of termination to us, presented on a comparative basis with the corresponding period of the previous 2 fiscal years;

(C) An income statement for the interim period between the end of the last fiscal year and the date of the balance sheet required by paragraph (d)(23)(i)(B) of this section, presented on a comparative basis with the corresponding period of the previous 2 fiscal years;

(D) A pro forma balance sheet of the successor institution presented as if termination had occurred as of the date of the most recent balance sheet presented in the plan of termination; and

(E) A pro forma summary of earnings for the successor institution presented as if the termination had been effective at the beginning of the interim period between the end of the last fiscal year and the date of the balance sheet presented under paragraph (d)(23)(i)(D) of this section.

(ii) The format for the balance sheet and income statement must be the same as the format in your annual report and must contain appropriate footnote disclosures, including data on high-risk assets, other property owned, and allowance for losses.

(iii) The financial statements must include either:

(A) A statement signed by the chief executive officer and each board member that the various financial statements are unaudited but have been prepared in all material respects in conformity with GAAP (except as otherwise disclosed) and are, to the best of each signer's knowledge, a fair and accurate presentation of the financial condition of the institution; or

(B) A signed opinion by an independent certified public accountant that the various financial statements have been examined in conformity with generally accepted auditing standards and included such tests of the accounting records and other such auditing procedures as were considered necessary in the circumstances, and, as of the date of the statements, present fairly the financial position of the institution in conformity with GAAP applied on a consistent basis, except as otherwise disclosed.

(24) *Subsequent financial events.* Describe any event after the date of the financial statements, but before the date you send the plan of termination to us, that would have a material impact on your financial condition or the condition of the successor institution.

(25) *Other subsequent events.* Describe any event after you send the plan of termination to us that could have a material impact on any information in the plan of termination.

(26) *Other material disclosures.* Describe any other material fact or circumstance that a stockholder would need to know to make an informed decision on the termination, or that is necessary to make the disclosures not misleading. We may require you to disclose any assessments, analyses, studies, or rulings we require under § 611.1211.

(27) *Ballot and proxy.* Include a ballot and proxy, with instructions on the purpose and authority for their use, and the proper method for the stockholder to sign the proxy.

(28) *Board of directors certification.* Include a certification signed by the entire board of directors as to the truth, accuracy, and completeness of the information contained in the plan of termination. If any director refuses to sign the certification, the director must inform us of the reasons for refusing.

(29) *Directors' statements.* You must include statements, if any, by directors regarding the proposed termination.

(d) *Requirement to provide updated information.* After you send us the plan of termination, you must immediately send us:

(1) Any material change to information in the plan of termination, including financial information, that occurs between the date you file the plan of termination and the termination date;

(2) Copies of any additional written information on the termination that you have given or give to current or prospective equity holders before termination; and

(3) A description of any subsequent event(s) that could have a material impact on any information in the plan of termination or on the termination.

§ 611.1230 FCA review and approval—plan of termination.

(a) *FCA review period.* No later than 60 days after we receive the plan of termination, we will review it and either approve or disapprove the plan for submission to your equity holders. If we take no action on the plan of termination within the 60 days, you may submit the plan to your equity holders. The 60-day review period under section 7.11 of the Act will begin on the date we receive a complete plan of termination. We will advise you in writing when the 60-day period begins.

(b) *FCA approval of the plan of termination.* Our approval of the plan of termination for submission to your equity holders:

(1) Is not our approval of the termination; and

(2) May be subject to any condition we impose.

§ 611.1235 Plan of termination—distribution.

(a) *Reaffirmation resolution.* Not more than 14 days before mailing the plan of termination to your equity holders, your board of directors must adopt a resolution reaffirming support of the termination. A certified copy of the resolution must be sent to us and must accompany the plan of termination when it is distributed to stockholders.

(b) *Notice of meeting and distribution of plan.* You must provide all equity holders with a notice of meeting and the plan of termination at least 45 days before the stockholder vote. You must also provide a copy of the plan to us when you provide it to your equity holders.

§ 611.1240 Voting record date and stockholder approval.

(a) *Stockholder meeting.* You must call the meeting by written notice in compliance with your bylaws. The stockholder meeting to vote on the termination must occur at least 60 days after our approval of the plan of termination (or, if we take no action, at least 60 days after the end of our approval period).

(b) *Voting record date.* The voting record date may not be more than 70 days before the stockholders' meeting.

(c) *Quorum requirement for termination vote.* At least 30 percent, unless your bylaws provide for a higher quorum, of the voting stockholders of the institution must be present at the meeting either in person or by proxy in order to hold the vote on the termination.

(d) *Approval requirement.* The affirmative vote of a majority of the voting stockholders of the institution present and voting or voting by proxy at the duly authorized meeting at which a quorum is present as prescribed in paragraph (c) of this section is required for approval of the termination.

(e) *Voting procedures.* The voting procedures must comply with §§ 611.330 and 611.340. You must have

an independent third party count the ballots. If a voting stockholder notifies you of the stockholder's intent to exercise dissenters' rights, the tabulator must be able to verify to you that the stockholder voted against the termination. Otherwise, the votes of stockholders must remain confidential.

(f) *Notice to FCA and equity holders of voting results.* Within 10 days of the termination vote, you must send us a certified record of the results of the vote. You must notify all equity holders of the results within 30 days after the stockholder meeting. If the stockholders approve the termination, you must give the following information to equity holders:

(1) Stockholders who voted against termination and equity holders who were not entitled to vote have a right to dissent as provided in § 611.1280; and

(2) Voting stockholders have a right, under § 611.1245, to file a petition with the FCA for reconsideration within 35 days after the date you mail to them the notice of the results of the termination vote.

(g) *Requirement to notify new equity holders.* You must provide the information described in paragraph (f)(1) of this section to each person that becomes an equity holder after the termination vote and before termination.

§ 611.1245 Stockholder reconsideration.

(a) *Right to reconsider termination.* Voting stockholders have the right to reconsider their approval of the termination if a petition signed by at least 15 percent of the voting stockholders is filed with us within 35 days after you mail notices to stockholders that the termination was approved. If we determine that the petition complies with the requirements of section 7.9 of the Act, you must call a special stockholders' meeting to reconsider the vote. The meeting must occur within 60 days after the date on which you mailed to stockholders the results of the termination vote.

(b) *Quorum requirement for termination reconsideration vote.* At least 30 percent, unless your bylaws provide for a higher quorum, of the voting stockholders of the institution must be present at the stockholders' meeting either in person or by proxy in order to hold the reconsideration vote. If a majority of the voting stockholders voting in person or by proxy vote against the termination, the termination may not take place.

(c) *Stockholder list and expenses.* You must, at your expense, timely give stockholders who request it a list of the names and addresses of stockholders eligible to vote in the reconsideration vote. The petitioners must pay all other expenses for the petition. You must pay expenses that you incur for the reconsideration vote.

§ 611.1246 Filing of termination application and its contents.

(a) *Filing of termination application.* Send us your termination application no later than 90 days after you send us notice of the stockholder vote approving the termination. Please send us an original and five copies of the termination application for review and approval. If you send us the termination application in electronic form, you must send us at least one hard copy with original signatures.

(b) *Contents of termination application.* The application must contain:

(1) A certified copy of the termination and reaffirmation resolutions;

(2) A certification signed by the board of directors that the board continues to support the termination, there has been no material change to any of the information contained in the plan of termination or information statement after the FCA approved the plan of termination, and there have not been any subsequent events that could have a material impact on any of the information in the plan of termination or the termination; and

(3) Any additional information that is required under this subpart, that we request or that your board of directors wishes to submit in support of the application.

§ 611.1247 FCA review and approval—termination.

(a) *FCA action on application.* After we receive the termination application, we will review it and either approve or disapprove the termination.

(b) *Basis for disapproval.* We will disapprove the termination if we determine that there are one or more appropriate reasons for disapproval consistent with our authorities under the Act and our regulations. We will inform you of our reason(s) for disapproval in writing.

(c) *Conditions of FCA approval.* We will approve your termination application only if:

(1) Your stockholders have voted in favor of termination in the termination vote and in any reconsideration vote;

(2) You have given us executed copies of all contracts, agreements, and other documents submitted under §§ 611.1221 and 611.1223;

(3) You have paid or made adequate provision for payment of debts, including responsibility for any contingent liabilities, and for retirement of equities;

(4) A Federal or State chartering authority has granted a new charter to the successor institution;

(5) You deposit into escrow an amount equal to 110 percent of the estimated exit fee plus 110 percent of the estimated amount you must pay to retire equities of dissenting stockholders and Farm Credit institutions, as described in § 611.1255(c); and

(6) You have fulfilled any condition of termination we impose.

(d) *Effective date of termination.* If we approve the termination, we will revoke your charter, and the termination will be effective on the date that we provide, but no earlier than the last to occur of:

(1) Fulfillment of all conditions listed in or imposed under paragraph (c) of this section;

(2) Your proposed termination date;

(3) Ninety (90) days after we receive your termination application described in § 611.1246; or

(4) Fifteen (15) days after any reconsideration vote.

§ 611.1250 Preliminary exit fee estimate.

(a) *Preliminary exit fee estimate—terminating association.* You must provide a preliminary exit fee estimate to us when you submit the plan of termination under § 611.1221. Calculate the preliminary exit fee estimate in the following order:

(1) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period as of the quarter end immediately before the date you send us your plan of termination.

(2) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as "dollar amount."

(3) Compute the average daily balances based on financial statements that comply with GAAP. The financial statements, as of the quarter end immediately before the date you send us your plan of termination, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter. We may, in our discretion, waive the audit requirement if an independent audit was performed as of a date less than 6 months before you submit the plan of termination.

(4) Make adjustments to assets as follows:

(i) Add back expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, tax services, studies, auditing, business planning, equity holder meetings, and

application fees for the termination and reorganization. Do not add back to assets expenses related to a requirement by the FCA to engage independent experts to conduct assessments, analyses, or studies, or to request rulings that solely address the impact of the termination on the System or parties other than the terminating institution and its stockholders.

(ii) Subtract the dollar amount of estimated current and deferred tax expenses, if any, due to the termination.

(iii) Add the dollar amount of estimated current and deferred tax benefits, if any, due to the termination.

(iv) Adjust for the dollar amount of significant transactions you reasonably expect to occur between the quarter end before you file your plan of termination and date of termination. Examples of these transactions include, but are not limited to, gains or losses on the sale of assets, retirements of equity, loan repayments, and patronage distributions. Do not make adjustments for future expenses related to termination, such as severance or special retirement payments, or stock retirements to dissenting stockholders and Farm Credit institutions.

(5) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(6) Make any adjustments we require under paragraph (c) of this section.

(7) After making these adjustments to assets and liabilities, subtract liabilities from assets. This is your preliminary total capital for purposes of termination.

(8) Multiply assets as adjusted above by 6 percent, and subtract this amount from preliminary total capital. This is your preliminary exit fee estimate.

(b) *Preliminary exit fee estimate—terminating bank.*

(1) Affiliated associations that are terminating with you must calculate their individual preliminary exit fee estimates as described in paragraph (a) of this section.

(2) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period as of the quarter end immediately before the date you send us your plan of termination.

(3) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as "dollar amount."

(4) Compute the average daily balances based on bank-only financial statements that comply with GAAP. The financial statements, as of the quarter end immediately before the date you send us your plan of termination, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter. We may, in our discretion, waive this requirement if an independent audit was performed as of a date less than 6 months before you submit the plan of termination.

(5) Make adjustments to assets and liabilities as follows:

(i) Add back to assets the following:

(A) Expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, tax services, studies, auditing, business planning, equity holder meetings, and application fees for the termination and reorganization. Do not add back to assets expenses related to a requirement by the FCA to engage independent experts to conduct assessments, analyses, or studies, or to request rulings that solely address the impact of the termination on the System or parties other than the terminating institution and its stockholders.

(B) Any specific allowance for losses, and a pro rata portion of any general allowance for loan losses, on direct loans to associations that you do not expect to incur before or at termination.

(ii) Subtract from your assets and liabilities an amount equal to your direct loans to your affiliated associations that are not terminating.

(iii) Subtract the following from assets:

(A) Equity investments in your institution that are held by nonterminating associations and that you expect to transfer to another System bank before or at termination. A nonterminating association's investment consists of purchased equities, allocated equities, and a share of the bank's unallocated surplus calculated in accordance with the bank's bylaw provisions on liquidation. We may require a different calculation method for the unallocated surplus if we determine that using the liquidation provision would be inequitable to stockholders; and

(B) The dollar amount of estimated current and deferred tax expenses, if any, due to the termination.

(iv) Add the dollar amount of current and deferred estimated tax benefits, if any, due to the termination.

(v) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(vi) Adjust for the dollar amount of significant transactions you reasonably expect to occur between the quarter end before you file your plan of termination and date of termination. Examples of these transactions include, but are not limited to, retirements of equity, loan repayments, and patronage distributions. Do not make adjustments for future expenses related to termination, such as severance or special retirement payments, or stock retirements to dissenting stockholders and Farm Credit institutions.

(6) Make any adjustments we require under paragraph (c) of this section.

(7) After the above adjustments, combine your balance sheet with the balance sheets of your terminating associations after they have made the adjustments required in paragraph (a) of this section. Subtract liabilities from assets. This is your preliminary total capital estimate for purposes of termination.

(8) Multiply the assets of the combined balance sheet after the above adjustments by 6 percent. Subtract this amount from the preliminary total capital estimate of the combined balance sheet. The remainder is the preliminary exit fee estimate of the bank and terminating affiliated associations.

(9) Your preliminary exit fee estimate is the amount by which the preliminary exit fee estimate for the combined entity exceeds the total of the individual preliminary exit fee estimates of your affiliated terminating associations.

(c) *Adjustments.*

(1) We will review your account balances, transactions over the 3 years before the date of the termination resolution under § 611.1220, and any subsequent transactions. Our review will include, but not be limited to, the following:

(i) Additions to or subtractions from any allowance for losses;

(ii) Additions to assets or liabilities, or subtractions from assets or liabilities, due to transactions that are outside your ordinary course of business;

(iii) Dividends or patronage refunds exceeding your usual practices;

(iv) Changes in the institution's capital plan, or in implementing the plan, that increased or decreased the level of borrower investment;

(v) Contingent liabilities, such as loss-sharing obligations, that can be reasonably quantified; and

(vi) Assets, including real property and servicing rights, that may be overvalued, undervalued, or not recorded on your books.

(2) If we determine the account balances do not accurately show the value of your assets and liabilities (whether the assets and liabilities were booked before or during the 3-year look-

back adjustment period), we will make any adjustments we deem necessary.

(3) We may require you to reverse the effect of a transaction if we determine that:

(i) You have retired capital outside the ordinary course of business;

(ii) You have taken any other actions unrelated to your core business that have the effect of changing the exit fee; or

(iii) You incurred expenses related to termination prior to the 12-month average daily balance period on which the exit fee calculation is based.

(4) We may require you to make these adjustments to the preliminary exit fee estimate that is disclosed in the information statement, the final exit fee calculation, and the calculations of the value of equities held by dissenting stockholders, Farm Credit institutions that choose to have their equities retired at termination, and reaffiliating associations.

§ 611.1255 Exit fee calculation.

(a) *Final exit fee calculation—terminating association.* Calculate the final exit fee in the following order:

(1) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period preceding the termination date. Assume for this calculation that you have not paid or accrued the items described in paragraph (a)(4)(ii) and (iii) of this section.

(2) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as "dollar amount."

(3) Compute the average daily balances based on financial statements that comply with GAAP. The financial statements, as of the termination date, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter.

(4) Make adjustments to assets and liabilities as follows:

(i) Add back expenses related to the termination. Related expenses include, but are not limited to, legal services, accounting services, tax services, studies, auditing, business planning, payments of severance and special retirements, equity holder meetings, and application fees for the termination and reorganization. Do not add back to assets expenses related to a requirement by the FCA to engage independent experts to conduct assessments, analyses, or studies, or to request rulings that solely address the impact of the termination on the System or parties other than the terminating institution and its stockholders.

(ii) Subtract from assets the dollar amount of current and deferred tax expenses, if any, due to the termination.

(iii) Add to assets the dollar amount of current and deferred tax benefits, if any, due to the termination.

(iv) Subtract from liabilities any liability that we treat as regulatory capital under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(v) Make the adjustments that we require under § 611.1250(c). For the final exit fee, we will review and may require additional adjustments for transactions between the date you adopted the termination resolution and the termination date.

(5) After making these adjustments to assets and liabilities, subtract liabilities from assets. This is your total capital for purposes of termination.

(6) Multiply assets by 6 percent, and subtract this amount from total capital. This is your final exit fee.

(b) *Final exit fee calculation—terminating bank.*

(1) The individual exit fees of affiliated associations that are terminating with you must be calculated as described in paragraph (a) of this section.

(2) Base your exit fee calculation on the average daily balances of assets and liabilities for the 12-month period preceding the termination date. Assume for this calculation that you have not paid or accrued the items described in paragraph (b)(5)(iii)(B) and (b)(5)(iv) of this section.

(3) Any amounts we refer to in this section are average daily balances unless we specify that they are not. Amounts that are not average daily balances will be referred to as "dollar amount."

(4) Compute the average daily balances based on bank-only financial statements that comply with GAAP. The financial statements, as of the termination date, must be independently audited by a qualified public accountant, as defined in § 621.2(i) of this chapter.

(5) Make adjustments to assets and liabilities as follows:

(i) Add back the following to your assets:

(A) Expenses you have incurred related to termination. Related expenses include, but are not limited to, legal services, accounting services, tax services, studies, auditing, business planning, payments of severance and special retirements, equity holder meetings, and application fees for the termination and reorganization. Do not add back to assets expenses related to a requirement by the FCA to engage independent experts to conduct assessments, analyses, or studies, or to request rulings that solely address the impact of the termination on the System or parties other than the terminating institution and its stockholders.

(B) Any specific allowance for losses, and a pro rata share of any general allowance for losses, on direct loans to associations that are paid off or transferred before or at termination.

(ii) Subtract from your assets and liabilities your direct loans to affiliated associations that were paid off or transferred in the 12-month period before termination or at termination.

(iii) Subtract from your assets the following:

(A) Equity investments held in your institution by affiliated associations that you transferred at termination or during the 12 months before termination; and

(B) The dollar amount of current and deferred tax expenses, if any, due to the termination;

(iv) Add to assets, the dollar amount of estimated current and deferred tax benefits, if any, due to the termination.

(v) Subtract from liabilities any liability that we treat as regulatory capital (or that we do not treat as a liability) under the capital or collateral requirements in subparts H and K of part 615 of this chapter.

(vi) Make the adjustments that we require under § 611.1250(c). For the final exit fee, we will review and may require additional adjustments for transactions between the date you adopted the termination resolution and the termination date.

(6) After the above adjustments, combine your balance sheet with the balance sheets of terminating associations after making the adjustments required in paragraph (a) of this section.

(7) Subtract combined liabilities from combined assets. This is the total capital of the combined balance sheet.

(8) Multiply the assets of the combined balance sheet after the above adjustments by 6 percent. Subtract this amount from the total capital of the combined balance sheet. This amount is the combined final exit fee for your institution and the terminating affiliated associations.

(9) Your final exit fee is the amount by which the combined final exit fee exceeds the total of the individual final exit fees of your affiliated terminating associations.

(c) *Payment of exit fee.* On the termination date, you must:

(1) Deposit into an escrow account acceptable to us and the FCSIC an

amount equal to 110 percent of the preliminary exit fee estimate, adjusted to account for stock retirements to dissenting stockholders and Farm Credit institutions, and any other adjustments we require.

(2) Deposit into an escrow account acceptable to us an amount equal to 110 percent of the equity you must retire for dissenting stockholders and System institutions holding stock that would be entitled to a share of the remaining assets in a liquidation.

(d) *Pay-out of escrow.* Following the independent audit of the institution's account balances as of the termination date, we will determine the amount of the final exit fee and the amounts owed to stockholders to retire their equities. We will then direct the escrow agent to:

(1) Pay the exit fee to the Farm Credit Insurance Fund;

(2) Pay the amounts owed to dissenting stockholders and Farm Credit institutions; and

(3) Return any remaining amounts to the successor institution.

(e) *Additional payment.* If the amount held in escrow is not enough to pay the amounts under paragraph (d)(1) and (d)(2) of this section, the successor institution must pay any remaining liability to the escrow agent for distribution to the appropriate parties. The termination application must include evidence that, after termination, the successor institution will pay any remaining amounts owed.

§ 611.1260 Payment of debts and assessments—terminating association.

(a) *General rule.* If your institution is a terminating association, you must pay or make adequate provision for the payment of all outstanding debt obligations and assessments.

(b) *No OFI relationship.* If the successor institution will not become an OFI, you must either:

(1) Pay debts and assessments owed to your affiliated Farm Credit bank at termination; or

(2) With your affiliated Farm Credit bank's concurrence, arrange to pay any obligations or assessments to the bank after termination.

(c) *Obligations to other Farm Credit institutions.* You must pay or make adequate provision for payment of obligations to any Farm Credit institution (other than your affiliated bank) under any loss-sharing or other agreement.

§ 611.1265 Retirement of a terminating association's investment in its affiliated bank.

(a) *Safety and soundness restrictions.* Notwithstanding anything in this subpart to the contrary, we may prohibit a bank from retiring the equities you hold in the bank if the retirement would cause the bank to fall below its regulatory capital requirements after retirement, or if we determine that the bank would be in an unsafe or unsound condition after retirement.

(b) *Retirement agreement.* Your affiliated bank may retire the purchased and allocated equities held by your institution in the bank according to the terms of the bank's capital revolvement plan or an agreement between you and the bank.

(c) *Retirement in absence of agreement.* Your affiliated bank must retire any equities not subject to an agreement or revolvement plan no later than when you or the successor institution pays off your loan from the bank.

(d) *No retirement of unallocated surplus.* When your bank retires equities you own in the bank, the bank must pay par or face value for purchased and allocated equities, less any impairment. The bank may not pay you any portion of its unallocated surplus.

(e) *Exclusion of equities from capital ratios.* If another Farm Credit institution makes an agreement to retire equities you hold in that institution after termination, we may require that institution to exclude part or all of those equities from assets and capital when the institution calculates its capital and net collateral ratios under subparts H and K of part 615 of this chapter.

§ 611.1270 Repayment of obligations—terminating bank.

(a) *General rule.* If your institution is a terminating bank, you must pay or make adequate provision for the payment of all outstanding debt obligations, and provide for your responsibility for any probable contingent liabilities identified.

(b) *Satisfaction of primary liability on consolidated or System-wide obligations.* After consulting with the other Farm Credit banks, the Funding Corporation, and the FCSIC, you must pay or make adequate provision for payment of your primary liability on consolidated or System-wide obligations in a method that we deem acceptable. Before we make a final decision on your proposal and as we deem necessary, we may consult with the other Farm Credit banks, the Funding Corporation, and the FCSIC.

(c) *Satisfaction of joint and several liability and liability for interest on individual obligations.*

(1) You and the other Farm Credit banks must enter into an agreement, which is subject to our approval, covering obligations issued under section 4.2 of the Act and outstanding on the termination date. The agreement must specify how you and your successor institution will make adequate provision for the payment of your joint and several liability to holders of obligations other than those obligations on which you are primarily liable, in the event we make calls for payment under section 4.4 of the Act. You and your successor institution must also provide for your liability under section 4.4(a)(1) of the Act to pay interest on the individual obligations issued by other System banks. As a part of the agreement, you must also agree that your successor institution will provide ongoing information to the Funding Corporation to enable it to fulfill its funding and disclosure duties. The Funding Corporation may, at its option, be a party to the agreement to the extent necessary to fulfill its duties with respect to financing and disclosure.

(2) If you and the other Farm Credit banks are unable to reach agreement within 90 days before the proposed termination date, we will specify the manner in which you will make adequate provision for the payment of the liabilities in question and how we will make joint and several calls for those obligations outstanding on the termination date.

(3) Notwithstanding any other provision in these regulations, the successor institution will be jointly and severally liable for consolidated and System-wide debt outstanding on the termination date (other than the obligations on which you are primarily liable). The successor institution will also be liable for interest on other banks' individual obligations as described in section 4.4(a)(1) of the Act and outstanding on the termination date. The termination application must include evidence that the successor institution will continue to be liable for consolidated and System-wide debt and for interest on other banks' individual obligations.

§ 611.1275 Retirement of equities held by other System institutions.

(a) *Retirement at option of equity holder.* If your institution is a terminating institution, System institutions that own your equities have the right to require you to retire the equities on the termination date.

(b) *Value of equity holders' interests.* You must retire the equities in accordance with the liquidation provisions in your bylaws unless we determine that the liquidation provisions would result in an

inequitable distribution to stockholders. If we make such a determination, we will require you to distribute the equity in accordance with another method that we deem equitable to stockholders. Before you retire any equity, you must make the following adjustments to the amount of stockholder equity as stated in the financial statements on the termination date:

(1) Make deductions for any taxes due to the termination that have not yet been recorded;

(2) Deduct the amount of the exit fee; and

(3) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(c) *Transfer of affiliated association's investment.* As an alternative to equity retirement, an affiliated association that reaffiliates with another Farm Credit bank instead of terminating with its bank has the right to require the terminating bank to transfer its investment to its new affiliated bank when it reaffiliates. If your institution is a terminating bank, at the time of reaffiliation you must transfer the purchased and allocated equities held by the association, as well as its share of unallocated surplus, to the new affiliated bank. Calculate the association's share before deduction of the exit fee as of the month end preceding the reaffiliation date (or the termination date if it is the same as the reaffiliation date) in accordance with the liquidation provisions of your bylaws, unless we determine that the liquidation provisions would result in an inequitable distribution. If we make such a determination, we will require you to distribute the association's share of your unallocated surplus in accordance with another method that we deem equitable to stockholders. Before you distribute any unallocated surplus, you must make the following adjustments to stockholder equity as stated in the financial statements as of the month end preceding the reaffiliation date (or the termination date if it is the same as the reaffiliation date):

(1) Add back any taxes due to the termination, and the exit fee; and

(2) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(d) *Prohibition on certain affiliations.* No Farm Credit institution may retain an equity interest otherwise prohibited by law in a successor institution

§ 611.1280 Dissenting stockholders' rights.

(a) *Definition.* A dissenting stockholder is an equity holder (other than a System institution) in a terminating institution on the termination date who either:

(1) Was eligible to vote on the termination resolution and voted against termination;

(2) Was an equity holder on the voting record date but was not eligible to vote; or

(3) Became an equity holder after the voting record date.

(b) *Retirement at option of a dissenting stockholder.* A dissenting stockholder may require a terminating institution to retire the stockholder's equity interest in the terminating institution.

(c) *Value of a dissenting stockholder's interest.* You must pay a dissenting stockholder according to the liquidation provision in your bylaws, except that you must pay at least par or face value for eligible borrower stock (as defined in section 4.9A(d)(2) of the Act). If we determine that the liquidation provision is inequitable to stockholders, we will require you to calculate their share in accordance with another formula that we deem equitable.

(d) *Calculation of interest of a dissenting stockholder.* Before you retire any equity, you must make the following adjustments to the amount of stockholder equity as stated in the financial statements on the termination date:

(1) Deduct any taxes due to the termination that you have not yet recorded;

(2) Deduct the amount of the exit fee; and

(3) Make any adjustments described under § 611.1250(c) that we may require as we deem appropriate.

(e) *Form of payment to a dissenting stockholder.* You must pay dissenting stockholders for their equities as follows:

(1) Pay cash for the par or face value of purchased stock, less any impairment;

(2) For equities other than purchased equities, you may:

(i) Pay cash;

(ii) Cause or otherwise provide for the successor institution to issue, on the date of termination, subordinated debt to the stockholder with a face value equal to the value of the remaining equities. This subordinated debt must have a maturity date of 7 years or less, must have priority in liquidation ahead of all equity, and must carry a rate of interest not less than the rate (at the time of termination) for debt of comparable maturity issued by the U.S. Treasury plus 1 percent; or

(iii) Provide for a combination of cash and subordinated debt as described above.

(f) *Payment to holders of special class of stock.* If you have adopted bylaws under § 611.1210(f), you must pay a dissenting stockholder who owns shares of the special class of stock an amount equal to the lower of the par (or face) value or the value of such stock as determined under § 611.1280(c) and (d).

(g) *Notice to equity holders.* The notice to equity holders required in § 611.1240(f) must include a form for stockholders to send back to you, stating their intention to exercise dissenters' rights. The notice must contain the following information:

(1) A description of the rights of dissenting stockholders set forth in this section and the approximate value per share that a dissenting stockholder can expect to receive. State whether the successor institution will require borrowers to be stockholders or whether it will require stockholders to be borrowers.

(2) A description of the current book and par value per share of each class of equities, and the expected book and market value of the stockholder's interest in the successor institution.

(3) A statement that a stockholder must return the enclosed form to you within 30 days if the stockholder chooses to exercise dissenters' rights.

(h) *Notice to subsequent equity holders.* Equity holders that acquire their equities after the termination vote must also receive the notice described in paragraph (g) of this section. You must give them at least 5 business days to decide whether to request retirement of their stock.

(i) *Reconsideration.* If a reconsideration vote is held and the termination is disapproved, the right of stockholders to exercise dissenters' rights is rescinded. If a reconsideration vote is held and the termination is approved, you must retire the equities of dissenting stockholders as if there had been no reconsideration vote.

§ 611.1285 Loan refinancing by borrowers.

(a) *Disclosure of credit and loan information.* At the request of a borrower seeking refinancing with another System institution before you terminate, you must give credit and loan information about the borrower to such institution.

(b) *No reassignment of territory.* If, at the termination date, we have not assigned your territory to another System institution, any System institution may lend in your territory, to the extent otherwise permitted by the Act and the regulations in this chapter.

§ 611.1290 Continuation of borrower rights.

You may not require a waiver of contractual borrower rights provisions as a condition of borrowing from and owning equity in the successor institution. Institutions that become other financing institutions on termination must comply with the applicable borrower rights provisions in the Act and part 617 of this chapter.

Dated: July 27, 2006.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

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Federal Register

Friday,
August 4, 2006

Part IV

Social Security Administration

20 CFR Part 404
Revised Medical Criteria for Evaluating Immune System Disorders; Proposed Rule

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

RIN 0960–AF33

Revised Medical Criteria for Evaluating Immune System Disorders

AGENCY: Social Security Administration.

ACTION: Proposed rule.

SUMMARY: We propose to revise the criteria in the Listing of Impairments (the listings) that we use to evaluate claims involving immune system disorders. We apply these criteria when you claim benefits based on disability under title II and title XVI of the Social Security Act (the Act). The proposed revisions reflect our adjudicative experience, as well as advances in medical knowledge, treatment, and methods of evaluating immune system disorders.

DATES: To be sure your comments are considered, we must receive them by October 3, 2006.

ADDRESSES: You may give us your comments by: using our Internet facility (i.e., Social Security Online) at *http://policy.ssa.gov/erm/rules.nsf/Rules+Open+To+Comment* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or, letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site, or you may inspect them physically on regular business days by making arrangements with the contact person shown in this preamble.

FOR FURTHER INFORMATION CONTACT: Greg Zwitch, SSA Regulations Officer, Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–1887 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, Social Security Online, at *http://www.socialsecurity.gov/.*

SUPPLEMENTARY INFORMATION: *Electronic Access:* The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.* It is also available on the Internet site for SSA (i.e., Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs.*

What programs would these proposed regulations affect?

These proposed regulations would affect disability determinations and decisions that we make for you under title II and title XVI of the Act. In addition, to the extent that Medicare entitlement and Medicaid eligibility are based on whether you qualify for disability benefits under title II and title XVI, these proposed regulations would also affect the Medicare and Medicaid programs.

Who can get disability benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act,
- Children of insured workers, and
- Widows, widowers, and surviving divorced spouses (see § 404.336) of insured workers.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you are disabled and have limited income and resources.

How do we define disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that is expected to result in death or which has lasted or is expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under * * *	And you are * * *	Disability means you have a medically determinable impairment(s) as described above that results in * * *
Title II	an adult or a child	the inability to do any substantial gainful activity (SGA).
Title XVI	a person age 18 or older	the inability to do any SGA.
Title XVI	a person under age 18	marked and severe functional limitations.

What are the listings?

The listings are examples of impairments that we consider severe enough to prevent you as an adult from doing any gainful activity. If you are a child seeking SSI payments based on disability, the listings describe impairments that we consider severe enough to result in "marked and severe functional limitations." Although we publish the listings only in appendix 1 to subpart P of part 404 of our rules, we incorporate them by reference in the SSI program in § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

How do we use the listings?

The listings are in two parts. There are listings for adults (part A) and for children (part B). If you are a person age 18 or over, we apply the listings in part A when we assess your claim, and we never use the listings in part B.

If you are a person under age 18, we first use the criteria in part B of the listings. If the listings in part B do not apply, and if the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A. (See §§ 404.1525 and 416.925.)

If your impairment(s) does not meet any listing, we will also consider whether it medically equals any listing; that is, whether it is as medically severe. (See §§ 404.1526 and 416.926.)

We use the listings only to decide that you are disabled or that you are still disabled. We will never deny your claim or decide that you no longer qualify for benefits because your impairment(s) does not meet or medically equal a listing. If you have a severe impairment(s) that does not meet or medically equal any listing, we may still find you disabled based on other rules in the "sequential evaluation process" that we use to evaluate all disability claims. (See §§ 404.1520, 416.920, and 416.924.)

Also, when we conduct reviews to determine whether your disability continues, we will not find that your disability has ended based only on any changes in the listings. Our regulations explain that, when we change our listings, we continue to use our prior listings when we review your case, if you qualified for disability benefits or SSI payments based on our determination or decision that your impairment(s) met or medically equaled the listings. In these cases, we determine whether you have experienced medical improvement and,

if so, whether the medical improvement is related to the ability to work. If your condition(s) has medically improved so that you no longer meet or medically equal the prior listing, we evaluate your case further to determine whether you are currently disabled. We may find that you are currently disabled, depending on the full circumstances of your case. See §§ 404.1594(c)(3)(i) and 416.994(b)(2)(iv)(A). If you are a child who is eligible for SSI payments, we follow a similar rule after we decide that you have experienced medical improvement in your condition(s). See § 416.994a(b)(2).

Why are we proposing to revise the listings for immune system disorders?

We are proposing these revisions to update the listings and to provide more information about how we evaluate immune system disorders. We have not updated these rules since we first published them in 1993 (58 FR 36008). At that time, we established body system listings for immune system disorders in part A and part B. We made those rules effective for 5 years from the date of publication, unless we extended them, or revised and issued them again (58 FR at 36051). Since that time, we have extended the expiration date of the immune body system listings but we have not comprehensively revised them.

We have, however, made several changes to these listings over the years. On November 19, 2001, we also published final rules in the **Federal Register** adding listings 14.09 and 114.09, for inflammatory arthritis, to these body system listings, including introductory text to those listings in sections 14.00B6 and 114.00E (66 FR 58009). We published minor technical changes to these body system listings on February 24, 2002 (67 FR 20018).

How did we develop these proposed rules?

These proposed rules reflect our adjudicative experience and advances in medical knowledge, treatment, and methods of evaluating immune system disorders. They also reflect comments we asked you to provide to help us develop the proposals.

We published an Advance Notice of Proposed Rulemaking (ANPRM) in the **Federal Register** on May 9, 2003 (68 FR 24896). The purpose of the ANPRM was to inform the public that we were planning to update and revise the rules we use to evaluate immune system disorders and to invite interested individuals and organizations to send us comments and suggestions for updating and revising the immune system listings. In the ANPRM, we provided a 60-day period for comments and suggestions; that period ended on July 8, 2003. We received over 200 letters and e-mails in response to the notice, many from individuals who have immune system disorders or who have family members with such disorders. We also received comments from medical experts, advocates, and people who adjudicate claims for us. Although we are not summarizing or responding to the comments in this notice, we read and considered them carefully and are proposing changes in our rules based on some of the suggestions we received.

We also hosted policy conferences on "Immune System Disorders in the Disability Programs" in Philadelphia, PA, on December 15, 2003, and in San Francisco, CA, on February 18 and 19, 2004. At these conferences, we heard comments and suggestions for updating and revising these rules from individuals who have immune system disorders and their family members, physicians who treat individuals with immune system disorders, other professionals who work with people who have immune system disorders, advocates who represent individuals with immune system disorders, and individuals who make disability determinations and decisions for us in the State agencies and the Office of Hearings and Appeals. Several of the changes we propose in these rules are based on information we obtained at these conferences.

When will we start to use these rules?

We will not use these proposed rules until we evaluate the public comments we receive on them, determine whether they should be issued as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them, and we will summarize and respond to the public comments. Until the effective date of any final rules, we will continue to use our current rules.

How long would these proposed rules be effective?

If we publish these proposed rules as final rules, they will remain in effect for 8 years after the date they become effective, unless we extend them, or revise and issue them again.

What revisions are we proposing to make?

We are proposing to:

- Expand and reorganize the introductory text in proposed 14.00 and 114.00 to provide more guidance for our adjudicators, to update it, and to reflect the revised listings.
- Add paragraph headings to the introductory text in proposed 14.00 and 114.00 for easier reference.
- Add proposed 14.00C and 114.00C to explain the meaning of key terms.
- Remove all reference listings. Reference listings are listings that are met by satisfying the criteria of another listing. For example, current listing 14.08G1 for human immunodeficiency virus (HIV) infection with anemia is a reference listing that requires evaluation under current listing 7.02 for chronic anemia. Therefore, it is redundant. Instead of using a reference listing, we propose to provide general guidance in the introductory text to the immune system listings (proposed 14.00J2g) stating that hematologic abnormalities, such as anemia, may be evaluated under 7.00ff. In some cases, we are also replacing reference listings with new specific listing criteria for the impairments. For example, current listing 14.06, for undifferentiated connective tissue disorders, is entirely a reference listing. In the proposed rules, we are replacing the reference listing criterion with criteria that are specific to these disorders.
- Add proposed listings 14.10 and 114.10 for evaluating Sjoögren's syndrome.
- Add criteria to the listings, similar to those in current HIV infection listings 14.08N and 114.08O, for each of the other listed immune system disorders (for example, systemic lupus erythematosus and systemic vasculitis).
- Make nonsubstantive editorial changes to update the medical terminology in the introductory text and the listings and to make their language simpler and clearer.

How are we proposing to change the introductory text to the adult immune system listings?

We propose to expand and reorganize the introductory text to these listings. There are four major sections in current 14.00, and the longest of those sections, 14.00D, addresses only the evaluation of HIV infection. In these proposed rules, we add more sections and expand the guidance we provide about evaluating other kinds of immune system disorders.

Some of the guidance in current 14.00D is useful for evaluating other kinds of immune system disorders in addition to HIV infection. We are proposing to move that guidance from current 14.00D to new sections that would have more general applicability to immune system disorders. We are not proposing to remove any substantive guidance about how we evaluate HIV infection, only to reorganize some of the

information now in 14.00D of the current rules and to give it broader applicability where appropriate. We are also proposing to update and expand some of the guidance we provide for evaluating HIV infection and its effects, as we describe in more detail below.

The four sections in the current rules are:

- Current 14.00A, a short paragraph that describes generally the kinds of disorders we include in this body system.
- Current 14.00B, a lengthy section that discusses the evaluation of connective tissue disorders; that is, autoimmune disorders. It includes six undesignated paragraphs that primarily explain the kinds of evidence we need to document the existence and severity of these disorders, including how we evaluate loss of function. These paragraphs are followed by six numbered sections that provide guidance about specific impairments in the listings.
- Current 14.00C, a single sentence that explains that we evaluate allergic disorders under the appropriate listing of the affected body system.
- Current 14.00D, a lengthy section that explains how we document the existence and severity of HIV infection, including how we evaluate loss of function under listing 14.08N. It includes eight numbered subsections and many paragraphs that are not designated with letters or numbers within those subsections.

In the proposed rules, there are 10 sections in the introductory text. The first three sections (proposed 14.00A, B, and C) provide general information about this body system, including definitions of terms. Each of the next three sections describes a particular category or type of immune system disorder: Autoimmune disorders (proposed 14.00D); immune deficiency disorders, excluding HIV infection (proposed 14.00E); and HIV infection (proposed 14.00F). The next three sections explain how we consider the effects of your treatment (proposed 14.00G), your symptoms (proposed 14.00H), and the functional limitations from your immune system disorder under these listings (proposed 14.00I). The last section, proposed section 14.00J, explains how we consider the effects of your immune system disorder when it does not meet the requirements of one of the proposed immune system listings. We are designating all paragraphs in the proposed rules with letters or numbers to make it easier to refer to them. We are also providing headings for all of the major sections and many of the subsections.

The following are the names of the major sections in proposed 14.00. We describe each section in detail later in this preamble.

- Proposed 14.00A: *What disorders do we evaluate under the immune system listings?*
- Proposed 14.00B: *What information do we need to show that you have an immune system disorder?*
- Proposed 14.00C: *Definitions*
- Proposed 14.00D: *What are the listed autoimmune disorders in these listings?*
- Proposed 14.00E: *How do we evaluate immune deficiency disorders, excluding HIV infection (14.07)?*
- Proposed 14.00F: *How do we evaluate human immunodeficiency virus (HIV) infection?*
- Proposed 14.00G: *How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?*
- Proposed 14.00H: *How do we consider your symptoms, including your constitutional symptoms or pain?*
- Proposed 14.00I: *How do we use the functional criteria in these listings?*
- Proposed 14.00J: *How do we evaluate your immune system disorder when it does not meet one of these listings?*

The following is a detailed description of the proposed changes in the introductory text of these proposed rules.

14.00 Immune System Disorders

We propose to change the name of this body system from "Immune System" to "Immune System Disorders" to more accurately reflect that we use these listings to evaluate immune system disorders in accordance with the requirements of the disability program.

Proposed 14.00A—What disorders do we evaluate under the immune system listings?

In proposed 14.00A, we provide a brief overview of this body system. We explain the kinds of disorders we evaluate under the immune system listings and that we organize these impairments under the categories of "autoimmune disorders," "immune deficiency disorders, excluding HIV infection," and "HIV infection." Proposed 14.00A has four subsections.

We incorporate current 14.00A in the opening sentence of proposed 14.00A1. We propose to revise the sentence, which explains the kinds of immune system dysfunction that immune system disorders may cause, to update and simplify it. In proposed 14.00A1a and 14.00A1b, we incorporate the first sentence in the sixth paragraph of current 14.00B to explain that immune system disorders can cause dysfunction in one or more components of the immune system, and describe ways in which immune system disorders may result in loss of function. In the second sentence of 14.001b, we propose to add "involuntary" as a descriptor of weight loss to clarify that we mean weight loss due to an immune system disorder(s) or its treatment. We are adding "involuntary" as a descriptor of weight loss throughout the introductory text in part A and part B for this same reason. Proposed 14.00A1c is a new paragraph that explains how we have organized immune system disorders in the preface (introductory text) of these listings.

In proposed 14.00A2, *Autoimmune disorders,* we incorporate the first paragraph in current 14.00B to provide a brief description of autoimmune disorders. We propose to add an explanation that these disorders are sometimes referred to as "rheumatic diseases," "connective tissue disorders," or "collagen vascular disorders" and that some of the features of these disorders in adults differ from the features of the same disorders in children. We provide a cross-reference to proposed 14.00D, the section of the introductory text that addresses autoimmune disorders in detail. We also propose to remove the last sentence of the first paragraph of current 14.00B, which explains that connective tissue disorders generally evolve and persist over time, may result in functional loss, and may require long-term, repeated evaluation and management, because it does not provide useful adjudicative guidance. However, we do explain in proposed 14.00A1b that immune system disorders can cause limitation(s) that result in an "extreme" loss of function.

Proposed 14.00A3, *Immune deficiency disorders, excluding HIV infection,* is new. We explain that these disorders can be classified as "primary" or "acquired," are characterized by recurrent or unusual infections, and are associated with an increased risk of malignancies and of other autoimmune disorders. We also provide a cross-reference to proposed 14.00E, the introductory section that addresses immune deficiency disorders in detail.

In proposed 14.00A4, *Human immunodeficiency virus (HIV) infection,* we provide a brief description of HIV infection. We propose to move the first sentence in current 14.00D1 to this section. The sentence explains that HIV infection is caused by a specific retrovirus and may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions.

We also provide a cross-reference to proposed 14.00F, the section of the introductory text that addresses HIV infection in detail.

Proposed 14.00B—What information do we need to show that you have an immune system disorder?

In proposed 14.00B, we incorporate the first sentence of the second paragraph of current 14.00B to explain what information we need to show that you have an immune system disorder. We moved the second and third sentences of the second paragraph of current 14.00B, which define our term "appropriate medically acceptable imaging," to proposed 14.00C, a new section that provides definitions of terms in these listings. We propose to remove the last two sentences of the current paragraph. They explain that we will not purchase tests that may involve significant risk; however, we already include this general policy in §§ 404.1519m and 416.919m of our regulations so it is not necessary to repeat them in this section.

In the second sentence of proposed 14.00B, we provide that "we will make every reasonable effort" to obtain your medical history, medical findings, and the results of laboratory tests in documenting whether you have an immune system disorder. We include this requirement in current 14.00D, for HIV infection, but we do not include similar guidance in current 14.00B, for connective tissue disorders. We propose to add this guidance under proposed 14.00B because it is appropriate for all immune system disorders.

We also propose to remove the third and fourth paragraphs of current 14.00B. The third paragraph of current 14.00B provides that we need a longitudinal clinical record of at least 3 months demonstrating active disease to assess the severity and duration of your impairment. However, this is not always the case, even under the current rules. For example, individuals with HIV infection and cryptococcal meningitis (current listing 14.08B4) or Kaposi's sarcoma (current listing 14.08B8), and individuals with ankylosing spondylitis with fixation (ankylosis) of the dorsolumbar spine at 45° (current listing 14.09B2) are disabled based on those findings alone. In that case, we do not need 3 months of evidence or evidence showing active disease. Other cases may be decided with less than 3 months of evidence, while others may require more than 3 months of evidence. Therefore, we are removing this guidance because each case should be decided on an individual basis.

Proposed 14.00C—Definitions

In proposed 14.00C, we define what we mean by important terms in these listings. As already noted, we include the definition of "appropriate medically acceptable imaging" from the second paragraph of current 14.00B. However, we propose to replace the word "proper" in the second sentence of this definition with the phrase "generally accepted and consistent with the prevailing state of medical knowledge and clinical practice" to more clearly explain what we mean. We also propose to include in this new section the definitions of the terms "severe" from the sixth paragraph of current 14.00B, "inability to ambulate effectively" and "inability to perform fine and gross movements effectively" from current 14.00B6b, and "resistant to treatment," "recurrent," and "disseminated" from the second, third, and fourth paragraphs of current 14.00D2. All of these terms will apply to several, and sometimes all, of the proposed listings in this body system.

In proposed 14.00C, we do not include the phrase "must have lasted, or be expected to last, for at least 12 months" from the definitions of "inability to ambulate effectively" and "inability to perform fine and gross movements effectively" in current 14.00B6b because we believe it is unnecessary. Unless an impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months to meet the definition of disability. This proposed change would also make the definitions of the terms consistent with the definitions of the same terms in 1.00B2b and 1.00B2c in the musculoskeletal body system.

We also propose to move and simplify the definitions of the terms "resistant to treatment," "recurrent," and "disseminated" in current 14.00D2, primarily to remove language that we believe is unnecessary. For example, we removed the explanation that the terms "have the same general meaning as used by the medical community." These changes are only editorial. We do not intend the proposed definitions to be substantively different from the current rules.

In proposed 14.00C8, we reference current 1.00F for the definition of "major peripheral joints" instead of restating the definition as we do in current 14.00B6a. We also propose to add the definitions of several other important terms in these listings, including in proposed 14.00C2, the term "constitutional symptoms or signs." In proposed 14.00C2, we also provide brief definitions for the constitutional symptoms "severe fatigue" and "malaise." We propose to add these definitions in response to the many comments we received that indicated that the fatigue and malaise that people who have immune system disorders experience can be very limiting.

Proposed 14.00D—What are the listed autoimmune disorders in these listings?

In proposed 14.00D, we incorporate and expand upon the information in current 14.00B1 through 14.00B6, which describe features commonly associated with each of the listed autoimmune system disorders. Throughout these sections, we refer to "autoimmune disorders" instead of "connective tissue disorders" because the phrase "autoimmune disorders" is more medically accurate and more frequently used. We also propose to add a new section 14.00D7 for Sjögren's syndrome because we are proposing to add new listing 14.10 for that autoimmune disorder.

In proposed 14.00D1, *Systemic lupus erythematosus* (14.02), we expand and clarify the information in current 14.00B1. In proposed 14.00D1a, *General,* we explain that systemic lupus erythematosus (SLE) may involve any organ or body system and describe by body system some potential manifestations that may be involved. We expand our explanation of how SLE is frequently characterized clinically and propose to change "fatigability" used in current 14.00B1 to "fatigue" to be consistent with how we describe this symptom throughout the immune system listings. We also add "involuntary" as a descriptor of weight loss to clarify that we mean weight loss due to SLE or its treatment. In proposed 14.00D1b, *Documentation of SLE,* we propose to update our rules to explain that your medical evidence will generally, but not always, show that your SLE satisfies the criteria in the "Criteria for the Classification of Systemic Lupus Erythematosus" by the American College of Rheumatology, found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation. This is a more up-to-date reference than the 1982 reference in the current rules.

In proposed 14.00D2, *Systemic vasculitis (14.03),* we clarify the information in the current rule. Proposed 14.00D2a, *General,* corresponds to the first three sentences of current 14.00B2. In it, we explain that vasculitis is an inflammation of blood vessels that may occur acutely in association with adverse drug reactions, certain chronic infections, and

occasionally malignancies, and that it may also be associated with other autoimmune disorders. We also give examples of several clinical patterns in which it may occur. We propose to remove the fourth sentence of current 14.00B2, which describes cutaneous vasculitis, because the impairment varies greatly in its manifestation, may not be associated with systemic involvement, and would not be expected to result in a listing-level impairment.

Proposed 14.00D2b, *Documentation of systemic vasculitis,* corresponds to the last two sentences of current 14.00B2. In it, we describe documentation that we use to confirm the diagnosis of systemic vasculitis.

Proposed 14.00D3, *Systemic sclerosis (scleroderma) (14.04),* corresponds to current 14.00B3. We propose to revise the heading and to expand the information in the section. Proposed 14.00D3a, *General,* corresponds to the first three sentences of current 14.00B3. We propose to change the term "Raynaud's phenomena," which we use in the second and third sentences of current 14.00B3, to "Raynaud's phenomenon" because the latter is the correct term. We make this same change in proposed listing 14.04C. In proposed 14.00D3b, *Diffuse cutaneous systemic sclerosis,* we continue to explain that, in addition to skin or blood vessels, major organ or systemic involvement may include the gastrointestinal tract, lungs, heart, kidneys, and muscle. This guidance corresponds to the fourth sentence in the current rule.

Proposed 14.00D3c, *Localized scleroderma (linear scleroderma or morphea),* is new. We propose to add this section and appropriate listings in proposed 14.04 for these disorders that originate in childhood because their disabling effects can persist into adulthood. Proposed 14.00D3c is essentially the same as proposed 114.00D3c, which we describe in detail later in this preamble.

Proposed 14.00D3d, *Documentation of systemic sclerosis (scleroderma),* is also new. In it, we explain what documenting systemic sclerosis (scleroderma) involves and that there may be an overlap with other autoimmune disorders.

In proposed 14.00D4, *Polymyositis and dermatomyositis (14.05),* we clarify the information in current 14.00B4. Proposed 14.00D4a, *General,* corresponds to the first three sentences of current 14.00B4. It describes the characteristics of polymyositis and dermatomyositis. In proposed 14.00D4b, *Documentation of polymyositis or dermatomyositis,* we describe the findings that are generally used to document these impairments. The first sentence of the proposed rule corresponds to the last sentence of current 14.00B4. We propose minor editorial revisions, including the removal of the reference to "myositis" because there are multiple characteristic abnormalities on muscle biopsy that support the diagnosis of polymyositis or dermatomyositis. We also propose to add a sentence to explain that people with dermatomyositis have a characteristic skin rash.

In proposed 14.00D4c, *Additional information about how we evaluate polymyositis and dermatomyositis under the listings,* we explain how we evaluate commonly occurring limitations associated with these disorders. Proposed 14.00D4c(i) corresponds to the fourth and fifth sentences of current 14.00B4. We propose to delete the example of weakness of the anterior neck flexor muscles in the sixth sentence of current 14.00B4 because we are proposing to delete the reference to the cervical muscles from listing 14.05 for reasons we explain later in this preamble. We also propose to add an example of squatting. Squatting is a common means for evaluating weakness in the pelvic girdle muscles.

In proposed 14.00D4c(ii), we explain that we will evaluate malignancies (which may be associated with these disorders) under the malignant neoplastic diseases listings (13.00ff). We do not provide this guidance in proposed 114.00D4c in the childhood section for polymyositis or dermatomyositis because malignancies are not commonly associated with these disorders in children. We also explain that we evaluate the involvement of other organs or body systems under the affected body system.

In proposed 14.00D5, *Undifferentiated and mixed connective tissue disease (14.06),* we reorganize and clarify the information in current 14.00B5. In the proposed rules, we are adding an explicit reference to mixed connective tissue disease (MCTD) to clarify what we mean in the current rules when we refer to "overlap" syndromes. This is not a substantive change, but a clarification of our current rules to update medical terminology. In proposed 14.00D5a, *General,* we describe what we mean by undifferentiated and mixed connective tissue disease. In proposed 14.00D5b, *Documentation of undifferentiated and mixed connective tissue disease,* we explain when clinical features and serologic findings may be used to diagnose undifferentiated and mixed connective tissue disease. These provisions in proposed 14.00D5a and 14.00D5b are not substantively different from the provisions in the first three sentences of current 14.00B5.

We propose to delete the last sentence of current 14.00B5. The current sentence indicates that the correct designation of an "overlap" disorder is important for the assessment of prognosis. We believe that this sentence, while useful in treatment settings, does not provide useful adjudicative guidance.

In proposed 14.00D6, *Inflammatory arthritis (14.09),* we expand, reorganize, and clarify the rules in current 14.00B6. Proposed 14.00D6a, *General,* corresponds to the first and fourth sentences of current 14.00B6. We continue to explain that inflammatory arthritides include a vast array of disorders that differ in cause, course, and outcome and may result in difficulties of ambulation or fine and gross movements. We edited the fourth sentence of current 14.00B6 to break it up into three shorter sentences. However, we do not intend to change the meaning of the provision.

Proposed 14.00D6b, *Inflammatory arthritides involving the axial spine (spondyloarthropathies),* and 14.00D6c, *Inflammatory arthritides involving the peripheral joints,* correspond to the second and third sentences of current 14.00B6. In these sections, we list some disorders that may be associated with inflammatory spondyloarthropathies involving the axial spine (proposed 14.00D6b) and inflammatory arthritides affecting the peripheral joints (proposed 14.00D6c). We propose to add inflammatory bowel disease (IBD) to the lists of examples in both sections because arthritis is the most common extra-intestinal complication of IBD. In proposed 14.00D6b, we remove the examples of "other reactive arthropathies" and "undifferentiated spondylitis" now included in the second sentence of current 14.00D6 because they are non-specific and the list is not intended to be complete, only to provide some examples. Finally, we propose to update some of the terminology in this section; for example, we refer to "psoriatic arthritis" instead of "psoriatic arthropathy."

Proposed 14.00D6d, *Documentation of inflammatory arthritides,* is new. In it, we explain that generally, but not always, the diagnosis of inflammatory arthritis is made by the clinical features and serologic findings described in the most recent edition of the *Primer on the Rheumatic Diseases.*

Proposed 14.00D6e, *How we evaluate the inflammatory arthritides under the*

listings, corresponds to the information in the last two sentences of current 14.00B6, current 14.00B6c, and current 14.00B6d. We are reorganizing the text to reflect the proposed reorganization of listing 14.09, which we explain later in this preamble, and to clarify it.

- Proposed 14.00D6e(i) explains that proposed listings 14.09A and 14.09C1 (current listings 14.09A and 14.09B) are met by showing an impairment that results in an "extreme limitation." This is how we describe "inability to ambulate effectively" in 1.00B2b in our musculoskeletal listings and, therefore, would only be a clarification of the current rule. In the proposed rule, we retain the provision from current 14.00B6c that the inability to ambulate effectively is implicit in proposed listing 14.09C1 (current listing 14.09B), the listing for ankylosis of the spine with fixation at a 45° angle, even though individuals who have the degree of ankylosis described in the listing ordinarily do not require the use of bilateral upper limb assistance.
- Proposed 14.00D6e(ii) explains proposed listings 14.09B (current listing 14.09D), 14.09C2 (current listing 14.09E), and 14.09D. These listings do not describe a single impairment manifestation that results in an "extreme" limitation. Rather, they describe combinations of impairment manifestations that should result in an "extreme" limitation or in "marked" limitations in at least two areas of functioning. We also incorporate the provision in the first sentence of current 14.00B6d that extra-articular impairments may meet listings in other body systems.
- Proposed 14.00D6e(iii) corresponds to the third and fourth sentences of current 14.00B6d. It explains that extra-articular features of inflammatory arthritis may involve any body system and lists examples of commonly occurring extra-articular impairments by body system. We propose to reorganize and expand the list of examples of such impairments and to clarify the body systems to which they belong.
- Proposed 14.00D6e(iv) and 14.00D6e(v) correspond to the last sentence of current 14.00B6. In proposed 14.00D6e(iv), we replace "persistent" with "permanent" and remove "without ongoing inflammation" to clarify that we evaluate permanent deformity of a major peripheral joint under listing 1.02 when it is the dominant feature of your impairment. Proposed 14.00D6e(v) explains that we use listing 1.03 to evaluate surgical reconstruction of a major weight-bearing joint.
- Proposed 14.00D6e(vi) would clarify that we evaluate your impairment under any appropriate listing when you have both inflammation and chronic deformities.

We are not including the provisions of current 14.00B6e in proposed 14.00D6. Current 14.00B6e provides that the fact that an individual is dependent on steroids, or any other drug, for the control of inflammatory arthritis is insufficient in itself to establish disability. We added it to part A of our listings in 2002 for consistency with 114.00E6, a provision we added to part B of the listings at the same time (66 FR 58010, 58020 (2001)). We are proposing to remove that provision for reasons we explain below in our summary of the proposed rules in part B. Therefore, we are proposing to remove this provision in part A for consistency with that change. However, in proposed 14.00G3, we continue to state that we will consider the adverse side effects of treatment, including the adverse effects of corticosteroids, to ensure that our adjudicators remember to consider the side effects an individual might experience from steroids and any other treatment.

Proposed 14.00D7, *Sjögren's syndrome (14.10)*, is new. As already noted, we are proposing to add a new listing for Sjögren's syndrome. In connection with that proposed listing, proposed 14.00D7a, *General*, explains the features of the disorder, including its resulting symptoms and possible complications. We also list organ systems that may be involved and note that Sjögren's syndrome may be associated with other autoimmune disorders. In proposed 14.00D7b, *Documentation of Sjögren's syndrome*, we also explain that if you have Sjögren's syndrome, your medical evidence will generally, but not always, show that your disease satisfies the criteria in the "Criteria for the Classification of Sjögren's Syndrome" found in the most recent edition of the *Primer on the Rheumatic Diseases*.

Proposed 14.00E—How do we evaluate immune deficiency disorders, excluding HIV infection (14.07)?

In proposed 14.00E, we add a new section describing how immune deficiency disorders (excluding HIV infection) are classified, documented, and evaluated. This section has four subsections.

In proposed 14.00E1, *General*, we explain that immune deficiency disorders are classified as either "primary" or "acquired." Primary disorders are mainly seen in children but, due to recent advances in treatment, many affected children survive into adulthood.

In proposed 14.00E2, *Documentation of immune deficiency disorders*, we explain that documentation of these disorders may be made by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

In proposed 14.00E3, *Immune deficiency disorders treated by stem cell transplantation*, we explain how we evaluate immune deficiency disorders that are treated in this way. In proposed 14.00E3a, *Evaluation in the first 12 months*, we explain that if you undergo stem cell transplantation we will consider you disabled until at least 12 months from the date of the transplant. This is the same provision that we use for most malignancies treated by bone marrow or stem cell transplants in the neoplastic listings. In 13.00L4 of those listings, we also included a special provision for autologous bone marrow transplants—transplants using your own stem cells (69 FR 67034). We do not include such an alternative provision in these proposed rules because people with immune deficiency disorders receive allogeneic transplants—that is, stem cells taken from other people. Also, we propose to use "stem cell transplantation" instead of "bone marrow or stem cell transplantation" in this proposed section and in proposed listing 14.07B because "stem cell transplantation" is a broader term that encompasses different sites for obtaining hematopoetic (blood-forming) stem cells, including bone marrow, peripheral blood, and umbilical cord blood. In proposed 14.00E3b, *Evaluation after the 12-month period has elapsed*, we explain that, after that period has elapsed, we consider any demonstrable residuals of your immune deficiency disorder including any residual impairment(s) resulting from your treatment. The provision also is based on 13.00L4 in our malignant neoplastic diseases listings.

Proposed 14.00E4, *Medication-induced immune suppression*, is new. We explain that medication effects can result in immune suppression that will usually resolve once the medication is ceased. However, if you take prescribed medications for long-term immune suppression, such as after an organ transplant, we will look at the frequency and severity of any infections you get, residuals from the organ transplant itself, and whether there has been any significant deterioration of other organ systems.

Proposed 14.00F—How do we evaluate human immunodeficiency virus (HIV) infection?

In proposed 14.00F, we incorporate, update, and expand information on HIV infection contained in current 14.00D3 through 14.00D7. We also make nonsubstantive editorial changes.

As already noted, we propose to move the first sentence of current 14.00D1 to proposed 14.00A4. Therefore, we begin proposed 14.00F with what is now the second sentence of current 14.00D1. It is a reminder that an individual with HIV infection need not meet the Centers for Disease Control definition of acquired immune deficiency syndrome (AIDS) to meet or medically equal the criteria of listing 14.08. We have made minor editorial changes to the sentence, but we do not intend to change its meaning.

We propose to move the provisions of current 14.00D2 to other sections in the proposed rules. In the first four paragraphs of current 14.00D2, we define the terms "resistant to treatment," "recurrent," and "disseminated," and we would now define those terms in proposed 14.00C. In the fifth paragraph of current 14.00D2, we define "significant involuntary weight loss" for purposes of current listing 14.08I (which has become listing 14.08H in these proposed rules). In the proposed rules, we include this definition in 14.00F5.

Like current 14.00D3, proposed 14.00F1 is in two major sections: A section explaining how we document the diagnosis of HIV infection definitively (14.00F1a) and a section explaining how we document the diagnosis of HIV infection when we do not have definitive evidence (14.00F1b). In proposed 14.00F1, *Documentation of HIV infection*, we incorporate and update the information in current 14.00D3 to explain the laboratory tests or other evidence we accept as documentation of HIV infection. Proposed 14.00F1a, *Documentation of HIV infection by definitive diagnosis*, corresponds to current 14.00D3a. We propose to update and expand this section to include newer laboratory diagnostic techniques that did not exist or were not widely used when we published the current rules in 1993.

- Proposed 14.00F1a(i), for HIV antibody tests, corresponds to current 14.00D3a(i). We propose only nonsubstantive editorial changes.
- Proposed 14.00F1a(ii) is new. It would add positive "viral load" tests for HIV infection, such as quantitative plasma HIV RNA, quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT–PCR), that were not widely available when we published the current rules.
- Proposed 14.00F1a(iii) is for HIV DNA detection by polymerase chain reaction (PCR). We include it as an example of an "other test" in current 14.00D3a(iii) because it was not widely available when we published the current rules.
- Proposed 14.00F1a(iv), for HIV antigen, corresponds to current 14.00D3a(ii).
- Proposed 14.00F1a(v) is new. It would add a positive viral culture for HIV from peripheral blood mononuclear cells (PBMC) as another test that definitively documents HIV infection. Even though it is not commonly used, we will accept it as definitive evidence if it is in your medical records.
- Proposed 14.00F1a(vi), for other tests that are highly specific for detection of HIV, corresponds to the first paragraph in current 14.00D3a(iii).

Proposed 14.00F1b, *Other acceptable documentation of HIV infection*, corresponds to current 14.00D3b. It explains what documentation of HIV infection we will accept instead of definitive laboratory testing. The proposed rule is essentially the same as the current rule except for nonsubstantive editorial changes.

In proposed 14.00F2, *CD4 tests*, we combine the provisions in the second undesignated paragraph after current 14.00D3a(iii) and the second paragraph in current 14.00D4a. We specify that, even though a reduced CD4 count or percent alone does not establish a definitive diagnosis of HIV infection, a CD4 count below 200/mm^3 or 14 percent along with clinical findings does offer supportive evidence of opportunistic infections without a definitive diagnosis. This is because a CD4 count below 200 or 14 percent is an indicator of an increased susceptibility to developing opportunistic infections. We also make nonsubstantive editorial changes.

In proposed 14.00F3, *Documentation of the manifestations of HIV infection*, we incorporate the information in current 14.00D4 with nonsubstantive editorial changes. Like proposed 14.00F1 and current 14.00D4, proposed 14.00F3 is divided into two main parts. The first section explains how we document manifestation of HIV infection definitively (14.00F3a), and the second section explains how we document manifestations of HIV infection when we do not have definitive evidence (14.00F3b).

Proposed 14.00F3a, *Documentation of the manifestations of HIV by definitive diagnosis*, incorporates the first paragraph in current 14.00D4a.

In proposed 14.00F3b, *Other acceptable documentation of the manifestations of HIV infection*, we incorporate information that is in the first paragraph of current 14.00D4b. We propose to revise the language of this paragraph both editorially and to clarify our original intent. In the current rule, we indicate that "if no definitive laboratory evidence is available, manifestations of HIV infection may be documented by medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence." The sentence may imply that we need to have all of the things listed (medical history *and* clinical findings *and* laboratory findings *and* diagnosis(es)) to determine that you have a manifestation of HIV infection when we do not have definitive laboratory findings. That is not our intent, so we are clarifying in the proposed rule that we may need only some of this information to make a finding that you have a manifestation of HIV infection, depending on the prevailing state of medical knowledge and clinical practice. We also propose to clarify what we mean by "laboratory findings" in this context; that is, laboratory findings that do not in themselves definitively establish the existence of a diagnosis of an HIV-related manifestation.

In 14.00D4 of the current rules we provide specific guidance for documenting one particular manifestation of HIV infection without definitive evidence: cytomegalovirus (CMV) disease. In proposed 14.00F3b, we expand the section to include two additional manifestations. In proposed 14.00F3b(i), we add guidance to explain that Pneumocystis carinii pneumonia (PCP) is frequently diagnosed presumptively without definitive evidence and to provide examples of evidence that is supportive of a presumptive diagnosis of PCP. We also note that Pneumocystis carinii is now known as Pneumocystis jiroveci; however, "PCP" remains in common usage for the pneumonia caused by this organism.

In proposed 14.00F3b(ii), we incorporate and expand the information now in the second paragraph of current 14.00D4b, regarding the documentation of CMV disease. We propose to clarify that a positive serology test for CMV identifies a "history" of infection but does not confirm an "active" disease process. We do not include "documentation of CMV disease requires confirmation by biopsy" as in the last sentence of the second

paragraph of current 14.00D4 because we are providing information on documentation other than definitive laboratory findings. Also, instead of stating that we can use generally acceptable methods to confirm the diagnosis of CMV, we provide examples of evidence, such as fever and positive CMV serology test, that are supportive evidence of a presumptive diagnosis of CMV disease.

In proposed 14.00F3b(iii), we add guidance on how toxoplasmosis of the brain is presumptively diagnosed since the definitive method of diagnosing toxoplasmosis of the brain by biopsy is not commonly performed.

In proposed 14.00F4, *Manifestations specific to women*, we incorporate the information in current 14.00D5. In proposed 14.00F4a, *General*, we incorporate the first paragraph of current 14.00D5 and in proposed 14.00F4b, *Additional considerations for evaluating HIV infection in women*, we incorporate the second paragraph of current 14.00D5. Except for adding paragraph designations and headings and minor editorial changes (including changes to reflect proposed changes in the paragraph designations of the listings explained below), the proposed provisions are the same as in the current rules.

In proposed 14.00F5, *involuntary weight loss*, we incorporate the last paragraph of current 14.00D2 with nonsubstantive editorial changes, including a change that reflects our proposal to redesignate listing 14.08I to listing 14.08H.

Proposed 14.00G—How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

In the current rules, we refer to treatment and its effects in four places.

- In the third paragraph of 14.00B, we provide that, for connective tissue diseases, we need a longitudinal clinical record of at least 3 months demonstrating active disease despite prescribed treatment, with the expectation that the disease will remain active for 12 months.
- In the fifth paragraph of 14.00B, we explain that "the chronic adverse effects of treatment (e.g., corticosteroid-related ischemic necrosis of bone) may result in functional loss" in individuals with connective tissue disease.
- In 14.00B6e, we explain that the fact that an individual with inflammatory arthritis is dependent on steroids or any other drug for the control of the arthritis is not in itself sufficient to establish that the individual is disabled. We also explain that we must evaluate each case on its own merits, taking into consideration any adverse effects of treatment.
- In 14.00D7, *Effect of treatment*, we provide three paragraphs discussing how we consider treatment in people with HIV infection. This section explains that we must consider both the positive effects and negative side effects of treatment for HIV infection and its manifestations, special considerations in evaluating treatment in individuals with HIV infection and, briefly, the kinds of evidence we need.

We are proposing to remove the provisions in the third paragraph of 14.00B and paragraph 14.00B6e. Neither of those sections nor the other current rules we will continue to use contain provisions that explain in detail how we evaluate the positive effects and negative side effects of treatment in individuals who have autoimmune disorders and immune deficiency disorders apart from HIV infection. Also, most current treatments for HIV infection came into use, or came into wide use, after we first published listing 14.08 in 1993. As a consequence, we believe that current 14.00D7 needs to be updated to reflect the newer and more widely used treatments and treatment protocols for HIV infection and to reflect the considerable medical experience that has been gained since 1993 about the long-term effects, usefulness, and limitations of such treatments.

Therefore, we propose to add a new separate section 14.00G—*How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?* The new section would address in one place issues of treatment that are common to all three types of immune system disorders as well as issues of treatment that are unique to each type of disorder, including treatment that is specifically for HIV infection. We do not propose to remove any guidance about treatment for HIV infection that is still relevant, only to move it to this new section. In fact, we propose to expand and update our rules to reflect what has been learned in applying different treatments for HIV infection since we published the current rules more than a decade ago. The provisions for addressing both the positive effects and negative side effects of treatment in individuals who have autoimmune disorders and immune deficiency disorders other than HIV infection would be new in these listings and, we believe, would provide useful adjudicative guidance that is lacking in our current rules.

Section 14.00G has six subsections. The first two (proposed 14.00G1 and 14.00G2) and the last one (proposed 14.00G6) are applicable to all immune system disorders. Proposed 14.00G3–14.00G5 provide guidance specific to each of the three main types of immune system disorders: Autoimmune disorders (proposed 14.00G3), immune deficiency disorders, excluding HIV infection (proposed 14.00G4), and HIV infection (proposed 14.00G5).

In proposed 14.00G1, *General*, we incorporate the first and fifth sentences of current 14.00D7. We believe that this guidance has general applicability to all immune system disorders, not just HIV infection. We first explain that we consider both the effectiveness of your treatment on your signs, symptoms, and laboratory findings, and the negative side effects of your treatment on your functioning. We also explain that we will make every reasonable effort to obtain a specific description of the treatment you receive. Then, we list eight factors we consider when we evaluate your treatment. They are mostly based on factors we mention in the current rule, but we propose to expand the list and in some cases to clarify the existing factors in our current rules. For example, instead of referring only to the "dosage [and] frequency of administration" of your treatment, we refer to "the intrusiveness and complexity of your treatment (the dosing schedule, need for injections, etc)." In proposed 14.00G1e, we also introduce the term "variability of your response to treatment," a concept we address for HIV infection in current 14.00D7 but that we believe is of particular importance in considering the effects of treatment in all individuals with immune system disorders. We explain this concept in more detail in proposed 14.00G2.

Proposed 14.00G1f is new. It describes the interactive and cumulative effects of treatments for immune system disorders and other disorders that people with immune system disorders may also have. We explain that the effects of these treatments taken together may be greater than they would be if we considered them separately, and we provide an example of treatment for HIV infection together with treatment for hepatitis C. Proposed 14.00G1g is also new. It explains that we will also consider the duration of your treatment. Proposed 14.00G1h is a catchall for other relevant factors we have not listed in 14.00G1a–14.00G1g.

In proposed 14.00G2, *Variability of your response to treatment*, we explain what we mean by this factor in terms of both HIV infection and other immune

system disorders. This proposed rule is based on the language of the second paragraph in current 14.00D7 and the second sentence of the third paragraph of that section. However, we propose to expand that guidance and to apply it to all other immune system disorders in addition to HIV infection. For example, we explain in a general way applicable to all immune system disorders that some individuals may show an initial positive response to drug treatment (or a combination of drugs), but the initial positive response may be followed by a decrease in the effectiveness of the medication.

We provide more specific information about treatment of autoimmune disorders in proposed 14.00G3, *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* This proposed rule repeats the rule in the fifth paragraph of current 14.00B that, when we evaluate the effects of your treatment for your autoimmune disorder(s), we will consider the adverse effects that may result in loss of function. We propose to expand this guidance to include more examples of potential chronic adverse effects of steroid treatment and to explain that the side effects of some medications may be acute or long-term. We also propose to add a provision that recognizes that the medications used in the treatment of autoimmune disorders may have effects on mental function, including cognition (memory), concentration, and mood.

Proposed 14.00G4, *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function,* is new. As in proposed 14.00G3, we repeat the principle that we will consider the side effects of your treatment when we evaluate your ability to function. We cite intravenous immunoglobulin and gamma interferon therapy as examples of treatment you may be receiving. We also provide examples of side effects of treatment for immune deficiency disorders, including physical symptoms (such as fatigue and headaches), clinical signs (such as high blood pressure and joint swelling), and limitations in mental function, including cognition, concentration, and mood.

Proposed 14.00G5, *How we evaluate the effects of treatment for HIV infection on your ability to function,* is in two parts. In proposed 14.00G5a, *General,* as in proposed 14.00G3 and 14.00G4, we repeat the principle from 14.00D7 that we consider the side effects of antiretroviral treatment and treatment for the manifestation of HIV infection on your ability to function. We propose to expand our guidance to provide examples of the physical and mental side effects of antiretroviral drugs. We also note that the symptoms of HIV infection and the side effects of medications may be indistinguishable, but that we will consider your functional limitations whether they are a result of your symptoms from HIV infection or the side effects of your treatment.

In proposed 14.00G5b, *Structured treatment interruptions,* we provide new guidance specifically about structured treatment interruptions (STIs, also called drug holidays) in individuals with HIV infection. The proposed guidance clarifies that STIs are part of a prescribed treatment plan and do not show that an individual is failing to follow treatment, or in themselves establish that an individual's impairment is not as severe as alleged.

In proposed 14.00G6, *When there is no record of ongoing treatment,* we explain how we will evaluate the medical severity and duration of your immune system disorder when you have not received ongoing treatment or have not had an ongoing relationship with any treatment source despite the existence of a severe impairment(s). The provision is based on a standard provision we include in most other body systems listings, for example, 1.00H3 in the musculoskeletal system, the third paragraph of 3.00A in the respiratory system, and the third paragraph of 4.00B3 in the cardiovascular system. We also explain that if you have just begun treatment and we cannot decide whether you are disabled based on the evidence we have, we may need to wait to determine the effect of your treatment. We explain that there is no set period because how long we may need to wait will depend on the facts of your individual case. This is consistent with the guidance we provide in the last sentence of the third paragraph in current 14.00D7, which explains we should decide the impact of treatment based on a sufficient period of treatment.

Proposed 14.00H—How do we consider your symptoms, including your constitutional symptoms or pain?

Proposed 14.00H is new. In it, we explain that we will evaluate the impact your symptoms have on your ability to function when the evidence of your immune system disorder(s) shows that you have a medically determinable impairment that could reasonably be expected to produce your symptoms.

Proposed 14.00I—How do we use the functional criteria in these listings?

Although we indicated in the ANPRM that we would not summarize or respond to the public comments (68 FR 24897), there was one theme that was common to many of the letters and e-mails and that was raised repeatedly by the medical specialists, advocates for people who have immune system disorders, and individuals with immune system disorders in the presentations at the two outreach meetings we held: The functional impact of immune system disorders, and the inadequacy of the immune system rules to address that impact, especially for immune system disorders other than HIV infection. This issue was raised so often, and as a matter of such great public interest, that we believe that it will be helpful to summarize briefly what people said to help explain why we are proposing to add new rules for evaluating functioning in these listings.

Many people said that we should recognize how immune system disorders can affect an individual's functioning. Many people described physical symptoms, such as pain, fatigue, and malaise, as well as mental symptoms, including loss of memory, loss of concentration, and depression. Commenters stressed that these symptoms could be very severe. A number of people indicated that the fatigue associated with these disorders was not merely a feeling of tiredness but a more profound and debilitating experience. Many people also noted that the impairments could be both episodic and variable in intensity, with some people experiencing "good" or relatively good days interspersed with days in which they were unable to function. They pointed out that there was a need for the rules to recognize the longitudinal effect of these episodic limitations on the ability to work. Other people pointed out that there is often comorbidity of immune system disorders; that is, many people have features of more than one immune system disorder. In those cases, the symptoms and limitations are multiplied to an effect that is worse than simply adding them up. These commenters said that under the current listings there is no adequate way to assess these multiplied effects. Many people also pointed out the effect that stress can have on the medical condition and symptomatology of individuals who have immune system disorders. Other people described the debilitating effects of treatment, not only the side effects, but sometimes the need to follow a very rigorous and time-

consuming schedule of treatment that in itself can be limiting.

A number of the commenters pointed with approval to the provisions of current listing 14.08N and the text in current 14.00D8 that explains that listing. These individuals thought that the provisions should not be confined to people who have HIV infection but should be extended to people with other kinds of immune system disorders who may be continuously limited by their symptoms and other manifestations, frequently become ill, have periodic manifestations, or have the kinds of serious limitations described in those rules. They urged us to consider extending such criteria to all listed immune system disorders to ensure that we do not overlook individuals who do not necessarily have the objective evidence needed to meet the other criteria in the listings but who may still be disabled.

We carefully considered these comments and are proposing a number of changes throughout the introductory text to the immune system listings to address them. We are proposing to significantly expand our guidance about specific immune system disorders and the effects of treatment. We agree with those commenters who suggested that we include the same kind of criteria for evaluating the overall functional impact of other immune system disorders as we provide in current listing 14.08N for people who have HIV infection. Therefore, we are proposing to add criteria similar to those in current listing 14.08N for each of the listed impairments in this body system. The proposed listings for evaluating functioning for other immune system disorders would be 14.02B, 14.03B, 14.04D, 14.05E, 14.06B, 14.07C, 14.09D, and 14.10B. We are also proposing to redesignate current listing 14.08N as 14.08K for reasons we explain below.

Proposed 14.00I is the section of the introductory text that would explain the proposed listings that include functional criteria. It corresponds to current 14.00D8, but we revised it so that it applies to all of the new proposed listings that include functional criteria, not just the listing for HIV infection (current listing 14.08N).

Like current 14.00D8, proposed 14.00I includes eight paragraphs. Except as described below, we propose to revise each paragraph so that it applies not only to HIV infection but to the other immune system disorders as well. For example, in the first paragraph of current 14.00D8 we explain that current listing 14.08N (proposed listing 14.08K) establishes standards for evaluating manifestations of HIV infection that do not meet the criteria of any of the preceding listings within 14.08; that is, current listings 14.08A–14.08M. We also explain that we use listing 14.08N both for manifestations that are listed in the preceding listings within 14.08 and for manifestations that are not listed at all. We propose to modify this language so that it applies to all of the immune system disorders within this body system. We also propose minor editorial changes throughout the paragraphs.

The following are other changes we propose to make in this section.

In proposed 14.00I2, we propose to remove the first sentence in the second paragraph of current 14.00D8, which explains that for individuals with HIV infection, we assess listing-level severity under current listing 14.08N based on the functional limitations imposed by the impairment. We believe that this point is already made in proposed 14.00I1 and that it is unnecessary to repeat it in proposed 14.00I2. We propose to revise the second sentence, which says that we must consider the full impact of "signs, symptoms, and laboratory findings" on the individual's ability to function. We believe that this guidance may not clearly explain what we intend. Therefore, we propose to revise it to explain that when we use one of the listings cited in 14.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder(s) on your ability to function on a sustained basis.

In proposed 14.00I3–14.00I8, which correspond to the last six paragraphs in current 14.00D, we propose to update our rules to make their language more consistent with our other rules that define the term "marked" and the domains of functioning. We do not intend these changes to be substantively different from the current rules. We also propose to include references to both pain and fatigue throughout proposed 14.00I6–14.00I8 as symptoms that may cause limitations. The current rules are not consistent in this regard.

Proposed 14.00J— How do we evaluate your immune system disorder when it does not meet one of these listings?

Proposed 14.00J1 and 14.00J3 would replace the guidance we now provide in the first and third paragraphs of current 14.00D6. As in other provisions throughout the introductory text, we propose to revise the language to make it apply generally to all immune system disorders, not just HIV infection. Also, we propose to remove guidance that is already covered in other sections in the introductory text of these proposed rules, such as the guidance that individuals may have signs or symptoms of a mental impairment or of another physical impairment.

Proposed 14.00J2 would be a new section in this body system. For reasons we explain below, we are proposing to remove reference listings—that is, listings that are met or equaled by meeting or equaling the criteria of another listing—from this body system. However, immune system disorders can have effects in virtually every body system, and we believe it is important to include guidance about those effects in the introductory text so that they are not overlooked.

Therefore, we propose to add new section 14.00J2 to explain that immune system disorders can have effects in other body systems; we also provide a list of examples of those effects in each of the relevant body systems with references to other body systems listings. The proposed provisions are based on language in the second paragraph of current 14.00D6, which is currently relevant only to the evaluation of HIV infection, and on the reference listings we are proposing to remove. In the latter case, we are also expanding the information to provide specific examples of impairments that may be caused by autoimmune disorders.

For example, current listings 14.02A6 and 14.04A4 are met with evidence of SLE, systemic sclerosis, or scleroderma with "Digestive involvement, as described under the criteria in 5.00ff." Apart from the fact that these listings are unnecessary because any individual who meets the criteria of a listing in the digestive body system (5.00ff) would be disabled under that listing, the guidance is not very specific. Also, in the current rules, we include these criteria only under listing 14.02 and 14.04; however, other immune system disorders can have effects in the digestive system. Therefore, we provide in proposed 14.00J2e that any immune system disorder can have effects in the digestive system, and we include an example of hepatitis C in addition to providing a reference to 5.00ff.

Proposed 14.00J2k provides examples of allergic disorders (including skin disorders) that individuals with immune system disorders may have. It would replace current 14.00C.

How are we proposing to change the criteria in the listings for evaluating immune system impairments in adults?

14.01 Category of Impairments, Immune System Disorders

The following is a detailed explanation of the significant changes in the proposed listings. Some changes are

common to several listings so we describe them first.

1. We propose to remove all of the reference listings from this body system. Every current listing section in this body system, except listing 14.07, includes reference listings. Reference listings are listings that are met by satisfying the criteria of another listing. For example, current listing 14.02A1, Joint involvement, is met when the resulting impairment meets the criteria of any appropriate listing in the musculoskeletal body system, 1.00ff. Current listing 14.08G1, for HIV infection with anemia, requires evaluation under current listing 7.02. Therefore, these listings are redundant because impairments that meet these listings must meet the requirements of other listings. We are removing reference listings from all of the body systems as we revise them. As already noted, instead of using reference listings, we propose to provide guidance in 14.00J of the introductory text stating that we may evaluate the resulting impairment of an immune system disorder under any affected body system.

2. We propose to revise current listings 14.02B, 14.03B, 14.04B, and 14.09D (proposed listings 14.02A, 14.03A, 14.04A, and 14.09B) as follows:

- We propose to remove the criterion for "significant, documented" constitutional symptoms or signs in each of these listings because we define the constitutional symptoms and signs in proposed 14.00C2. Moreover, it is unnecessary to specify "documented" because we always need to document the existence of any symptom or sign in any disability claim.
- Each of these current listings, except current listing 14.09D, also requires you to have all four of the constitutional symptoms or signs: Severe fatigue, fever, malaise, and involuntary weight loss. We propose to revise this requirement to "at least two" of the constitutional symptoms or signs instead of all four, because we believe that the requirement in the current listing is too severe. We believe that any individual with an autoimmune disorder involving two or more organs/body systems with one organ/body system involved to at least a moderate level of severity and who has at least two of the constitutional symptoms and signs in these listings will have an impairment that precludes any gainful activity. We also have added "involuntary" as a descriptor of weight loss in proposed listings 14.02A, 14.03A, 14.04A, 14.05E, 14.06A, 14.07C, 14.08K, 14.09B, and 14.10A for the same reason we explained earlier in the preamble.
- In proposed listings 14.02A, 14.03A, and 14.04A, which correspond to current listings 14.02B, 14.03B, and 14.04B, we propose to remove the reference to "lesser involvement" because we propose to remove the current reference listings to which these rules refer. We also believe the phrase is unnecessary—the severity of the impairment is demonstrated by the remaining criteria.

3. As we have already noted under the explanation of proposed 14.00I, we propose to add listings based on repeated manifestations accompanied by functional limitations and modeled after current listing 14.08N for each of the other immune system disorders. The proposed new listings are

- 14.02B for SLE,
- 14.03B for systemic vasculitis,
- 14.04D for systemic sclerosis (sclerodefma),
- 14.05E for polymyositis and dermatomyositis,
- 14.06B for undifferentiated and mixed connective tissue disease,
- 14.07C for immune deficiency disorders (other than HIV infection),
- 14.09D for inflammatory arthritides, and
- 14.10B for Sjögren's syndrome.

Each listing requires you to have:

- The specified immune system disorder for that listing,
- Repeated manifestations that do not satisfy the requisite findings of another listing for the specified immune system disorder,
- At least two of the constitutional symptoms or signs, and
- "Marked" limitation in one of three domains of functioning: Activities of daily living, social functioning, or completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

We explain what we mean by "repeated" in proposed 14.00I3 and by "marked" in proposed 14.00I4–5.

The following is an explanation of the other significant changes we propose to make. We are also proposing minor editorial changes in some listings and changes to cross-references to the introductory text throughout the listings to reflect the changes to the introductory text in the proposed rules. We do not describe all of those changes below.

Proposed Listing 14.04—Systemic sclerosis (scleroderma)

Proposed listing 14.04B corresponds to current listing 14.04C. As we have already noted, we propose to expand this listing to include provisions for individuals who had a childhood form of the disorder as children and who still have listing-level functional limitations as adults. The proposed listing is essentially identical to proposed listing 114.04, which we describe in detail later in this preamble, except that it includes references to appropriate adult rules defining "inability to ambulate effectively" and "inability to perform fine and gross movements effectively."

We also propose minor clarifications in the language of the current listing. Current listing 14.04C describes "[g]eneralized scleroderma with digital contractures." We propose to clarify that "digital" refers to either the toes or the fingers, and to list the effects in the toes separately from the effects in the fingers, in proposed listings 14.04B1 and 14.04B2, respectively. We also propose to remove the requirement for "generalized" scleroderma (that is, systemic sclerosis) because the very serious digital contractures described in the proposed listings would in themselves be disabling regardless of whether the scleroderma is generalized.

Proposed listing 14.04C corresponds to current listing 14.04D. We propose to change "Raynaud's phenomena" in current listing 14.04D to "Raynaud's phenomenon" for the same reason already described in the explanation of proposed 14.00D3. We propose to remove the word "[s]evere" as a descriptor of Raynaud's phenomenon in this listing because it is unnecessary given the severity of the impairment demonstrated by the remaining criteria, such as ischemia with ulcerations of fingers or toes, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively. As in proposed listing 14.04B, we also propose to clarify that "digital" refers to fingers or toes.

In proposed listing 14.04C, we also propose to revise the criteria in current listing 14.04D to provide a better description of listing-level Raynaud's phenomenon. The criteria in current listing 14.04D require severe Raynaud's phenomenon that is characterized by digital ulcerations, ischemia, or gangrene. We believe that this does not describe an impairment that precludes any gainful activity in every case. Therefore, in proposed listing 14.04C1 we would provide criteria for Raynaud's phenomenon characterized by gangrene of a toe or finger in at least two extremities, or a toe and finger to indicate an impairment that would preclude any gainful activity. We do not propose to require that the gangrene result in the inability to ambulate effectively or to perform fine and gross movements effectively because the presence of gangrene of a toe or finger

in at least two extremities or in a toe and finger by itself is an indication of a very serious impairment. In proposed listing 14.04C2, we provide criteria for ischemia with ulcerations of the toes or fingers that results in the inability to ambulate effectively or to perform fine and gross movements effectively; Raynaud's phenomenon characterized only by ischemia with ulcerations does not by itself describe an impairment that would necessarily result in an extreme loss of function. Also, ulcerations are an outcome of ischemia, so we propose to revise the language so that ischemia and ulcerations are not listed as though they are separate entities, as in the current rule.

Proposed Listing 14.05—Polymyositis and Dermatomyositis

Proposed listing 14.05A corresponds to current listing 14.05A. We propose to replace the word "severe" as a descriptor of proximal limb-girdle weakness with the more accurate "resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively, as defined in 14.00C6 and 14.00C7." We also propose to change "shoulder and/or pelvic" muscle weakness to "pelvic or shoulder" muscle weakness because pelvic muscle weakness can result in the inability to ambulate effectively and shoulder muscle weakness can result in the inability to perform fine and gross movements effectively. Therefore, either one of these findings could be sufficient in itself to show disability and the "and" is unnecessary.

Proposed listing 14.05B corresponds to current listing 14.05B1. We propose to remove the requirements in the opening paragraph for less severe limb-girdle muscle weakness than in 14.05A, associated with cervical muscle weakness, because impaired swallowing or impaired respiration may result in listing-level limitations without the presence of either of those findings. We also propose to remove the phrase "to at least a moderate level of severity" because the criterion in proposed 14.05B is of at least a moderate level of severity, making this language unnecessary. We propose to revise "impaired swallowing with dysphagia" to "impaired swallowing (dysphagia)" because dysphagia means impaired swallowing. We propose to revise "episodes of aspiration" to "aspiration" because of the progressive nature of muscle weakness that results from polymyositis or dermatomyositis. Once an episode of aspiration is documented, further documentation of multiple episodes is unnecessary. In addition, we propose to replace "cricopharyngeal weakness" with "muscle weakness" in proposed 14.05B because impaired swallowing with dysphagia and aspiration may result from muscles other than the cricopharyngeal muscles.

Proposed listing 14.05C corresponds to current listing 14.05B2. We propose to remove the requirements in the opening paragraph of current 14.05B2 for the same reasons as in the above paragraph for proposed listing 14.05B.

Proposed listing 14.05D, Diffuse calcinosis, is a new adult listing and has the same criteria as in proposed listing 114.05D for children, which we describe in detail later in this preamble. We propose to add this listing for individuals who had a form of the disorder as children and who still have listing-level functional limitations as adults.

Proposed Listing 14.06—Undifferentiated and Mixed Connective Tissue Disease

We propose to change the heading of current 14.06 to update it and to more accurately describe the disorders we evaluate under this listing.

Current listing 14.06 is entirely a reference listing, requiring evaluation under current listings 14.02A, 14.02B, or 14.04. We propose to change it to a stand-alone listing containing its own criteria. Proposed listing 14.06A uses the same criteria as in proposed listings 14.02A, 14.03A, and 14.04A for involvement of two or more body systems to at least a moderate level of severity and at least two constitutional symptoms or signs. Proposed listing 14.06B incorporates the same functional criteria for the evaluation of repeated manifestations of undifferentiated and mixed connective tissue disease as the other listings in this body system.

Proposed Listing 14.07—Immune Deficiency Disorders, Excluding HIV Infection

We propose to change the heading of listing 14.07 to update its terminology and to more accurately describe the disorders we evaluate under this listing.

The current listing is met with documented, recurrent severe infections occurring three or more times within a 5-month period. We propose to replace this criterion with a new, more accurate, and up-to-date listing. The listing is in three parts.

Proposed listing 14.07A is essentially the same as current listing 14.08M (proposed listing 14.08J) which describes individuals with HIV infection whose immune systems are so compromised that they frequently become ill. However, unlike current listing 14.07, current listing 14.08M provides that the infections must occur three times in a 12-month period, not three times in only a 5-month period. Current listing 14.08M is also more precise. It explains how severe the infections need to be by reference to resistance to treatment or a requirement for hospitalization or intravenous treatment. It also specifies six types of infections. We believe that the criteria in current listing 14.08M for people with HIV infection are equally as applicable to individuals with other kinds of immune deficiency disorders, and that they would be more inclusive than the criteria in current listing 14.07.

Proposed listing 14.07B is new. We propose to add this listing to recognize that some immune system disorders are treated by stem cell transplantation. In proposed listing 14.07B, we state that we will consider you under a disability until at least 12 months from the date of transplantation and, thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

Proposed listing 14.07C would incorporate the same functional criteria for the evaluation of repeated manifestations of immune deficiency disorders (excluding HIV infection) as in the other proposed listings in this body system and for the same reasons as described above.

Proposed Listing 14.08—Human Immunodeficiency Virus (HIV) Infection

We do not propose any substantive changes to the criteria in listing 14.08. We have carefully considered the advances in treatment and consequent longevity that have occurred since we published the current rules in 1993. However, we do not believe that there has been sufficient progress in the treatment and control of HIV infection to warrant any change in these rules. Moreover, even as some problems of people who have HIV infection appear to be improved, new problems have arisen to take their place. Advances in treatment are a case in point. While there have been significant strides in the treatment of HIV infection that have improved mortality, the treatment itself is often disabling both in terms of its side effects and its administration. Many people must structure their days and nights around their treatment, and any lapse can have dire consequences. Some people respond to treatment initially but become unresponsive without warning. Others have only limited success with their treatments. Relatively few people with HIV infection are considered "well." Therefore, from the standpoint of Social Security disability policy and efficient

administration of the disability programs, we have not seen sufficient evidence to persuade us to propose any significant changes in this listing.

As already noted, we propose to remove current reference listings throughout this body system, including the reference listings in listing 14.08. This would result in the removal of several specific listings within 14.08 and the redesignation of some of the current listings; for example, current listing 14.08N would become listing 14.08K. Where we propose to remove a reference listing, however, we have ensured that we provide guidance in the introductory text about where to evaluate the impairment. For example, current listing 14.08A4, for HIV infection with syphilis or neurosyphilis, is a reference listing that says only to consider the impairment under the criteria for the affected body system, such as 2.00 (special senses and speech), 4.00 (cardiovascular system), or 11.00 (neurological). Although we propose to remove this reference listing, we include this same guidance in proposed 14.00J2l.

We also propose to clarify some of the rules. We propose to reorganize the language in listing 14.08B2 to make it clearer that we evaluate under this listing candidiasis involving the esophagus, trachea, bronchi, or lungs, or at another site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes. We propose to move current listing 14.08C2, for PCP, from the listing for protozoan and helminthic infections to the listing for fungal infections because the organism that causes PCP is now known to be a fungus. We redesignate it as proposed listing 14.08B7.

We propose to redesignate current listing 14.08N as proposed listing 14.08K. We propose to expand our guidance on manifestations we evaluate under proposed listing 14.08K by adding "pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance, muscle weakness, and cognitive or other mental impairments" as new examples. We also expand our list of signs or symptoms by adding "nausea, vomiting, headaches, or insomnia."

We propose minor changes to the language of the functional criteria in proposed listing 14.08K from the current language in listing 14.08N. For example, we would replace the words "restriction" in current listing 14.08N1 and "difficulties" in current listings 14.08N2 and 14.08N3 with the word "limitation" in proposed listings 14.08K1, 14.08K2, and 14.08K3. We propose to make this change because "limitation" is a clearer term that we use throughout our rules.

Proposed Listing 14.09—Inflammatory Arthritis

We are redesignating current listing 14.09D as proposed listing 14.09B, current listing 14.09B as proposed listing 14.09C1, and current listing 14.09E as proposed listings 14.09C2 to put them in a more logical order. In the proposed rules, listing 14.09A would describe persistent inflammation or deformity of major peripheral joints that alone is disabling, while listing 14.09B would describe disability with lesser inflammation or deformity of major peripheral joints, organ involvement, and constitutional symptoms. Listing 14.09C would describe listing-level inflammatory arthritis of the spine. Proposed listing 14.09C1 would describe disability based only on fixation (ankylosis) of the spine, while listing 14.09C2 would describe disability based on a lesser degree of ankylosis of the spine with organ involvement. Proposed listing 14.09D would be the same functional listing we include in all of the proposed immune system listings and would apply to inflammatory arthritis affecting any joints.

Proposed listing 14.09A corresponds to current listing 14.09A. We propose to remove the requirement for a history of joint pain, swelling, and tenderness from this listing because it is unnecessary and to provide only that joint inflammation must be "persistent." (We do refer to joint pain, swelling, and tenderness in proposed 14.00D6a.) Persistent joint inflammation or deformity in two or more major peripheral joints resulting in the inability to ambulate effectively or inability to perform fine and gross movements effectively is in itself indicative of an impairment that would preclude any gainful activity. For the same reasons, we also propose to remove the requirement for "signs on current physical examination." We would not need signs of joint inflammation on a current physical examination when we have medical evidence documenting that you have inflammatory arthritis that results in the inability to ambulate effectively or inability to perform fine and gross movements effectively. Also, because of the episodic nature of inflammatory arthritis a current physical examination could show a brief period of improvement for a few days even though your longitudinal medical records may show persistent joint inflammation that results in the inability to ambulate effectively or inability to perform fine and gross movements. We propose to change "two or more major joints" to "two or more major peripheral joints" to distinguish these joints from the joints of the spine. We define "major peripheral joints" in proposed 14.00C8.

Proposed listing 14.09B corresponds to current listing 14.09D. The revisions in proposed 14.09B are similar to those in proposed listing 14.09A for the same reasons and to make it clearer that this listing requires joint inflammation in one or more major peripheral joints. Proposed 14.09B continues to require less joint involvement than in A, but we would no longer require "lesser extra-articular features than in C" because "C" refers to current reference listing 14.09C which we are proposing to remove. Instead, we require "extra-articular features that do not satisfy the criteria of a listing." Proposed listing 14.09B1 corresponds to current listing 14.09D2 with nonsubstantive editorial changes to make it consistent with how we present this criterion throughout these listings. Proposed listing 14.09B2 corresponds to current listing 14.09D1 except that we have removed the phrase "significant, documented" for reasons we have already explained. We also propose to correct an error in current listing 14.09D1. The explanatory abbreviation, "e.g." (for example) in current listing 14.09D1 inaccurately indicates that the four constitutional symptoms or signs, that is, fatigue, fever, malaise, and involuntary weight loss, are only examples when they are in fact a complete list. Consistent with changes in other proposed listings, we propose to require at least two of the constitutional symptoms or signs because we believe that the criteria in proposed listing 14.09B are indicative of an impairment that precludes any gainful activity.

Proposed listing 14.09C1 corresponds to current listing 14.09B. We propose to reorganize the criteria and to remove the requirements for "diagnosis established by findings of unilateral or bilateral sacroiliitis (e.g., erosions or fusions)" and "[h]istory of back pain, tenderness, and stiffness" because these findings are unnecessary. We believe ankylosing spondylitis or other spondyloarthropathies with ankylosis of the dorsolumbar or cervical spines at 45° or more of flexion documented as required in proposed listing 14.09C1 are in themselves indicative of an impairment that precludes any gainful activity.

Proposed listing 14.09C2 corresponds to current listing 14.09E. We propose to reorganize this listing to make it more consistent with the structure and

criteria that we use in the proposed listings for other autoimmune disorders. We propose to remove the phrase "with lesser deformity than in B," which describes a deformity that is less than the fixation "of the dorsolumbar or cervical spine at 45° or more of flexion" under current listing 14.09B, and to replace it with fixation "at 30° or more of flexion (but less than 45°)." We believe that this would be a clearer and more specific criterion that would help to provide greater uniformity in adjudications under this listing. We propose to remove the phrase "lesser extra-articular features than in C" because it refers to current reference listing 14.09C, which we are proposing to remove. We also propose to remove the phrase "with signs of unilateral or bilateral sacroiliitis" because the criteria in the proposed listing would be sufficient to show listing-level severity without this requirement, and the phrase "with the extra-articular features described in 14.09D" because it is unnecessary language.

Proposed Listing 14.10—Sjögren's Syndrome

Proposed listing 14.10 is new. We are proposing to add it in response to comments we received that Sjögren's syndrome is distinct from other immune system disorders with unique aspects that the current immune system listings do not address.

Although individuals with Sjögren's syndrome can qualify under current listings 14.03 and 14.09, and other listings, we believe that it is now appropriate to list Sjögren's syndrome separately in these listings. We propose to use the same two listing criteria for establishing listing-level severity as in the other proposed listings for autoimmune disorders because Sjögren's syndrome is an autoimmune disorder that can cause the same kinds of constitutional symptoms and signs as other autoimmune disorders, and because it can be as functionally limiting as other autoimmune disorders. Proposed listing 14.10A is the same as proposed listings 14.02A, 14.03A, 14.04A, and 14.06A, and proposed listing 14.10B is the same as proposed listings 14.02B, 14.03B, 14.04D, 14.05E, 14.06B, and 14.09D. We also provide a new separate section in the introductory text that describes the unique features of Sjögren's syndrome, proposed 14.00D7.

What revisions are we proposing to make in the immune system disorder listings for children—114.00?

As in proposed 14.00 in the adult rules, we propose to change the name of this body system to "Immune System Disorders."

Except for minor editorial changes, we have repeated much of the introductory text of proposed 14.00 in the introductory text to proposed 114.00. This is because the same basic rules for establishing and evaluating the existence and severity of immune system disorders in adults also apply to children. Because we have already described these provisions under the explanation of proposed 14.00, the following discussions describe only those provisions that are unique to the childhood rules or that require further explanation. We describe only the major provisions. For example, we do not summarize minor editorial changes that refer to "children" instead of adults or to the policy of "functional equivalence" instead of RFC assessment and steps in the adult sequential evaluation process.

Also, where appropriate in the introductory text of proposed 114.00, we have made an editorial change in the terms we use to identify the age categories of children in the introductory text of current 114.00 to be consistent with the terms we use in the introductory text of current 112.00, Mental Disorders. For example, in proposed 114.00F1b(ii), we use "newborn and younger infants (birth to attainment of age 1)" instead of "an infant 12 months of age or less" used in current 114.00D3b(i).

Proposed 114.00A—What disorders do we evaluate under the immune system listings?

In proposed 114.00A1b, we incorporate the first sentence in the last paragraph of current 114.00B, which explains that immune system disorders may affect growth, development, attainment of age-appropriate skills, and performance of age-appropriate activities in children. We propose to revise the sentence by adding the phrase "or their treatment." We also propose to remove the phrase "attainment of age-appropriate skills" because it is redundant of "development."

Proposed 114.00A2 is essentially the same as proposed 14.00A2 and similar to the first and second paragraphs of current 114.00B. We propose to expand and clarify the guidance in the second paragraph to explain that autoimmune disorders or their treatment may have a considerable impact on the physical, psychological, and developmental growth of pre-pubertal children that often differs from that of post-pubertal children or adults. We also remove the last sentences from both the first and second paragraphs of current 114.00B because they cross-refer to 14.00 in the part A listings. In part B of these proposed rules, we are repeating criteria from part A when they are appropriate for evaluating children in part B of the listings so it should rarely be necessary to refer back to 14.00 in part A.

Proposed 114.00D—What are the listed autoimmune disorders in these listings?

Proposed 114.00D parallels the structure and content of proposed 14.00D in the adult rules, except where the features commonly associated with the autoimmune disorders in these listings differ in children from adults.

In proposed 114.00D2, *Systemic vasculitis (114.03)*, as in current 114.00C3, we provide guidance (in 114.00D2a(ii)) on how we evaluate Kawasaki disease and add guidance about anaphylactoid purpura (Henoch-Schoenlein purpura). Also, in proposed 114.00D2a(ii), we do not use the example of giant cell arteritis (temporal arteritis) that is in proposed 14.00D2a(ii) because this disorder occurs almost exclusively in individuals over 50 years of age.

In proposed 114.00D3c, *Localized scleroderma (linear scleroderma or morphea)*, we describe features of focal forms of scleroderma in children. These disorders occur primarily in children and are more common than systemic sclerosis in children. In proposed 114.00D3c(i), we explain that the extent of involvement and the location of lesions are important factors in determining the limitations resulting from scleroderma. We also note that it may be appropriate to evaluate the limitations resulting from these impairments under the musculoskeletal (101.00) listings. In proposed 114.00D3c(ii), we describe features of isolated morphea of the face and explain that it may be more appropriate to evaluate the limitations from these disorders under the affected body system, such as the special senses listings (102.00) or mental disorders listings (112.00). In 114.00D3c(iii) we describe features of chronic variants of these syndromes and explain that it is appropriate to evaluate the limitations from these disorders under the affected body system, such as the musculoskeletal listings (101.00) or respiratory system listings (103.00).

In proposed 114.00D4, *Polymyositis and dermatomyositis (114.05)*, we note (in 114.00D4a, *General*) that polymyositis occurs rarely in children and describe the features of dermatomyositis that occur differently in children than in adults. In children, polymyositis and dermatomyositis usually do not occur in association with

malignancies. For this reason, we do not include a reference to malignancy or provide guidance that we will evaluate malignancies under the malignant neoplastic diseases listings (113.00ff) in proposed 114.00D4, as we do for adults in proposed 14.00D4. However, unlike in the adult rules, we include a reference to calcinosis for children because some children develop calcinosis late in the disease. Also, when dermatomyositis involves other organs or body systems, we evaluate the involvement under the affected body system. In proposed 114.00D4b, *Documentation of polymyositis or dermatomyositis*, we note that magnetic resonance imaging (MRI) showing muscle inflammation or vasculitis provides additional evidence of childhood dermatomyositis. We did not provide this guidance in proposed 14.00D4b because MRI findings are not considered diagnostic of dermatomyositis in adults. In proposed 114.00D4c(i), we explain how to evaluate polymyositis and dermatomyositis under the listings in newborn and younger infants.

In proposed 114.00D5, *Undifferentiated and mixed connective tissue disease (114.06)*, we note (in proposed 114.00D5a, *General*) that the most common pattern of undifferentiated autoimmune disorders in children is mixed connective tissue disease (MCTD). In proposed 114.00D5b, *Documentation of undifferentiated and mixed connective disease*, we note diagnostic laboratory findings specifically for children with MCTD and that the clinical findings are often suggestive of SLE or childhood dermatomyositis. We also note that many children later develop features of scleroderma.

In proposed 114.00D6, *Inflammatory arthritis (114.09)*, we discuss inflammatory arthritides. In proposed 114.00D6a, *General*, we incorporate guidance in current 114.00C2 and 114.00E. We explain that we evaluate growth impairment resulting from inflammatory arthritides under the criteria in 100.00ff. In proposed 114.00D6b, *Inflammatory arthritides involving the axial spine (spondyloarthropathies)*, we incorporate the second sentence in current 114.00E and revise some of the examples of disorders that may be associated with inflammatory spondyloarthropathies involving the axial spine with disorders that are more common in children.

Current 114.00E6 provides that the fact that a child is dependent on steroids, or any other drug, for the control of inflammatory arthritis is, in and of itself, insufficient to find disability. It explains that advances in the treatment of inflammatory connective tissue disease and in the administration of steroids for its treatment have corrected some of the previously disabling consequences of continuous steroid use. Although this statement is still true, we are not including this provision of current 114.00E6 in these proposed rules because we believe we no longer need it in the introductory text of the listings.

We added current 114.00E6 in 2002 (66 FR 58010, 58022 and 58045 (2001)). It was important when we added it because the listings prior to the revisions we made in 2002 included a listing (prior listing 101.02B) that said that all children with rheumatoid arthritis who were dependent on steroids were disabled. We removed that listing in 2002, explaining that, although the prior listing was appropriate when we first published it, advances in treatment and other reasons had made it obsolete (66 FR 58022). Thus, the paragraph in the introductory text served as a reminder that we no longer had that listing and that it was no longer appropriate to presume disability based on steroid use alone. Now that several years have passed since we removed the prior listing, we do not believe that we need this reminder any longer. However, in proposed 114.00G3, we continue to state that we will consider the adverse side effects of treatment, including the effects of corticosteroids, to ensure that our adjudicators remember to consider the side effects of steroids and any other treatment an individual might have.

Proposed 114.00F—How do we evaluate human immunodeficiency virus (HIV) infection?

Proposed 114.00F parallels the structure and content of proposed 14.00F in the adult rules, except where the features commonly associated with HIV infection differ in children from adults.

Proposed 114.00F1a, *Documentation of HIV infection by definitive diagnosis*, corresponds to 114.00D3a in the current rules and 14.00F1a in the proposed rules. In this section, we propose to lower the age for using HIV antibody tests from 24 months of age or older that is in current 114.00D3a(i) to 18 months or older in proposed 114.00F1a(i) because current clinical practice now accepts these tests beginning at 18 months of age.

In proposed 114.00F1a(iv), we clarify the provision in current 114.00D3a(ii) by explaining that a specimen that contains HIV antigen may be used to establish the diagnosis of HIV infection in a child age 1 month or older.

Proposed 114.00F1b, *Documentation of HIV infection in children from birth to the attainment of 18 months* is new and corresponds to the second paragraph in current 114.00D3b, *Other acceptable documentation of HIV infection in children*. However, we are proposing to move this information under proposed 114.00F1b to provide documentation of HIV infection by definitive diagnosis in children from birth to the attainment of 18 months of age who have tested positive for HIV antibodies. We also propose to lower the age for children testing positive for HIV antibodies from 24 months of age that is in the second paragraph of current 114.00D3b to 18 months in proposed 114.00F1b. We are proposing to make these changes because current clinical practice now accepts these positive test results as diagnostic of HIV infection in children beginning at 18 months of age who have tested positive for HIV antibodies.

In proposed 114.00F1b(i), we propose to add "One or more of the tests listed in F1a(ii)–F1a(vii)" of proposed 114.00F1a because these tests are accepted as diagnostic of HIV infection.

In proposed 114.00F1b(iii), we propose to change "12 to 24 months of age" in current 114.00D3b(ii) to "12 to 18 months of age" based on how these findings are used in current clinical practice.

In proposed 114.00F1b(v), we specify that a severely diminished immunoglobulin G (IgG) level is "<4g/l or 400 mg/dl." However, we do not provide an IgG level for greater than normal range for age due to the variability in the higher normal range of IgG level in children by age. There is consistency in the normal lower average range in children, so we are able to specify levels for severely diminished IgG.

Proposed 114.00F1c, *Other acceptable documentation of HIV infection*, corresponds to current 114.00D3b and proposed 14.00F1b. We propose to remove the first paragraph in current 114.00D3b because all infants who have HIV antibodies are now tested to determine definitively whether they have HIV infection. This makes the first paragraph in current 114.00D3b unnecessary.

In proposed 114.00F2, *CD4 tests*, we add more detailed guidance to the second paragraph of current 114.00D4a by specifying that the extent of immune depression correlates with the level of CD4 counts in children at 6 years of age or older, the age at which CD4 levels become comparable to adult CD4 levels.

In proposed 114.00F3b, *Other acceptable documentation of the manifestations of HIV infection*, we explain in proposed 114.00F3b(i) for PCP and in 114.00F3b(ii) for CMV that a CD4 count below 200 in children 6 years of age or older is supportive evidence of a presumptive diagnosis of these manifestations.

Proposed 114.00F4, *HIV manifestations specific to children*, corresponds to current 114.00D5, *HIV in children*. In proposed 114.00F4a, *General*, we propose to remove the second sentence in current 114.00D5. That sentence explains that survival times are shorter for children who are infected in the first year of life than they are for older children and adults. However, due to advances in medical treatment this is no longer the case. The second sentence of proposed 114.00F4a is based on the first paragraph in current 114.00D5.

In proposed 114.00F4b, *Neurologic abnormalities*, we make some nonsubstantive editorial changes to the second paragraph in current 114.00D5 in which we explain that the methods of identifying and evaluating neurological abnormalities vary depending on a child's age. We also replace "acquisition" with "onset" in the last sentence of proposed 114.00F4b because a sudden "onset" of a new learning disability is medically a more accurate description of how this neurologic abnormality would manifest in a child with HIV infection.

In proposed 114.00F4c, *Bacterial infections*, we incorporate the last two paragraphs in current 114.00D5. We propose only nonsubstantive editorial changes, including removing text that only repeats criteria from the listings.

Proposed 114.00G—How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?

In proposed 114.00G2, *Variability of your response to treatment*, we use an example of a child who develops otitis media instead of pneumonia or tuberculosis as we do in proposed 14.00G2 for an adult because otitis media is more common in children.

In proposed 114.00G3, *How we evaluate the effects of treatment for autoimmune disorders on your ability to function*, we use examples of impaired growth and osteopenia for children instead of osteoporosis as we do in proposed 14.00G3 for adults because impaired growth and osteopenia are more common in children.

Proposed 114.00I—How do we use the functional criteria in these listings?

As in the adult rules, we propose to add listings based on functional criteria to each of the listings in the immune system in addition to listing 114.08. Current listing 114.08O is the childhood listing that corresponds to current adult listing 14.08N, and we are proposing to use essentially the same criteria in the other listings as we do in this listing. (In the proposed rules, current listing 114.08O would become listing 114.08L.) Proposed 114.00I—*How do we use the functional criteria in these listings?*—corresponds to current 114.00D8 and provides guidance for applying the listings based on functional criteria. We propose to revise the current language to reflect the fact that there would now be functional listings for each of the listed impairments in this body system and for consistency with adult rules where appropriate.

Proposed 114.00J—How do we evaluate your immune system disorder when it does not meet one of these listings?

In proposed 114.00J2, we repeat the guidance in proposed 14.00J but with appropriate references to listings in part B, and we include growth impairment under 100.00ff as an example.

How are we proposing to change the criteria in the listings for evaluating immune system impairments in children?

Proposed 114.01 Category of Impairments, Immune System Disorders

As in the adult listings in part A, we propose to remove all reference listings from part B. We also propose to add listings like 114.08O to each of the other listings in this body system. The new listings would be proposed listings 114.02B, 114.03B, 114.04D, 114.05E, 114.06B, 114.07C, 114.09D, and 114.10B. In addition, current listing 114.08O would be redesignated as listing 114.08L because of the deletion of reference listings. The functional criteria in the new proposed listings for children would be the same as in current listing 114.08O (proposed listing 114.08L). They are different from the functional criteria in part A because the functional criteria for adults are not applicable to the evaluation of functioning in children. The childhood functional criteria are the same as in current listing 114.08O (proposed listing 114.08L); they use the functional criteria in listings 112.02 and 112.12.

The following is a description of the significant proposed changes in part B when they are different from the changes we propose in part A or require additional explanation.

Proposed Listing 114.04—Systemic Sclerosis (Scleroderma)

Proposed listings 114.04B1 and 114.04B2 correspond to current listing 114.04B1. We propose to change the requirement in current listing 114.04B1 for fixed deformity of "both feet" to "one or both feet" and to add "inability to ambulate effectively" to the listing criteria. This will allow some children with a serious deformity in only one foot to qualify based on the functional limitation we use to define listing-level severity throughout these listings. We also propose to add the criterion of "toe contractures" to proposed 114.04B1 even though toe contractures of listing-level severity would be rare in children to make it consistent with the criteria in proposed 14.04B1. We are retaining the requirement for involvement of both hands in proposed listing 114.04B2, because inability to use fine and gross movements effectively can only occur when both upper extremities are affected. We propose to add the criterion of "finger contractures" to proposed 114.004B2 for the same reason we are proposing to add "toe contractures" to proposed 114.04B1.

Proposed listings 114.04B3 and 114.04B4 correspond to current listing 114.04B2, the listing for "[m]arked destruction or marked atrophy of an extremity." We propose to revise the rules to

- Remove the word "marked,"
- Change the criterion for "destruction" to "irreversible damage,"
- Require both atrophy and irreversible damage in one or both lower extremities or both upper extremities, and
- Require either inability to ambulate effectively or to use the upper extremities to perform fine and gross movements effectively.

We propose to remove the word "marked" because we use it in various other listings and other regulations to describe a particular measure of functional limitations, and it does not describe what we intend in this listing. We propose to replace the criterion for "marked destruction" with a criterion for "irreversible damage" because it is a more accurate medical description of this complication of systemic sclerosis. We propose to require both atrophy and irreversible damage because we would not expect either of these findings alone to establish an impairment that results in marked and severe functional limitations in every case. Finally, we propose to require "inability to ambulate effectively" or "inability to

perform fine or gross movements effectively" to establish an impairment that is of listing-level severity, consistent with other existing and proposed listings.

Proposed listing 114.04C, Raynaud's phenomenon, is a new childhood listing and has the same criteria as in proposed listing 14.04C for adults. Even though listing-level severity would be rare in children with Raynaud's phenomenon, it can occur.

Proposed Listing 114.05—Polymyositis and Dermatomyositis

We propose to remove current listing 114.05B1 because multiple joint contractures are not typically a part of the disease process of polymyositis or dermatomyositis in children. However, if this should occur, we would evaluate whether your polymyositis or dermatomyositis with multiple joint contractures meets or medically equals the criteria in proposed listing 114.05E, medically equals the criteria in another listing, such as proposed listing 114.05A, or functionally equals the listings.

In proposed listing 114.05D, we propose to revise current listing 114.05B2 by replacing "cutaneous calcification" with "calcinosis." We are proposing this change because "calcification" describes the normal process by which calcium salts are deposited in bone, and "calcinosis" describes the abnormal deposits of calcium salt in body tissues as we intend by this criterion. We are also proposing to replace "formation of an exoskeleton" with "limitation of joint mobility or intestinal motility" because it is a better description of the known complications of dermatomyositis in children.

Proposed Listing 114.07—Immune deficiency disorders, excluding HIV infection

We propose to remove current listing 114.07B because of advances in medical knowledge that now allow us to identify different subgroups of thymic dysplastic syndromes. The subgroups of these disorders vary in severity, and therefore, they should be evaluated under proposed listing 114.07A, B, or C, as appropriate to the particular immune deficiency disorder and its effects.

Proposed Listing 114.08—Human Immunodeficiency Virus (HIV) Infection

In proposed listing 114.08A5, we incorporate current listing 114.08A6 except to remove "Other" as a descriptor to make it consistent with the proposed adult listing. We propose to replace "acquisition" as used in current listing 114.08H1 with "onset" in proposed listing 114.08G1 because a sudden "onset" of a new learning disability is medically a more accurate description of how this neurologic abnormality would manifest in a child with HIV infection. We are also redesignating a number of listings to reflect the proposed removal of reference listings.

Proposed Listing 114.10— Sjögren's Syndrome

We propose to add a new listing 114.10 to evaluate Sjögren's syndrome in children for the same reasons we propose to add a Sjögren's syndrome listing for adults in part A.

Other Changes

We propose to make minor conforming changes in current 1.00B and 101.00B, and 1.00L and 101.00L to reflect changes in the proposed immune body system listings.

We also propose to make minor conforming changes in current 8.00D3 and 108.00D3 of the skin disorders listings. We would revise these sections to indicate that we evaluate Sjögren's syndrome under the new listing for that disorder, listings 14.10 and 114.10.

Clarity of These Proposed Rules

Executive Order 12866, as amended by Executive Order 13258, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand.

For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were subject to OMB review.

Regulatory Flexibility Act

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules contain reporting requirements at 14.00B, 14.00D, 14.00E, 14.00F, 114.00B, 114.00D, 114.00E, 114.00F, 114.08 and 114.09. The public reporting burden is accounted for in the Information Collection Requests for the various forms that the public uses to submit the information to SSA. Consequently, a 1-hour placeholder burden is being assigned to the specific reporting requirement(s) contained in these rules. We are seeking clearance of the burdens referenced in these rules because they were not considered during the clearance of the forms. An Information Collection Request has been submitted to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments should be submitted and/or faxed to the Office of Management and Budget and to the Social Security Administration at the following addresses/numbers:

Office of Management and Budget, Attn: Desk Officer for SSA, New Executive Office Building, Room 10230, 725 17th St., NW., Washington, DC 20530. Fax Number: 202–395–6974.

Social Security Administration, Attn: SSA Reports Clearance Officer, Rm. 1338 Annex Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. Fax Number: 410–965–6400.

Comments can be received for up to 60 days after publication of this notice, and your comments will be most useful if received by SSA within 30 days of publication. To receive a copy of the OMB clearance package, you may call the SSA Reports Clearance Officer on 410–965–0454.

References

We consulted the following sources when developing these proposed rules:

Bartlett, J.G. and Gallant, J.E., Medical Management of HIV Infection (Johns Hopkins University 2003).

Burchett, S.A. and Pizzo, P.A., HIV Infection in Infants, Children, and Adolescents, Pediatrics in Review, 24(6), 186–194 (2001).
Davidson, A. and Diamond, B., Autoimmune Diseases, The New England Journal of Medicine, 345(5), 1–21 (2001).
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Harris, E.D., *et al.*, Eds., Kelley's Textbook of Rheumatology, (Elsevier, 7th ed. 2005).
Klippel, J.H., *et al.*, Eds., Primer on the Rheumatic Diseases, (Arthritis Foundation, 12th ed. 2001).
Sicherer, S.H., *et al.*, Primary Immunodeficiency Diseases in Adults, Journal of American Medical Association, 279:58 (1998).
Tyndall, A. and Koike, T., High-dose immunoablative therapy with hematopoietic stem cell support in the treatment of severe autoimmune disease: current status and future direction, Internal Medicine, 41(8), 608–12 (2002).

These references are included in the rulemaking record for these proposed rules and are available for inspection by interested persons by making arrangements with the contact person shown in this preamble.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Dated: July 28, 2006.

Jo Anne B. Barnhart,

Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend subpart P of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Public Law 104–193, 110 Stat. 2105, 2189.

Appendix 1 to Subpart P of Part 404—[Amended]

2. Appendix 1 to subpart P of part 404 is amended as follows:

a. Revise the expiration date in item 15 of the introductory text before part A of appendix 1.

b. Revise the second sentence of section 1.00B1 of part A of appendix 1.

c. Revise the fourth sentence of section 1.00L of part A of appendix 1.

d. Revise section 8.00D3 of part A of appendix 1.

e. Revise section 14.00 of part A of appendix 1.

f. Revise the second sentence of section 101.00B1 of part B of appendix 1.

g. Revise the fourth sentence of section 101.00L of part B of appendix 1.

h. Revise section 108.00D3 of part B of appendix 1.

i. Revise section 114.00 of part B of appendix 1.

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

15. Immune System Disorders (14.00 and 114.00): (date 8 years from the effective date of the final rules.)

* * * * *

Part A

* * * * *

1.00 Musculoskeletal System

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B. *Loss of function.*

1. *General.* * * * For inflammatory arthritides that may result in loss of function because of inflammatory peripheral joint or axial arthritis or sequelae, or because of extra-articular features, see 14.00D6. * * *

* * * * *

L. *Abnormal curvatures of the spine.* * * * When the abnormal curvature of the spine results in symptoms related to fixation of the dorsolumbar or cervical spine, evaluation of equivalence may be made by reference to 14.09C. * * *

* * * * *

8.00 Skin Disorders

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D. *How do we assess impairments that may affect the skin and other body systems?*

* * * * *

3. *Autoimmune disorders and other immune system disorders* (for example, systemic lupus erythematosus, scleroderma, human immunodeficiency virus (HIV) infection, and Sjögren's syndrome) often involve more than one body system. We first evaluate these disorders under the immune system listings in 14.00. We evaluate lupus erythematosus under 14.02, scleroderma under 14.04, symptomatic HIV infection under 14.08, and Sjögren's syndrome under 14.10.

* * * * *

14.00 Immune System Disorders

A. *What disorders do we evaluate under the immune system listings?*

1. *We evaluate immune system disorders that cause dysfunction in one or more components of your immune system.*

a. These listings are examples of immune system disorders that are severe enough to prevent you from doing any gainful activity. The dysfunction may be due to problems in antibody production, impaired cell-mediated immunity, a combined type of antibody/cellular deficiency, impaired phagocytosis, or complement deficiency.

b. Immune system disorders may result in recurrent and unusual infections, or inflammation and dysfunction of the body's own tissues. Immune system disorders can cause a deficit in a single organ or body system that results in extreme (that is, very serious) loss of function. They can also cause lesser degrees of limitations in two or more organs or body systems, and when associated with symptoms or signs such as fatigue, fever, malaise, diffuse musculoskeletal pain, or involuntary weight loss, can also result in extreme limitation.

c. In this preface, we organize the discussions of immune system disorders in three categories: Autoimmune disorders; Immune deficiency disorders, excluding human immunodeficiency virus (HIV) infection; and HIV infection.

2. *Autoimmune disorders (14.00D).* Autoimmune disorders are caused by dysfunctional immune responses directed against the body's own tissues, resulting in chronic, multisystem impairments that differ in clinical manifestations, course, and outcome. They are sometimes referred to as rheumatic diseases, connective tissue disorders, or collagen vascular disorders. Some of the features of autoimmune disorders in adults differ from the features of the same disorders in children.

3. *Immune deficiency disorders, excluding HIV infection (14.00E).* Immune deficiency disorders are characterized by recurrent or unusual infections that respond poorly to treatment, and are often associated with complications affecting other parts of the body. Immune deficiency disorders are classified as either *primary* (congenital) or *acquired.* Individuals with immune deficiency disorders also have an increased risk of malignancies and of having autoimmune disorders.

4. *Human immunodeficiency virus (HIV) infection (14.00F).* HIV infection is caused by a specific retrovirus and may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions as described in 14.08.

B. *What information do we need to show that you have an immune system disorder?* Generally, we need your medical history, report(s) of physical examination, report(s) of laboratory findings, and in some instances, appropriate medically acceptable imaging or tissue biopsy reports to show that you have an immune system disorder. Therefore, we will make every reasonable effort to obtain your medical history, medical findings, and results of laboratory tests. We explain the information we need in more detail in the sections below.

C. *Definitions.*

1. *Appropriate medically acceptable imaging* includes, but is not limited to, angiography, x-ray imaging, computerized axial tomography (CAT scan) or magnetic resonance imaging (MRI), with or without contrast material, myelography, and radionuclear bone scans. "Appropriate" means that the technique used is one that is generally accepted and consistent with the

prevailing state of medical knowledge and clinical practice to support the evaluation and diagnosis of the impairment.

2. *Constitutional symptoms or signs* means fatigue, fever, malaise, or involuntary weight loss. *Severe fatigue* means a frequent sense of exhaustion that results in significantly reduced physical activity or mental function. *Malaise* means frequent feelings of illness, bodily discomfort, or lack of well-being that result in significantly reduced physical activity or mental function.

3. *Disseminated* means that a condition is spread over a considerable area. The type and extent of the spread will depend on your specific disease.

4. *Dysfunction* means that one or more of the body regulatory mechanisms are impaired, causing either an excess or deficiency of immunocompetent cells or their products.

5. *Extra-articular* means "other than the joints"; for example, the effect is in an organ(s) such as the heart, lungs, kidneys, or skin.

6. *Inability to ambulate effectively* has the same meaning as in 1.00B2b.

7. *Inability to perform fine and gross movements effectively* has the same meaning as in 1.00B2c.

8. *Major peripheral joints* has the same meaning as in 1.00F.

9. *Persistent* means that a sign(s) or symptom(s) has continued over time. The precise meaning will depend on the specific immune system disorder, the usual course of the disorder, and the other circumstances of your clinical course.

10. *Recurrent* means that a condition that previously responded adequately to an appropriate course of treatment returns after a period of remission or regression. The precise meaning, such as the extent of response or remission and the time periods involved, will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

11. *Resistant to treatment* means that a condition did not respond adequately to an appropriate course of treatment. Whether a response is adequate or a course of treatment is appropriate will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

12. *Severe* describes medical severity as used by the medical community. The term does not have the same meaning as it does when we use it in connection with a finding at the second step of the sequential evaluation processes in §§ 404.1520, 416.920, and 416.924.

D. *What are the listed autoimmune disorders in these listings?*

1. *Systemic lupus erythematosus (14.02).*

a. *General.* Systemic lupus erythematosus (SLE) is a chronic inflammatory disease that can affect any organ or body system. It is frequently, but not always, accompanied by constitutional symptoms or signs (fatigue, fever, malaise, involuntary weight loss). Major organ or body system involvement can include: Respiratory (pleuritis, pneumonitis), cardiovascular (endocarditis, myocarditis, pericarditis, vasculitis), renal (glomerulonephritis), hematologic (anemia, leukopenia, thrombocytopenia), skin (photosensitivity), neurologic (seizures), mental (anxiety), fluctuating cognition ("lupus fog"), mood disorders, organic brain syndrome, psychosis), or immune system (inflammatory arthritis) disorders. Immunologically, there is an array of circulating serum auto-antibodies and pro- and anti-coagulant proteins that may occur in a highly variable pattern.

b. *Documentation of SLE.* Generally, but not always, the medical evidence will show that your SLE satisfies the criteria in the current "Criteria for the Classification of Systemic Lupus Erythematosus" by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

2. *Systemic vasculitis (14.03).*

a. *General.* (i) Vasculitis is an inflammation of blood vessels. It may occur acutely in association with adverse drug reactions, certain chronic infections, and occasionally, malignancies. More often, it is chronic and the cause is unknown. Symptoms vary depending on which blood vessels are involved. Systemic vasculitis may also be associated with other autoimmune disorders; for example, SLE or dermatomyositis.

(ii) There are several clinical patterns, including but not limited to polyarteritis nodosa, Takayasu's arteritis (aortic arch arteritis), giant cell arteritis (temporal arteritis), and Wegener's granulomatosis.

b. *Documentation of systemic vasculitis.* Angiography or tissue biopsy confirms a diagnosis of systemic vasculitis when the disease is suspected clinically. Usually the results will be in your medical records.

3. *Systemic sclerosis (scleroderma) (14.04).*

a. *General.* Systemic sclerosis (scleroderma) constitutes a spectrum of disease in which thickening of the skin is the clinical hallmark. Raynaud's phenomenon, often medically severe and progressive, is present frequently and may be the peripheral manifestation of a vasospastic abnormality in the heart, lungs, and kidneys. The CREST syndrome (calcinosis, Raynaud's phenomenon, esophageal dysmotility, sclerodactyly, and telangiectasia) is a variant that may slowly progress over years to the generalized process, systemic sclerosis.

b. *Diffuse cutaneous systemic sclerosis.* In diffuse cutaneous systemic sclerosis (also known as diffuse scleroderma), major organ or systemic involvement can include the gastrointestinal tract, lungs, heart, kidneys, and muscle in addition to skin or blood vessels. Although arthritis can occur, joint dysfunction results primarily from soft tissue/cutaneous thickening, fibrosis, and contractures.

c. *Localized scleroderma (linear scleroderma and morphea).*

(i) Localized scleroderma (linear scleroderma and morphea) is more common in children than in adults; however, this type of scleroderma can persist into adulthood. The extent of involvement of linear scleroderma and a description of the lesions are important in assessing the severity of the impairment. For example, linear scleroderma involving the arm but not crossing any joints is not as functionally limiting as sclerodactyly (scleroderma localized to the fingers). Linear scleroderma of a lower extremity involving skin thickening and atrophy of underlying muscle or bone can result in contracture(s) and leg length discrepancies. In such cases, evaluation under the musculoskeletal (1.00ff) listing may be appropriate.

(ii) When there is isolated morphea of the face causing facial disfigurement from unilateral hypoplasia of the mandible, maxilla, zygoma, or orbit, adjudication may be more appropriate under the criteria in the special senses listings (2.00ff) or mental disorders listings (12.00ff).

(iii) Chronic variants of these syndromes include disseminated morphea, Shulman's disease (diffuse fasciitis with eosinophilia), and eosinophilia-myalgia syndrome (often associated with toxins such as toxic oil or contaminated tryptophan), all of which can impose medically severe musculoskeletal dysfunction and may also lead to restrictive pulmonary disease. We evaluate these variants of the disease under the criteria in the musculoskeletal listings (1.00ff) or respiratory system listings (3.00ff).

d. *Documentation of systemic sclerosis (scleroderma).* Documentation involves differentiating the clinical features of systemic sclerosis (scleroderma) from other autoimmune disorders; however, there may be an overlap.

4. *Polymyositis and dermatomyositis (14.05).*

a. *General.* Polymyositis and dermatomyositis are related disorders that are characterized by an inflammatory process in striated muscle, occurring alone or in association with other autoimmune disorders or malignancy. Symmetric weakness, and less frequently pain and tenderness of the proximal limb-girdle (shoulder or pelvic) musculature, are the most common manifestations. There may also be involvement of the cervical, cricopharyngeal, esophageal, intercostal, and diaphragmatic muscles.

b. *Documentation of polymyositis and dermatomyositis.* Generally, but not always, polymyositis is associated with elevated serum muscle enzymes (creatine phosphokinase (CPK), aminotransferases, aldolase), and characteristic abnormalities on electromyography and muscle biopsy. In dermatomyositis there are characteristic skin findings in addition to the findings of polymyositis.

c. *Additional information about how we evaluate polymyositis and dermatomyositis under the listings.*

(i) Weakness of your pelvic girdle muscles that results in your inability to rise independently from a squatting or sitting position or to climb stairs may be an indication that you are unable to ambulate effectively. Weakness of your shoulder girdle muscles may result in your inability to perform lifting, carrying, and reaching overhead, and also may seriously affect your ability to perform activities requiring fine movements. We evaluate these limitations under 14.05A.

(ii) We use the malignant neoplastic diseases listings (13.00ff) to evaluate malignancies associated with polymyositis or dermatomyositis. We evaluate the involvement of other organs/body systems under the criteria for the listings in the affected body system.

5. *Undifferentiated and mixed connective tissue disease (14.06).*

a. *General.* This listing includes syndromes with clinical and immunologic features of several autoimmune disorders, but which do not satisfy the criteria for any of the specific disorders described. For example, you may have clinical features of systemic lupus erythematosus and systemic vasculitis, and the serologic (blood test) findings of rheumatoid arthritis.

b. *Documentation of undifferentiated and mixed connective tissue disease.* Undifferentiated connective tissue disease is diagnosed when clinical features and serologic (blood test) findings, such as rheumatoid factor or antinuclear antibody (consistent with an autoimmune disorder) are present but do not satisfy the criteria for a specific disease. Mixed connective tissue disease (MCTD) is diagnosed when clinical features and serologic findings of two or more autoimmune diseases overlap.

6. *Inflammatory arthritis (14.09).*

a. *General.* The inflammatory arthritides include a vast array of disorders that differ in cause, course, and outcome. Clinically, inflammation of major peripheral joints may be the dominant manifestation causing difficulties with ambulation or fine and gross movements; there may be joint pain, swelling, and tenderness. The arthritis may affect other joints, or cause less functional limitations in ambulation or performance of fine and gross movements. However, in combination with extra-articular features, including constitutional symptoms or signs (fatigue, fever, malaise, involuntary weight loss), inflammatory arthritis may result in an extreme limitation.

b. *Inflammatory arthritides involving the axial spine (spondyloarthropathies).* In adults, inflammatory arthritides involving the axial spine may be associated with heterogeneous disorders such as:

(i) Reiter's syndrome;
(ii) Ankylosing spondylitis;
(iii) Psoriatic arthritis;
(iv) Whipple's disease;
(v) Behçet's disease; and
(vi) Inflammatory bowel disease.

c. *Inflammatory arthritides involving the peripheral joints.* The inflammatory arthropathies involving peripheral joints may be associated with disorders such as:

(i) Rheumatoid arthritis;
(ii) Sjögren's syndrome;
(iii) Psoriatic arthritis;
(iv) Crystal deposition disorders (gout and pseudogout);
(v) Lyme disease; and
(vi) Inflammatory bowel disease.

d. *Documentation of inflammatory arthritides.* Generally, but not always, the diagnosis of inflammatory arthritis is made by the clinical features and serologic findings described in the most recent edition of the *Primer on Rheumatic Diseases* published by the Arthritis Foundation.

e. *How we evaluate the inflammatory arthritides under the listings.*

(i) Listing-level severity in 14.09A and 14.09C1 is shown by an impairment that results in an "extreme" (very serious) limitation. In 14.09A, the criterion is satisfied with persistent inflammation or deformity in two or more major peripheral joints resulting in the inability to ambulate effectively or inability to perform fine and gross movements effectively, as defined in 14.00C6 and 14.00C7. In 14.09C1, if you have the required ankylosis (fixation) of your cervical or dorsolumbar spine, we will find that you have an extreme limitation in your ability to see in front of you, above you, and to the side. Therefore, inability to ambulate effectively is implicit in 14.09C1, even though you might not require bilateral upper limb assistance.

(ii) Listing-level severity is shown in 14.09B, 14.09C2, and 14.09D when the arthritis does not result in the extreme limitation in 14.09A or 14.09C1, involves one or more major peripheral joints, or involves other joints, but is complicated by extra-articular features that cumulatively result in an "extreme" (very serious) limitation or "marked" (serious) limitations in at least two areas of functioning. Extra-articular impairments may also meet listings in other body systems.

(iii) Extra-articular features of inflammatory arthritis may involve any body system. Commonly occurring extra-articular impairments include: Musculoskeletal (heel enthesopathy), ophthalmologic (iridocyclitis, keratoconjunctivitis sicca, uveitis), pulmonary (pleuritis, pulmonary fibrosis or nodules, restrictive lung disease), cardiovascular (aortic valve insufficiency, arrhythmias, coronary arteritis, myocarditis, pericarditis, Raynaud's phenomenon, systemic vasculitis), renal (amyloidosis of the kidney), hematologic (chronic anemia, thrombocytopenia), neurologic (peripheral neuropathy, radiculopathy, spinal cord or cauda equina compression with sensory and motor loss), and immune system (Felty's syndrome (hypersplenism with compromised immune competence)) disorders.

(iv) If permanent deformity of a major peripheral joint is the dominant feature of your impairment, we evaluate your impairment under 1.02.

(v) If there has been surgical reconstruction of a major weight-bearing joint, we evaluate your impairment under 1.03.

(vi) If both inflammation and chronic deformities are present, we evaluate your impairment under the criteria of any appropriate listing.

7. *Sjögren's syndrome (14.10).*

a. *General.* (i) Sjögren's syndrome is an immune-mediated disorder of the exocrine glands. Involvement of the lacrimal and salivary glands is the hallmark feature, resulting in symptoms of dry eyes and dry mouth, and possible complications such as corneal damage, blepharitis (eyelid inflammation), dysphagia (difficulty in swallowing), dental caries, and the inability to speak for extended periods of time. Involvement of the exocrine glands of the upper airways may result in persistent dry cough.

(ii) Many other organ systems may be involved, including musculoskeletal (arthritis, myositis), respiratory (interstitial fibrosis), gastrointestinal (dysmotility, dysphagia, involuntary weight loss), genitourinary (interstitial cystitis, renal tubular acidosis), skin (purpura, vasculitis), neurologic (central nervous system disorders, cranial and peripheral neuropathies), mental (cognitive dysfunction, poor memory), and neoplastic (lymphoma). Fatigue and malaise are frequently reported. Sjögren's syndrome may be associated with other autoimmune disorders (for example, rheumatoid arthritis or SLE); usually the clinical features of the associated disorder predominate.

b. *Documentation of Sjögren's syndrome.* If you have Sjögren's syndrome, the medical evidence will generally, but not always, show that your disease satisfies the criteria in the current "Criteria for the Classification of Sjögren's Syndrome" by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

E. *How do we evaluate immune deficiency disorders, excluding HIV infection (14.07)?*

1. *General.*

a. Immune deficiency disorders can be classified as:

(i) *Primary* (congenital); for example, X-linked agammaglobulinemia, thymic hypoplasia (DiGeorge syndrome), severe combined immunodeficiency (SCID), chronic granulomatous disease (CGD), C1 esterase inhibitor deficiency.

(ii) *Acquired;* for example, medication-related.

b. Primary immune deficiency disorders are seen mainly in children. However, recent advances in the treatment of these disorders have allowed many affected children to survive well into adulthood. Occasionally, these disorders are first diagnosed in adolescence or adulthood.

2. *Documentation of immune deficiency disorders.* The medical evidence must include documentation of the specific type of immune deficiency. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

3. *Immune deficiency disorders treated by stem cell transplantation.*

a. *Evaluation in the first 12 months.* If you undergo stem cell transplantation for your immune deficiency disorder, we will consider you disabled until at least 12 months from the date of the transplant.

b. *Evaluation after the 12-month period has elapsed.* After the 12-month period has elapsed, we will consider any residuals of your immune deficiency disorder as well as any residual impairment(s) resulting from the treatment, such as complications arising from:

(i) Graft-versus-host (GVH) disease.

(ii) Immunosuppressant therapy, such as frequent infections.

(iii) Significant deterioration of other organ systems.

4. *Medication-induced immune suppression.* Medication effects can result in varying degrees of immune suppression, but

most resolve when the medication is ceased. However, if you are prescribed medication for long-term immune suppression, such as after an organ transplant, we will evaluate:

a. The frequency and severity of infections.

b. Residuals from the organ transplant itself, after the 12-month period has elapsed.

c. Significant deterioration of other organ systems.

F. *How do we evaluate human immunodeficiency virus (HIV) infection?* Any individual with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 14.08 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.* The medical evidence must include documentation of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for HIV infection, we will make every reasonable effort to obtain reports of the results of that testing.

a. *Documentation of HIV infection by definitive diagnosis.* A definitive diagnosis of HIV infection is documented by one or more of the following laboratory tests:

(i) HIV antibody tests. HIV antibodies are usually first detected by an ELISA screening test performed on serum. Because the ELISA can yield false positive results, confirmation is required using a more definitive test, such as a Western blot or an immunofluorescence assay.

(ii) Positive "viral load" (VL) tests. These tests are normally used to quantitate the amount of the virus present but also document HIV infection. Such tests include the quantitative plasma HIV RNA, quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT–PCR).

(iii) HIV DNA detection by polymerase chain reaction (PCR).

(iv) A specimen that contains HIV antigen (for example, serum specimen, lymphocyte culture, or cerebrospinal fluid).

(v) A positive viral culture for HIV from peripheral blood mononuclear cells (PBMC).

(vi) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. *Other acceptable documentation of HIV infection.* We may also document HIV infection without the definitive laboratory evidence described in 14.00F1a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice, and is consistent with the other evidence in your case record. If no definitive laboratory evidence is available, we may document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, toxoplasmosis of the brain, Pneumocystis carinii pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment, lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *CD4 tests.* Individuals who have HIV infection or other disorders of the immune system may have tests showing a reduction of either the absolute count or the percentage of their T-helper lymphocytes (CD4 cells). The extent of immune suppression correlates with the level or rate of decline of the CD4 count. Generally, when the CD4 count is 200/mm^3 or less (14 percent or less) the susceptibility to opportunistic infection is greatly increased. Although a reduced CD4 count *alone* does not establish a definitive diagnosis of HIV infection, a CD4 count below 200 does offer supportive evidence when there are clinical findings, but not a definitive diagnosis of an opportunistic infection(s). However, a reduced CD4 count alone does not document the severity or functional consequences of HIV infection.

3. *Documentation of the manifestations of HIV infection.* The medical evidence must also include documentation of the manifestations of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for a manifestation of HIV infection, we will make every reasonable effort to obtain reports of the results of that testing.

a. *Documentation of the manifestations of HIV infection by definitive diagnosis.* The definitive method of diagnosing opportunistic diseases or conditions that are manifestations of HIV infection is by culture, serologic test, or microscopic examination of biopsied tissue or other material (for example, bronchial washings). We will make every reasonable effort to obtain specific laboratory evidence of an opportunistic disease or other condition whenever this information is available. If a histologic or other test has been performed, the evidence should include a copy of the appropriate report. If we cannot obtain the report, the summary of hospitalization or a report from the treating source should include details of the findings and results of the diagnostic studies (including appropriate medically acceptable imaging studies) or microscopic examination of the appropriate tissues or body fluids.

b. *Other acceptable documentation of the manifestations of HIV infection.* We may also document manifestations of HIV infection without the definitive laboratory evidence described in 14.00F3a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice, and is consistent with the other evidence in your case record. If no definitive evidence is available, we may document the manifestations of HIV infection with other appropriate evidence. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

(i) Although a definitive diagnosis of PCP requires identifying the organism in bronchial washings, induced sputum, or lung biopsy, these tests are frequently bypassed if PCP can be diagnosed presumptively. (Note: *Pneumocystis carinii* is now known as *Pneumocystis jiroveci*; however, "PCP" remains in common usage for the pneumonia caused by this organism.) Supportive evidence includes: Fever, dyspnea, hypoxia, and CD4 count below 200. Also supportive are bilateral lung interstitial infiltrates on x-ray, or a typical pattern on CT scan, or a gallium scan positive for pulmonary uptake. Response to anti-PCP therapy usually requires 5–7 days.

(ii) Documentation of cytomegalovirus (CMV) disease (14.08D) may present special problems because definitive diagnosis (except for chorioretinitis, which may be diagnosed by an ophthalmologist on funduscopic exam) requires identification of viral inclusion bodies or a positive culture from the affected organ and the absence of any other infectious agent likely to be causing the disease. A positive serology test identifies a history of infection with CMV, but it does not confirm an active disease process. Therefore, a presumptive diagnosis of CMV disease requires corroborating evidence that CMV is causing the disease. Supportive evidence includes: Fever, positive CMV serology test, urinary culture positive for CMV, and CD4 count below 200. A clear response to anti-CMV therapy also supports a diagnosis.

(iii) A definitive diagnosis of toxoplasmosis of the brain is made by brain biopsy, but this procedure carries significant risk and is not commonly performed. This condition is usually diagnosed presumptively based on symptoms or signs of fever, headache, focal neurologic deficits, seizures, typical lesions on brain imaging, and a positive serology test.

4. *Manifestations specific to women.*

a. *General.* Most women with severe immunosuppression secondary to HIV infection exhibit the typical opportunistic infections and other conditions, such as PCP, candida esophagitis, wasting syndrome, cryptococcosis, and toxoplasmosis. However, HIV infection may have different manifestations in women than in men. Adjudicators must carefully scrutinize the medical evidence and be alert to the variety of medical conditions specific to, or common in, women with HIV infection that may affect their ability to function in the workplace.

b. *Additional considerations for evaluating HIV infection in women.* Many of these manifestations (for example, vulvovaginal candidiasis, pelvic inflammatory disease) occur in women with or without HIV infection, but can be more severe or resistant to treatment, or occur more frequently in a woman whose immune system is suppressed. Therefore, when evaluating the claim of a woman with HIV infection, it is important to consider gynecologic and other problems specific to women, including any associated

symptoms (for example, pelvic pain), in assessing the severity of the impairment and resulting functional limitations. We may evaluate manifestations of HIV infection in women under the specific criteria (for example, cervical cancer under 14.08E), under an applicable general category (for example, pelvic inflammatory disease under 14.08A4) or, in appropriate cases, under 14.08K.

5. *Involuntary weight loss.* As used in 14.08H, "significant involuntary weight loss" does not correspond to a specific minimum amount or percentage of weight loss. For purposes of this listing, an involuntary weight loss of at least 10 percent of baseline is always considered significant. Loss of less than 10 percent may or may not be significant, depending on the individual's baseline weight and body habitus. (For example, a 7-pound weight loss in a 100-pound woman who is 63 inches tall might be considered significant; but a 14-pound weight loss in a 200-pound woman who is the same height might not be significant.)

G. *How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?*

1. *General.* If your impairment does not otherwise meet the requirements of a listing we will consider your medical treatment both in terms of its effectiveness in improving the signs, symptoms, and laboratory abnormalities of your specific immune system disorder or its manifestations, and in terms of any side effects that limit your functioning. We will make every reasonable effort to obtain a specific description of the treatment you receive (including surgery) for your immune system disorder. We consider:

a. The effects of medications you take.

b. Adverse side effects (acute and chronic).

c. The intrusiveness and complexity of your treatment (for example, the dosing schedule, need for injections).

d. The effect of treatment on your mental functioning (for example, cognitive changes, mood disturbance).

e. Variability of your response to treatment (see 14.00G2).

f. The interactive and cumulative effects of your treatments. For example, many individuals with immune system disorders receive treatment both for their immune system disorders and for the manifestations of the disorders or co-occurring impairments, such as treatment for HIV infection and hepatitis C. The interactive and cumulative effects of these treatments may be greater than the effects of each treatment considered separately.

g. The duration of your treatment.

h. Any other aspects of treatment that may interfere with your ability to function.

2. *Variability of your response to treatment.* Your response to treatment and the adverse or beneficial consequences of your treatment may vary widely. The effects of your treatment may be temporary or long term. For example, some individuals may show an initial positive response to a drug or combination of drugs followed by a decrease in effectiveness. When we evaluate your response to treatment and how your treatment may affect you, we consider such factors as disease activity before treatment, requirements for changes in therapeutic regimes, the time required for therapeutic effectiveness of a particular drug or drugs, the limited number of drug combinations that may be available for your impairment(s), and the time-limited efficacy of some drugs. For example, an individual with HIV infection or another immune deficiency disorder who develops pneumonia or tuberculosis may not respond to the same antibiotic regimen used in treating individuals without these disorders or may not respond to an antibiotic that he or she responded to before. Therefore, we must consider the effects of your treatment on an individual basis, including the effects of your treatment on your ability to function.

3. *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* Some medications may have acute or long-term side effects. When we consider the effects of corticosteroids or other treatments for autoimmune disorders on your ability to function, we consider the factors in 14.00G1 and 14.00G2. Long-term corticosteroid treatment can cause ischemic necrosis of bone, posterior subcapsular cataract, weight gain, glucose intolerance, increased susceptibility to infection, and osteoporosis that may result in a loss of function. In addition, medications used in the treatment of autoimmune disorders may also have effects on mental function including cognition (for example, memory), concentration, and mood.

4. *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function.* When we consider the effects of your treatment for your immune deficiency disorder on your ability to function, we consider the factors in 14.00G1 and 14.00G2. A frequent need for treatment such as intravenous immunoglobulin and gamma interferon therapy can be intrusive and interfere with your ability to work on a sustained basis. We will also consider whether you have chronic side effects from these or other medications, including fatigue, fever, headaches, high blood pressure, joint swelling, muscle aches, nausea, shortness of breath, or limitations in mental function including cognition (for example, memory), concentration, and mood.

5. *How we evaluate the effects of treatment for HIV infection on your ability to function.*

a. *General.* When we consider the effects of antiretroviral drugs (including the effects of highly active antiretroviral therapy (HAART)) and the effects of treatments for the manifestations of HIV infection on your ability to function, we consider the factors in 14.00G1 and 14.00G2. Side effects of antiretroviral drugs include, but are not limited to: Bone marrow suppression, pancreatitis, gastrointestinal intolerance (nausea, vomiting, diarrhea), neuropathy, rash, hepatotoxicity, lipodystrophy, glucose intolerance, and lactic acidosis. In addition, medications used in the treatment of HIV infection may also have effects on mental function, including cognition (for example, memory), concentration, and mood, and may result in malaise, fatigue, joint and muscle pain, and insomnia. The symptoms of HIV infection and the side effects of medication may be indistinguishable from each other. We will consider all of your functional limitations, whether they result from your symptoms of HIV infection or the side effects of your treatment.

b. *Structured treatment interruptions.* A structured treatment interruption (STI, also called a "drug holiday") is a treatment practice during which your treating source advises you to stop taking your medications temporarily. An STI in itself does not imply that your medical condition has improved or that you are noncompliant with your treatment because you are following your treating source's advice. Therefore, if you have stopped taking medication because your treating source prescribed or recommended an STI, we will not find that you are failing to follow treatment or draw inferences about the severity of your impairment on this fact alone. We will consider why your treating source has prescribed or recommended an STI and all the other information in your case record when we determine the severity of your impairment.

6. *When there is no record of ongoing treatment.* If you have not received ongoing treatment or have not had an ongoing relationship with the medical community despite the existence of a severe impairment(s), we will evaluate the medical severity and duration of your immune system impairment on the basis of the current objective medical evidence and other evidence in your case record, taking into consideration your medical history, symptoms, clinical and laboratory findings, and medical source opinions. If you have just begun treatment and we cannot determine whether you are disabled based on the evidence we have, we may need to wait to determine the effect of the treatment on your ability to function. The amount of time we need to wait will depend on the facts of your case. If you have not received treatment, you may not be able to show an impairment that meets the criteria of one of the immune system listings, but your immune system impairment may medically equal a listing or be disabling based on a consideration of your residual functional capacity, age, education, and work experience.

H. *How do we consider your symptoms, including your constitutional symptoms or pain?*

Your symptoms, including pain, fatigue, and malaise, may be important factors in our determination whether your immune system disorder(s) meets or medically equals a listing or in our determination whether you are otherwise able to work. In order for us to consider your symptoms, you must have medical signs or laboratory findings showing the existence of a medically determinable impairment(s) that could reasonably be expected to produce the symptoms. If you have such an impairment(s), we will evaluate the intensity, persistence, and functional effects of your symptoms using the rules throughout 14.00 and in our other regulations. See §§ 404.1528, 404.1529, 416.928, and 416.929.

I. *How do we use the functional criteria in these listings?*

1. The following listings in this body system include standards for evaluating the

limitations resulting from repeated manifestations of immune system disorders that do not meet the criteria of the other sections of their respective listings: 14.02B, for systemic lupus erythematosus; 14.03B, for systemic vasculitis; 14.04D, for systemic sclerosis (scleroderma); 14.05E, for polymyositis and dermatomyositis; 14.06B, for undifferentiated and mixed connective tissue disease; 14.07C, for immune deficiency disorders, excluding HIV infection; 14.08K, for HIV infection; 14.09D, for inflammatory arthritides; and 14.10B, for Sjöogren's syndrome.

2. When we use one of the listings cited in 14.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder(s) on your ability to function on a sustained basis. Important factors we will consider when we evaluate your functioning under these listings include, but are not limited to: Your symptoms, the frequency and duration of manifestations of your immune system disorder, periods of exacerbation and remission, and the functional impact of your treatment, including the side effects of your medication.

3. As used in these listings, "repeated" means that the manifestations occur on an average of three times a year, or once every 4 months, each lasting 2 weeks or more; or the manifestations do not last for 2 weeks but occur substantially more frequently than three times in a year or once every 4 months; or they occur less frequently than an average of three times a year or once every 4 months but last substantially longer than 2 weeks.

4. To satisfy the functional criterion in a listing, your immune system disorder must result in a marked level of limitation in one of three general areas of functioning: Activities of daily living, social functioning, or difficulties in completing tasks due to deficiencies in concentration, persistence, or pace. Functional limitation may result from the impact of the disease process itself on your mental functioning, physical functioning, or both your mental and physical functioning. This could result from persistent or intermittent symptoms, such as depression, fatigue, or pain, resulting in a limitation of your ability to do a task, to concentrate, to persevere at a task, or to perform the task at an acceptable rate of speed. You may also have limitations because of your treatment and its side effects (see 14.00G).

5. When "marked" is used as a standard for measuring the degree of functional limitation, it means more than moderate but less than extreme. We do not define "marked" by a specific number of different activities of daily living in which your functioning is impaired, different behaviors in which your social functioning is impaired, or tasks that you are able to complete, but by the nature and overall degree of interference with your functioning. You may have a marked limitation when several activities or functions are impaired, or even when only one is impaired. Also, you need not be totally precluded from performing an activity to have a marked limitation, as long as the degree of limitation seriously interferes with your ability to function independently, appropriately, and effectively. The term "marked" does not imply that you must be confined to bed, hospitalized, or in a nursing home.

6. *Activities of daily living* include, but are not limited to, such activities as doing household chores, grooming and hygiene, using a post office, taking public transportation, or paying bills. We will find that you have "marked" limitation of activities of daily living if you have a serious limitation in your ability to maintain a household or take public transportation because of symptoms, such as pain, fatigue, anxiety, or difficulty concentrating, imposed by your immune system disorder (including manifestations of the disorder) or its treatment, even if you are able to perform some self-care activities.

7. *Social functioning* includes the capacity to interact independently, appropriately, effectively, and on a sustained basis with others. It includes the ability to communicate effectively with others. We will find that you have "marked" difficulty maintaining social functioning if you have serious limitation in social interaction on a sustained basis because of symptoms, such as pain, fatigue, anxiety, or difficulty concentrating, or a pattern of exacerbation and remission, caused by your immune system disorder (including manifestations of the disorder) or its treatment even if you are able to communicate with close friends or relatives.

8. *Completing tasks in a timely manner* involves the ability to sustain concentration, persistence, or pace to permit timely completion of tasks commonly found in work settings. We will find that you have "marked" difficulty completing tasks if you have serious limitation in your ability to sustain concentration or pace adequate to complete work-related tasks because of symptoms, such as pain, fatigue, anxiety, or difficulty concentrating, caused by your immune system disorder (including manifestations of the disorder) or its treatment even if you are able to do some routine activities of daily living.

J. *How do we evaluate your immune system disorder when it does not meet one of these listings?*

1. These listings are only examples of immune system disorders that we consider severe enough to prevent you from doing any gainful activity. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. Individuals with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. We may evaluate these impairments under any affected body system. For example, we will evaluate:

a. Musculoskeletal involvement, such as surgical reconstruction of a joint, under 1.00ff.

b. Ocular involvement, such as dry eye, under 2.00ff.

c. Respiratory impairments, such as pleuritis, under 3.00ff.

d. Cardiovascular impairments, such as cardiomyopathy, under 4.00ff.

e. Digestive impairments, such as hepatitis (including hepatitis C), under 5.00ff.

f. Genitourinary impairments, such as nephropathy, under 6.00ff.

g. Hematologic abnormalities, such as anemia, granulocytopenia, and thrombocytopenia, under 7.00ff.

h. Skin impairments, such as persistent fungal and other infectious skin eruptions, and photosensitivity, under 8.00ff.

i. Neurologic impairments, such as neuropathy or seizures, under 11.00ff.

j. Mental disorders, such as depression, anxiety, or cognitive deficits, under 12.00ff.

k. Allergic disorders, such as asthma or atopic dermatitis, under 3.00ff or 8.00ff or under the criteria in another affected body system.

l. Syphilis or neurosyphilis under the criteria for the affected body system; for example, 2.00 Special senses and speech, 4.00 Cardiovascular system, or 11.00 Neurological.

3. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. (See §§ 404.1526 and 416.926.) If it does not, you may or may not have the residual functional capacity to engage in substantial gainful activity. Therefore, we proceed to the fourth, and if necessary, the fifth steps of the sequential evaluation process in §§ 404.1520 and 416.920. We use the rules in §§ 404.1594, 416.994, and 416.994a as appropriate, when we decide whether you continue to be disabled.

14.01 *Category of Impairments, Immune System Disorders*

14.02 *Systemic lupus erythematosus.* As described in 14.00D1. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Repeated manifestations of SLE but without the requisite findings in A, resulting in at least two of the constitutional symptoms or signs in A2, and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.03 *Systemic vasculitis.* As described in 14.00D2. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Repeated manifestations of systemic vasculitis but without the requisite findings

in A, resulting in at least two of the constitutional symptoms or signs in A2, and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.04 *Systemic sclerosis (scleroderma).* As described in 14.00D3. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and
2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. With one of the following:

1. Toe contractures or fixed deformity of one or both feet, resulting in the inability to ambulate effectively as defined in 14.00C6; or
2. Finger contractures or fixed deformity in both hands, resulting in the inability to perform fine and gross movements effectively as defined in 14.00C7; or
3. Atrophy with irreversible damage in one or both lower extremities, resulting in the inability to ambulate effectively as defined in 14.00C6; or
4. Atrophy with irreversible damage in both upper extremities, resulting in the inability to perform fine and gross movements effectively as defined in 14.00C7.

OR

C. Raynaud's phenomenon, characterized by:

1. Gangrene of a toe or finger in at least two extremities, or of a toe and finger; or
2. Ischemia with ulcerations of toes or fingers, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively as defined in 14.00C6 and 14.00C7; or

D. Repeated manifestations of systemic sclerosis (scleroderma) but without the requisite findings in A, B, or C, resulting in at least two of the constitutional symptoms or signs in A2, and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.05 *Polymyositis and dermatomyositis.* As described in 14.00D4. With:

A. Proximal limb-girdle (pelvic or shoulder) muscle weakness, resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively as defined in 14.00C6 and 14.00C7.

OR

B. Impaired swallowing (dysphagia) with aspiration due to muscle weakness.

OR

C. Impaired respiration due to intercostal and diaphragmatic muscle weakness.

OR

D. Diffuse calcinosis with limitation of joint mobility or intestinal motility.

OR

E. Repeated manifestations of polymyositis or dermatomyositis but without the requisite findings in A, B, or C, resulting in at least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss, and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.06 *Undifferentiated and mixed connective tissue disease.* As described in 14.00D5. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and
2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Repeated manifestations of undifferentiated or mixed connective tissue disease but without the requisite findings in A, resulting in at least two of the constitutional symptoms or signs in A2, and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.07 *Immune deficiency disorders, excluding HIV infection.* As described in 14.00E. With:

A. One or more of the following infections. The infection(s) must either be resistant to treatment, or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or
2. Meningitis; or
3. Pneumonia; or
4. Septic arthritis; or
5. Endocarditis; or
6. Sinusitis documented by appropriate medically acceptable imaging.

OR

B. Stem cell transplantation as described under 14.00E3. Consider under a disability until at least 12 months from the date of transplantation. Thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

OR

C. Repeated manifestations of an immune deficiency disorder but without the requisite findings in A or B, resulting in at least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss, and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social function.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.08 *Human immunodeficiency virus (HIV) infection.* With documentation as described in 14.00F and one of the following:

A. Bacterial infections:

1. Mycobacterial infection (for example, caused by M. avium-intracellulare, M. kansasii, or M. tuberculosis) at a site other than the lungs, skin, or cervical or hilar lymph nodes, or pulmonary tuberculosis resistant to treatment; or
2. Nocardiosis; or
3. Salmonella bacteremia, recurrent non-typhoid; or
4. Multiple or recurrent bacterial infection(s), including pelvic inflammatory disease, requiring hospitalization or intravenous antibiotic treatment three or more times in a 12-month period.

OR

B. Fungal Infections:

1. Aspergillosis; or
2. Candidiasis involving the esophagus, trachea, bronchi, or lungs, or at another site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes; or
3. Coccidioidomycosis, at a site other than the lungs or lymph nodes; or
4. Cryptococcosis, at a site other than the lungs (for example, cryptococcal meningitis); or
5. Histoplasmosis, at a site other than the lungs or lymph nodes; or
6. Mucormycosis; or
7. Pneumocystis carinii (jiroveci) pneumonia or extrapulmonary pneumocystis carinii (jiroveci) infection.

OR

C. Protozoan or helminthic infections:

1. Cryptosporidiosis, isosporiasis, or microsporidiosis, with diarrhea lasting for 1 month or longer; or
2. Strongyloidiasis, extra-intestinal; or
3. Toxoplasmosis of an organ other than the liver, spleen, or lymph nodes.

OR

D. Viral infections:

1. Cytomegalovirus disease (documented as described in 14.00F3b(ii)) at a site other than the liver, spleen or lymph nodes; or
2. Herpes simplex virus causing:
   a. Mucocutaneous infection (for example, oral, genital, perianal) lasting for 1 month or longer; or
   b. Infection at a site other than the skin or mucous membranes (for example, bronchitis, pneumonitis, esophagitis, or encephalitis); or
   c. Disseminated infection; or
3. Herpes zoster:
   a. Disseminated; or
   b. With multidermatomal eruptions that are resistant to treatment; or
4. Progressive multifocal leukoencephalopathy.

OR

E. Malignant neoplasms:

1. Carcinoma of the cervix, invasive, FIGO stage II and beyond; or
2. Kaposi's sarcoma with:
   a. Extensive oral lesions; or
   b. Involvement of the gastrointestinal tract, lungs, or other visceral organs; or

3. Lymphoma (for example, primary lymphoma of the brain, Burkitt's lymphoma, immunoblastic sarcoma, other non-Hodgkin's lymphoma, Hodgkin's disease); or

4. Squamous cell carcinoma of the anus.

OR

F. Conditions of the skin or mucous membranes (other than described in B2, D2, or D3, above), with extensive fungating or ulcerating lesions not responding to treatment (for example, dermatological conditions such as eczema or psoriasis, vulvovaginal or other mucosal candida, condyloma caused by human papillomavirus, genital ulcerative disease).

OR

G. HIV encephalopathy, characterized by cognitive or motor dysfunction that limits function and progresses.

OR

H. HIV wasting syndrome, characterized by involuntary weight loss of 10 percent or more of baseline (or other significant involuntary weight loss, as described in 14.00F5) and, in the absence of a concurrent illness that could explain the findings, either:

1. Chronic diarrhea with two or more loose stools daily lasting for 1 month or longer; or

2. Chronic weakness and documented fever greater than 38 °C (100.4 °F) for the majority of 1 month or longer.

OR

I. Diarrhea, lasting for 1 month or longer, resistant to treatment, and requiring intravenous hydration, intravenous alimentation, or tube feeding.

OR

J. One or more of the following infections (other than described in A–I, above). The infection(s) must either be resistant to treatment, or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

OR

K. Repeated (as defined in 14.00I3) manifestations of HIV infection, including those listed in 14.08A–J, but without the requisite findings for those listings (for example, carcinoma of the cervix not meeting the criteria in 14.08E, diarrhea not meeting the criteria in 14.08I), or other manifestations (for example, oral hairy leukoplakia, myositis, pancreatitis, hepatitis, peripheral neuropathy, glucose intolerance, muscle weakness, cognitive or other mental impairment) resulting in significant, documented symptoms or signs (for example, fatigue, fever, malaise, involuntary weight loss, pain, night sweats, nausea, vomiting, headaches, or insomnia) and one of the following at the marked level (as defined in 14.00I5):

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.09 *Inflammatory arthritis.* As described in 14.00D6. With:

A. Persistent inflammation or deformity in two or more major peripheral joints resulting in the inability to ambulate effectively or inability to perform fine and gross movements effectively as defined in 14.00C6 and 14.00C7.

OR

B. Inflammation or deformity in one or more major peripheral joints, but with less joint involvement than in A and extra-articular features that do not satisfy the criteria of a listing, with:

1. Involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

C. Ankylosing spondylitis or other spondyloarthropathies, with:

1. Ankylosis (fixation) of the dorsolumbar or cervical spines as shown by appropriate medically acceptable imaging and measured on physical examination at 45° or more of flexion from the vertical position (zero degrees); or

2. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 30° or more of flexion (but less than 45°) measured from the vertical position (zero degrees), and involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity.

OR

D. Repeated manifestations of inflammatory arthritis but without the requisite findings in A, B, or C, resulting in at least two of the constitutional symptoms or signs in B2, and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

14.10 *Sjögren's syndrome.* As described in 14.00D7. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Repeated manifestations of Sjögren's syndrome but without the requisite findings in A, resulting in at least two of the constitutional symptoms or signs in A2, and one of the following at the marked level:

1. Limitation of activities of daily living.

2. Limitation in maintaining social functioning.

3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

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Part B

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101.00 Musculoskeletal System

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B. *Loss of function.*

1. *General.* * * * For inflammatory arthritides that result in loss of function because of inflammatory peripheral joint or axial arthritis or sequelae, or because of extra-articular features, see 114.00D6. * * *

* * * * *

L. *Abnormal curvatures of the spine.* * * * When the abnormal curvature of the spine results in symptoms related to fixation of the dorsolumbar or cervical spine, evaluation of equivalence may be made by reference to 114.09C. * * *

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108.00 Skin Disorders

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D. *How do we assess impairments that may affect the skin and other body systems?*

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3. *Autoimmune disorders and other immune system disorders* (for example, systemic lupus erythematosus, scleroderma, human immunodeficiency virus (HIV) infection, and Sjögren's syndrome) often involve more than one body system. We first evaluate these disorders under the immune system listings in 114.00. We evaluate lupus erythematosus under 114.02, scleroderma under 114.04, symptomatic HIV infection under 114.08, and Sjögren's syndrome under 114.10.

* * * * *

114.00 Immune System Disorders

A. *What disorders do we evaluate under the immune system listings?*

1. *We evaluate immune system disorders that cause dysfunction in one or more components of your immune system.*

a. These listings are examples of immune system disorders that are severe enough to result in marked and severe functional limitations. The dysfunction may be due to problems in antibody production, impaired cell-mediated immunity, a combined type of antibody/cellular deficiency, impaired phagocytosis, or complement deficiency.

b. Immune system disorders may result in recurrent and unusual infections, or inflammation and dysfunction of the body's own tissues. Immune system disorders can cause a deficit in a single organ or body system that results in extreme (that is, very serious) loss of function. They can also cause lesser degrees of limitations in two or more organs or body systems, and when associated with symptoms or signs such as fatigue, fever, malaise, diffuse musculoskeletal pain, or involuntary weight loss, can also result in extreme limitation. In children, immune system disorders or their treatment may also affect growth, development, and performance of age-appropriate activities.

c. In this preface, we organize the discussions of immune system disorders in three categories: Autoimmune disorders; Immune deficiency disorders, excluding human immunodeficiency virus (HIV) infection; and HIV infection.

2. *Autoimmune disorders (114.00D).* Autoimmune disorders are caused by dysfunctional immune responses directed against the body's own tissues, resulting in chronic, multisystem impairments that differ in clinical manifestations, course, and outcome. They are sometimes referred to as rheumatic diseases, connective tissue disorders, or collagen vascular disorders. Some of the features of autoimmune disorders in children differ from the features of the same disorders in adults. The impact of the disorders or their treatment on physical, psychological, and developmental growth of pre-pubertal children may be considerable, and often differs from that of post-pubertal adolescents or adults.

3. *Immune deficiency disorders, excluding HIV infection (114.00E).* Immune deficiency disorders are characterized by recurrent or unusual infections that respond poorly to treatment, and are often associated with complications affecting other parts of the body. Immune deficiency disorders are classified as either *primary* (congenital) or *acquired*. Children with immune deficiency disorders also have an increased risk of malignancies and of having autoimmune disorders.

4. *Human immunodeficiency virus (HIV) infection (114.00F).* HIV infection is caused by a specific retrovirus and may be characterized by increased susceptibility to opportunistic infections, cancers, or other conditions as described in 114.08.

B. *What information do we need to show that you have an immune system disorder?* Generally, we need your medical history, report(s) of physical examination, report(s) of laboratory findings, and in some instances, appropriate medically acceptable imaging or tissue biopsy reports to show that you have an immune system disorder. Therefore, we will make every reasonable effort to obtain your medical history, medical findings, and results of laboratory tests. We explain the information we need in more detail in the sections below.

C. *Definitions*

1. *Appropriate medically acceptable imaging* includes, but is not limited to, angiography, x-ray imaging, computerized axial tomography (CAT scan) or magnetic resonance imaging (MRI), with or without contrast material, myelography, and radionuclear bone scans. "Appropriate" means that the technique used is one that is generally accepted and consistent with the prevailing state of medical knowledge and clinical practice to support the evaluation and diagnosis of the impairment.

2. *Constitutional symptoms or signs* means fatigue, fever, malaise, or involuntary weight loss. *Severe fatigue* means a frequent sense of exhaustion that results in significantly reduced physical activity or mental function. *Malaise* means frequent feelings of illness, bodily discomfort, or lack of well-being that result in significantly reduced physical activity or mental function.

3. *Disseminated* means that a condition is spread over a considerable area. The type and extent of the spread will depend on your specific disease.

4. *Dysfunction* means that one or more of the body regulatory mechanisms are impaired, causing either an excess or deficiency of immunocompetent cells or their products.

5. *Extra-articular* means "other than the joints"; for example, the effect is in an organ(s) such as the heart, lungs, kidneys, or skin.

6. *Inability to ambulate effectively* has the same meaning as in 101.00B2b.

7. *Inability to perform fine and gross movements effectively* has the same meaning as in 101.00B2c.

8. *Major peripheral joints* has the same meaning as in 101.00F.

9. *Persistent* means that a sign(s) or symptom(s) has continued over time. The precise meaning will depend on the specific immune system disorder, the usual course of the disorder, and the other circumstances of your clinical course.

10. *Recurrent* means that a condition that previously responded adequately to an appropriate course of treatment returns after a period of remission or regression. The precise meaning, such as the extent of response or remission and the time periods involved, will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

11. *Resistant to treatment* means that a condition did not respond adequately to an appropriate course of treatment. Whether a response is adequate or a course of treatment is appropriate will depend on the specific disease or condition you have, the body system affected, the usual course of the disorder and its treatment, and the other facts of your particular case.

12. *Severe* describes medical severity as used by the medical community. The term does not have the same meaning as it does when we use it in connection with a finding at the second step of the sequential evaluation process in § 416.924.

D. *What are the listed autoimmune disorders in these listings?*

1. *Systemic lupus erythematosus (114.02).*

a. *General.* Systemic lupus erythematosus (SLE) is a chronic inflammatory disease that can affect any organ or body system. It is frequently, but not always, accompanied by constitutional symptoms or signs (fatigue, fever, malaise, involuntary weight loss). Major organ or body system involvement can include: Respiratory (pleuritis, pneumonitis), cardiovascular (endocarditis, myocarditis, pericarditis, vasculitis), renal (glomerulonephritis), hematologic (anemia, leukopenia, thrombocytopenia), skin (photosensitivity), neurologic (seizures), mental (anxiety, fluctuating cognition ("lupus fog"), mood disorders, organic brain syndrome, psychosis), or immune system (inflammatory arthritis) disorders. Immunologically, there is an array of circulating serum auto-antibodies and pro- and anti-coagulant proteins that may occur in a highly variable pattern.

b. *Documentation of SLE.* Generally, but not always, the medical evidence will show that your SLE satisfies the criteria in the current "Criteria for the Classification of Systemic Lupus Erythematosus" by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

2. *Systemic vasculitis (114.03).*

a. *General.* (i) Vasculitis is an inflammation of blood vessels. It may occur acutely in association with adverse drug reactions, certain chronic infections, and occasionally, malignancies. More often, it is chronic and the cause is unknown. Symptoms vary depending on which blood vessels are involved. Systemic vasculitis may also be associated with other autoimmune disorders; for example, SLE or dermatomyositis.

(ii) Children can develop the vasculitis of Kawasaki disease, of which the most serious manifestation is formation of coronary artery aneurysms and related complications. We evaluate heart problems related to Kawasaki disease under the criteria in the cardiovascular listings (104.00ff). Children can also develop the vasculitis of anaphylactoid purpura (Henoch-Schoenlein purpura), which may cause intestinal and renal disorders. We evaluate intestinal and renal disorders related to vasculitis of anaphylactoid purpura under the criteria in the digestive (105.00ff) or genitourinary (106.00ff) listings. Other clinical patterns include, but are not limited to, polyarteritis nodosa, Takayasu's arteritis (aortic arch arteritis), and Wegener's granulomatosis.

b. *Documentation of systemic vasculitis.* Angiography or tissue biopsy confirms a diagnosis of systemic vasculitis when the disease is suspected clinically. Usually the results will be in your medical records.

3. *Systemic sclerosis (scleroderma) (114.04).*

a. *General.* Systemic sclerosis (scleroderma) constitutes a spectrum of disease in which thickening of the skin is the clinical hallmark. Raynaud's phenomenon, often medically severe and progressive, is present frequently and may be the peripheral manifestation of a vasospastic abnormality in the heart, lungs, and kidneys. The CREST syndrome (calcinosis, Raynaud's phenomenon, esophageal dysmotility, sclerodactyly, and telangiectasia) is a variant that may slowly progress over years to the generalized process, systemic sclerosis.

b. *Diffuse cutaneous systemic sclerosis.* In diffuse cutaneous systemic sclerosis (also known as diffuse scleroderma), major organ or systemic involvement can include the gastrointestinal tract, lungs, heart, kidneys, and muscle in addition to skin or blood vessels. Although arthritis can occur, joint dysfunction results primarily from soft tissue/cutaneous thickening, fibrosis, and contractures.

c. *Localized scleroderma (linear scleroderma and morphea).*

(i) Localized scleroderma (linear scleroderma and morphea) is more common in children than systemic scleroderma. The extent of involvement of linear scleroderma and a description of the lesions are important in assessing the severity of the impairment.

For example, linear scleroderma involving the arm but not crossing any joints is not as functionally limiting as sclerodactyly (scleroderma localized to the fingers). Linear scleroderma of a lower extremity involving skin thickening and atrophy of underlying muscle or bone can result in contracture(s) and leg length discrepancies. In such cases, evaluation under the musculoskeletal (101.00ff) listings may be appropriate.

(ii) When there is isolated morphea of the face causing facial disfigurement from unilateral hypoplasia of the mandible, maxilla, zygoma, or orbit, adjudication may be more appropriate under the criteria in the special senses listings (102.00ff) or mental disorders listings (112.00ff).

(iii) Chronic variants of these syndromes include disseminated morphea, Shulman's disease (diffuse fasciitis with eosinophilia), and eosinophilia-myalgia syndrome (often associated with toxins such as toxic oil or contaminated tryptophan), all of which can impose medically severe musculoskeletal impairment and may also lead to restrictive pulmonary disease. We evaluate these variants of the disease under the criteria in the musculoskeletal listings (101.00ff) or respiratory system listings (103.00ff).

d. *Documentation of systemic sclerosis (scleroderma).* Documentation involves differentiating the clinical features of systemic sclerosis (scleroderma) from other autoimmune disorders; however, there may be an overlap.

4. *Polymyositis and dermatomyositis (114.05).*

a. *General.*

(i) Polymyositis and dermatomyositis are related disorders that are characterized by an inflammatory process in striated muscle, occurring alone or in association with other autoimmune disorders. Symmetric weakness, and less frequently pain and tenderness of the proximal limb-girdle (shoulder or pelvic) musculature, are the most common manifestations. There may also be involvement of the cervical, cricopharyngeal, esophageal, intercostal, and diaphragmatic muscles.

(ii) Polymyositis occurs rarely in children; the more common presentation in children is dermatomyositis with symmetric proximal muscle weakness and characteristic skin rash. The clinical course of dermatomyositis can be more severe when it is accompanied by systemic vasculitis rather than just localized to striated muscle. Late in the disease, some children with dermatomyositis develop calcinosis of the skin and subcutaneous tissues, muscles and joints. We evaluate the involvement of other organs/body systems under the criteria for the listings in the affected body system.

b. *Documentation of polymyositis and dermatomyositis.* Generally, but not always, polymyositis is associated with elevated serum muscle enzymes (creatine phosphokinase (CPK), aminotransferases, aldolase), and characteristic abnormalities on electromyography and muscle biopsy. In children, the diagnosis of dermatomyositis is supported largely by medical history, findings on physical examination that include the characteristic skin rash, and elevated serum muscle enzymes. Additional evidence of the diagnosis of childhood dermatomyositis is depiction on MRI of muscle inflammation or vasculitis.

c. *Additional information about how we evaluate polymyositis and dermatomyositis under the listings.*

(i) In newborn and younger infants (birth to attainment of age 1), we consider muscle weakness that affects motor skills, such as head control, reaching, grasping, taking solids, or self-feeding under 114.05A. In older infants and toddlers (age 1 to attainment of age 3), we also consider muscle weakness affecting the child's ability to roll over, sit, crawl, or walk under 114.05A.

(ii) If you are of preschool age through adolescence (age 3 to attainment of age 18), weakness of your pelvic girdle muscles that results in your inability to rise independently from a squatting or sitting position or to climb stairs may be an indication that you are unable to ambulate effectively. Weakness of your shoulder girdle muscles may result in your inability to perform lifting, carrying, and reaching overhead, and also may seriously affect your ability to perform activities requiring fine movements. We evaluate these limitations under 114.05A.

5. *Undifferentiated and mixed connective tissue disease (114.06).*

a. *General.* This listing includes syndromes with clinical and immunologic features of several autoimmune disorders, but which do not satisfy the criteria for any of the specific disorders described. For example, you may have clinical features of systemic lupus erythematosus and systemic vasculitis, and the serologic (blood test) findings of rheumatoid arthritis. The most common pattern of undifferentiated autoimmune disorders in children is mixed connective tissue disease (MCTD).

b. *Documentation of undifferentiated and mixed connective tissue disease.* Undifferentiated connective tissue disease is diagnosed when clinical features and serologic (blood test) findings, such as rheumatoid factor or antinuclear antibody (consistent with an autoimmune disorder) are present but do not satisfy the criteria for a specific disease. Children with MCTD have laboratory findings of extremely high antibody titers to extractable nuclear antigen (ENA) or ribonucleoprotein (RNP) without high titers of anti-dsDNA or anti-SM antibodies. There are often clinical findings suggestive of SLE or childhood dermatomyositis. Many children later develop features of scleroderma.

6. *Inflammatory arthritis (114.09).*

a. *General.* The inflammatory arthritides include a vast array of disorders that differ in cause, course, and outcome. Clinically, inflammation of major peripheral joints may be the dominant manifestation causing difficulties with ambulation or fine and gross movements; there may be joint pain, swelling, and tenderness. The arthritis may affect other joints, or cause less functional limitations in ambulation or performance of fine and gross movements. However, in combination with extra-articular features, including constitutional symptoms or signs (fatigue, fever, malaise, involuntary weight loss), inflammatory arthritis may result in an extreme limitation. You may also have impaired growth as a result of the inflammatory arthritides because of its effects on the immature skeleton, open epiphyses, and young cartilage and bone. We evaluate any associated growth impairment under the criteria in 100.00ff.

b. *Inflammatory arthritides involving the axial spine (spondyloarthropathies).* In children, inflammatory arthritides involving the axial spine may be associated with heterogeneous disorders such as:

(i) Reactive arthropathies;

(ii) Juvenile ankylosing spondylitis;

(iii) Psoriatic arthritis;

(iv) SEA syndrome (seronegative enthesopathy arthropathy syndrome);

(v) Behçet's disease; and

(vi) Inflammatory bowel disease.

c. *Inflammatory arthritides involving the peripheral joints.* In children, the inflammatory arthropathies involving peripheral joints may be associated with disorders such as:

(i) Juvenile rheumatoid arthritis;

(ii) Sjögren's syndrome;

(iii) Psoriatic arthritis;

(iv) Crystal deposition disorders (gout and pseudogout);

(v) Lyme disease; and

(vi) Inflammatory bowel disease.

d. *Documentation of inflammatory arthritides.* Generally, but not always, the diagnosis of inflammatory arthritis is made by the clinical features and serologic findings described in the most recent edition of the *Primer on Rheumatic Diseases* published by the Arthritis Foundation.

e. *How we evaluate the inflammatory arthritides under the listings.*

(i) Listing-level severity in 114.09A and 114.09C1 is shown by an impairment that results in an "extreme" (very serious) limitation. In 114.09A, the criterion is satisfied with persistent inflammation or deformity in two or more major peripheral joints resulting in the inability to ambulate effectively or inability to perform fine and gross movements effectively, as defined in 114.00C6 and 114.00C7. In 114.09C1, if you have the required ankylosis (fixation) of your cervical or dorsolumbar spine, we will find that you have an extreme limitation in your ability to see in front of you, above you, and to the side. Therefore, inability to ambulate effectively is implicit in 114.09C1, even though you might not require bilateral upper limb assistance.

(ii) Listing-level severity is shown in 114.09B, 114.09C2, and 114.09D when the arthritis does not result in the extreme limitation in 114.09A or 114.09C1, involves one or more major peripheral joints, or involves other joints, but is complicated by extra-articular features that cumulatively result in an "extreme" (very serious) limitation or "marked" (serious) limitations in at least two areas of functioning. Extra-articular impairments may also meet listings in other body systems.

(iii) Extra-articular features of inflammatory arthritis may involve any body system. Commonly occurring extra-articular impairments include: Musculoskeletal (heel enthesopathy), ophthalmologic (iridocyclitis, keratoconjunctivitis sicca, uveitis), pulmonary (pleuritis, pulmonary fibrosis or

nodules, restrictive lung disease), cardiovascular (aortic valve insufficiency, arrhythmias, coronary arteritis, myocarditis, pericarditis, Raynaud's phenomenon, systemic vasculitis), renal (amyloidosis of the kidney), hematologic (chronic anemia, thrombocytopenia), neurologic (peripheral neuropathy, radiculopathy, spinal cord or cauda equina compression with sensory and motor loss), and immune system (Felty's syndrome (hypersplenism with compromised immune competence)) disorders.

(iv) If permanent deformity of a major peripheral joint is the dominant feature of your impairment, we evaluate your impairment under 101.02.

(v) If there has been surgical reconstruction of a major weight-bearing joint, we evaluate your impairment under 101.03.

(vi) If both inflammation and chronic deformities are present, we evaluate your impairment under the criteria of any appropriate listing.

7. *Sjögren's syndrome (114.10).*

a. *General.* (i) Sjögren's syndrome is an immune-mediated disorder of the exocrine glands. Involvement of the lacrimal and salivary glands is the hallmark feature, resulting in symptoms of dry eyes and dry mouth, and possible complications such as corneal damage, blepharitis (eyelid inflammation), dysphagia (difficulty in swallowing), dental caries, and the inability to speak for extended periods of time. Involvement of the exocrine glands of the upper airways may result in persistent dry cough.

(ii) Many other organ systems may be involved, including musculoskeletal (arthritis, myositis), respiratory (interstitial fibrosis), gastrointestinal (dysmotility, dysphagia, involuntary weight loss), genitourinary (interstitial cystitis, renal tubular acidosis), skin (purpura, vasculitis,), neurologic (central nervous system disorders, cranial and peripheral neuropathies), mental (cognitive dysfunction, poor memory), and neoplastic (lymphoma). Fatigue and malaise are frequently reported. Sjögren's syndrome may be associated with other autoimmune disorders (for example, rheumatoid arthritis or SLE); usually the clinical features of the associated disorder predominate.

b. *Documentation of Sjögren's syndrome.* If you have Sjögren's syndrome, the medical evidence will generally, but not always, show that your disease satisfies the criteria in the current "Criteria for the Classification of Sjögren's Syndrome" by the American College of Rheumatology found in the most recent edition of the *Primer on the Rheumatic Diseases* published by the Arthritis Foundation.

E. *How do we evaluate immune deficiency disorders, excluding HIV infection (114.07)?*

1. *General.*

a. Immune deficiency disorders can be classified as:

(i) *Primary* (congenital); for example, X-linked agammaglobulinemia, thymic hypoplasia (DiGeorge syndrome), severe combined immunodeficiency (SCID), chronic granulomatous disease (CGD), C1 esterase inhibitor deficiency.

(ii) *Acquired;* for example, medication-related.

b. Primary immune deficiency disorders are seen mainly in children. However, recent advances in the treatment of these disorders have allowed many affected children to survive well into adulthood. Occasionally, these disorders are first diagnosed in adolescence or adulthood.

2. *Documentation of immune deficiency disorders.* The medical evidence must include documentation of the specific type of immune deficiency. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice.

3. *Immune deficiency disorders treated by stem cell transplantation.*

a. *Evaluation in the first 12 months.* If you undergo stem cell transplantation for your immune deficiency disorder, we will consider you disabled until at least 12 months from the date of the transplant.

b. *Evaluation after the 12-month period has elapsed.* After the 12-month period has elapsed, we will consider any residuals of your immune deficiency disorder as well as any residual impairment(s) resulting from treatment, such as complications arising from:

(i) Graft-versus-host (GVH) disease.

(ii) Immunosuppressant therapy, such as frequent infections.

(iii) Significant deterioration of other organ systems.

4. *Medication-induced immune suppression.* Medication effects can result in varying degrees of immune suppression, but most resolve when the medication is ceased. However, if you are prescribed medication for long-term immune suppression, such as after an organ transplant, we will evaluate:

a. The frequency and severity of infections.

b. Residuals from the organ transplant itself, after the 12-month period has elapsed.

c. Significant deterioration of other organ systems.

F. *How do we evaluate human immunodeficiency virus (HIV) infection?* Any child with HIV infection, including one with a diagnosis of acquired immune deficiency syndrome (AIDS), may be found disabled under 114.08 if his or her impairment meets the criteria in that listing or is medically equivalent to the criteria in that listing.

1. *Documentation of HIV infection.* The medical evidence must include documentation of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for HIV infection, we will make every reasonable effort to obtain reports of the results of that testing.

a. *Documentation of HIV infection by definitive diagnosis.* A definitive diagnosis of HIV infection is documented by one or more of the following laboratory tests:

(i) HIV antibody tests. HIV antibodies are usually first detected by an ELISA screening test performed on serum. Because the ELISA can yield false positive results, confirmation is required using a more definitive test, such as a Western blot or an immunofluorescence assay. Positive results on these tests are considered to be diagnostic of HIV infection in a child age 18 months or older. (See b. below, for information about HIV antibody testing in children younger than 18 months of age.)

(ii) Positive "viral load" (VL) tests. These tests are normally used to quantitate the amount of the virus present but also document HIV infection. Such tests include the quantitative plasma HIV RNA, quantitative plasma HIV branched DNA, and reverse transcriptase-polymerase chain reaction (RT–PCR).

(iii) HIV DNA detection by polymerase chain reaction (PCR).

(iv) A specimen that contains HIV antigen (for example, serum specimen, lymphocyte culture, or cerebrospinal fluid), in a child age 1 month or older.

(v) A positive viral culture for HIV from peripheral blood mononuclear cells (PBMC).

(vi) An immunoglobulin A (IgA) serological assay that is specific for HIV.

(vii) Other tests that are highly specific for detection of HIV and that are consistent with the prevailing state of medical knowledge.

b. *Documentation of HIV infection in children from birth to the attainment of 18 months.* For children from birth to the attainment of 18 months of age, and who have tested positive for HIV antibodies, HIV infection is documented by:

(i) One or more of the tests listed in F1a(ii)–F1a(vii).

(ii) For newborn and younger infants (birth to attainment of age 1), a CD4 (T4) count of 1500/mm^3 or less, or a CD4 count less than or equal to 20 percent of total lymphocytes.

(iii) For older infants and toddlers from 12 to 18 months of age, a CD4 (T4) count of 750/mm^3 or less, or a CD4 count less than or equal to 20 percent of total lymphocytes.

(iv) An abnormal CD4/CD8 ratio.

(v) A severely diminished immunoglobulin G (IgG) level (<4 g/l or 400 mg/dl), or significantly greater than normal range for age.

c. *Other acceptable documentation of HIV infection.* We may also document HIV infection without the definitive laboratory evidence described in 114.00F1a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice, and is consistent with the other evidence in your case record. If no definitive laboratory evidence is available, we may document HIV infection by the medical history, clinical and laboratory findings, and diagnosis(es) indicated in the medical evidence. For example, we will accept a diagnosis of HIV infection without definitive laboratory evidence if you have an opportunistic disease that is predictive of a defect in cell-mediated immunity (for example, Pneumocystis carinii pneumonia (PCP)), and there is no other known cause of diminished resistance to that disease (for example, long-term steroid treatment, lymphoma). In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

2. *CD4 tests.* Children who have HIV infection or other disorders of the immune system may have tests showing a reduction of either the absolute count or the percentage

of their T-helper lymphocytes (CD4 cells). The extent of immune suppression correlates with the level or rate of decline of the CD4 count. At age 6, children begin to have CD4 counts comparable to the levels found in adults. Generally, in these children when the CD4 count is 200/mm^3 or less (14 percent or less) the susceptibility to opportunistic infection is greatly increased. Although a reduced CD4 count alone does not establish a definitive diagnosis of HIV infection, a CD4 count below 200 does offer supportive evidence when there are clinical findings, but not a definitive diagnosis of an opportunistic infection(s). However, a reduced CD4 count *alone* does not document the severity or functional consequences of HIV infection.

3. *Documentation of the manifestations of HIV infection.* The medical evidence must also include documentation of the manifestations of HIV infection. Documentation may be by laboratory evidence or by other generally acceptable methods consistent with the prevailing state of medical knowledge and clinical practice. When you have had laboratory testing for a manifestation of HIV infection, we will make every reasonable effort to obtain reports of the results of that testing.

a. *Documentation of the manifestations of HIV infection by definitive diagnosis.* The definitive method of diagnosing opportunistic diseases or conditions that are manifestations of HIV infection is by culture, serologic test, or microscopic examination of biopsied tissue or other material (for example, bronchial washings). We will make every reasonable effort to obtain specific laboratory evidence of an opportunistic disease or other condition whenever this information is available. If a histologic or other test has been performed, the evidence should include a copy of the appropriate report. If we cannot obtain the report, the summary of hospitalization or a report from the treating source should include details of the findings and results of the diagnostic studies (including appropriate medically acceptable imaging studies) or microscopic examination of the appropriate tissues or body fluids.

b. *Other acceptable documentation of the manifestations of HIV infection.* We may also document manifestations of HIV infection without the definitive laboratory evidence described in 114.00F3a, provided that such documentation is consistent with the prevailing state of medical knowledge and clinical practice, and is consistent with the other evidence in your case record. If no definitive evidence is available, we may document the manifestations of HIV infection with other appropriate evidence. For example, many conditions are now commonly diagnosed based on some or all of the following: Medical history, clinical manifestations, laboratory findings (including appropriate medically acceptable imaging), and treatment responses. In such cases, we will make every reasonable effort to obtain full details of the history, medical findings, and results of testing.

(i) Although a definitive diagnosis of PCP requires identifying the organism in bronchial washings, induced sputum, or lung biopsy, these tests are frequently bypassed if PCP can be diagnosed presumptively. (**Note:** *Pneumocystis carinii* is now known as *Pneumocystis jiroveci;* however, "PCP" remains in common usage for the pneumonia caused by this organism.) Supportive evidence includes: Fever, dyspnea, hypoxia, and CD4 count below 200 in children 6 years of age or older. Also supportive are bilateral lung interstitial infiltrates on x-ray, or a typical pattern on CT scan, or a gallium scan positive for pulmonary uptake. Response to anti-PCP therapy usually requires 5–7 days.

(ii) Documentation of cytomegalovirus (CMV) disease (114.08D) may present special problems because definitive diagnosis (except for chorioretinitis, which may be diagnosed by an ophthalmologist on funduscopic exam) requires identification of viral inclusion bodies or a positive culture from the affected organ and the absence of any other infectious agent likely to be causing the disease. A positive serology test identifies a history of infection with CMV, but it does not confirm an active disease process. Therefore, a presumptive diagnosis of CMV disease requires corroborating evidence that CMV is causing the disease. Supportive evidence includes: Fever, positive CMV serology test, urinary culture positive for CMV, and CD4 count below 200 in children 6 years of age or older. A clear response to anti-CMV therapy also supports a diagnosis.

(iii) A definitive diagnosis of toxoplasmosis of the brain is made by brain biopsy, but this procedure carries significant risk and is not commonly performed. This condition is usually diagnosed presumptively based on symptoms or signs of fever, headache, focal neurologic deficits, seizures, typical lesions on brain imaging, and a positive serology test.

4. *HIV infection manifestations specific to children.*

a. *General.* The clinical manifestation and course of disease in children who become infected with HIV perinatally or in the first 6 years of life may differ from that in adolescents (age 12 to attainment of age 18) and adults. Newborn and younger infants (birth to attainment of age 1) and older infants and toddlers (age 1 to attainment of age 3) may present with failure to thrive or PCP; preschool children (age 3 to attainment of age 6) and primary school children (age 6 to attainment of age 12) may present with recurrent infections, neurological problems, or developmental abnormalities. Adolescents may also exhibit neurological abnormalities such as HIV encephalopathy, or have growth problems.

b. *Neurologic abnormalities.* The methods of identifying and evaluating neurologic abnormalities may vary depending on a child's age. For example, in an infant impaired brain growth can be documented by a decrease in the growth rate of the head. In an older child, impaired brain growth may be documented by brain atrophy on a CT scan or MRI. Neurologic abnormalities in infants and young children may present as serious developmental delays or in the loss of previously acquired developmental milestones. In school-age children and adolescents, this type of neurologic abnormality would generally present as the loss of previously acquired intellectual abilities. This may be evidenced by a decrease in intelligence quotient (IQ) scores, by a child forgetting information he or she previously learned, by being unable to learn new information, or by a sudden onset of a new learning disability.

c. *Bacterial infections.* Children with HIV infection may contract any of a broad range of bacterial infections. Certain major infections caused by pyogenic bacteria (for example, some pneumonias) can be severely limiting, especially in pre-adolescent children. We evaluate these major bacterial infections under 114.08A4. Although 114.08A4 applies only to children under 13 years of age, children age 13 and older may have an impairment that medically equals this listing if the circumstances of the case warrant; for example, if there is delayed puberty. We will evaluate pelvic inflammatory disease in older girls under 114.08A5.

G. *How will we consider the effect of treatment in evaluating your autoimmune disorder, immune deficiency disorder, or HIV infection?*

1. *General.* If your impairment does not otherwise meet the requirements of a listing we will consider your medical treatment both in terms of its effectiveness in improving the signs, symptoms, and laboratory abnormalities of your specific immune system disorder or its manifestations, and in terms of any side effects that limit your functioning. We will make every reasonable effort to obtain a specific description of the treatment you receive (including surgery) for your immune system disorder. We consider:

a. The effects of medications you take.

b. Adverse side effects (acute and chronic).

c. The intrusiveness and complexity of your treatment (for example, the dosing schedule, need for injections).

d. The effect of treatment on your mental functioning (for example, cognitive changes, mood disturbance).

e. Variability of your response to treatment (see 114.00G2).

f. The interactive and cumulative effects of your treatments. For example, many individuals with immune system disorders receive treatment both for their immune system disorders and for the manifestations of the disorders or co-occuring impairments, such as treatment for HIV infection and hepatitis C. The interactive and cumulative effects of these treatments may be greater than the effects of each treatment considered separately.

g. The duration of your treatment.

h. Any other aspects of treatment that may interfere with your ability to function.

2. *Variability of your response to treatment.* Your response to treatment and the adverse or beneficial consequences of your treatment may vary widely. The effects of your treatment may be temporary or long term. For example, some individuals may show an initial positive response to a drug or combination of drugs followed by a decrease in effectiveness. When we evaluate your response to treatment and how your treatment may affect you, we consider such factors as disease activity before treatment,

requirements for changes in therapeutic regimes, the time required for therapeutic effectiveness of a particular drug or drugs, the limited number of drug combinations that may be available for your impairment(s), and the time-limited efficacy of some drugs. For example, a child with HIV infection or another immune deficiency disorder who develops otitis media may not respond to the same antibiotic regimen used in treating children without these disorders or may not respond to an antibiotic that he or she responded to before. Therefore, we must consider the effects of your treatment on an individual basis, including the effects of your treatment on your ability to function.

3. *How we evaluate the effects of treatment for autoimmune disorders on your ability to function.* Some medications may have acute or long-term side effects. When we consider the effects of corticosteroids or other treatments for autoimmune disorders on your ability to function, we consider the factors in 114.00G1 and 114.00G2. Long-term corticosteroid treatment can cause ischemic necrosis of bone, posterior subcapsular cataract, impaired growth, weight gain, glucose intolerance, increased susceptibility to infection, and osteopenia that may result in a loss of function. In addition, medications used in the treatment of autoimmune disorders may also have effects on mental function including cognition (for example, memory), concentration, and mood.

4. *How we evaluate the effects of treatment for immune deficiency disorders, excluding HIV infection, on your ability to function.* When we consider the effects of your treatment for your immune deficiency disorder on your ability to function, we consider the factors in 114.00G1 and 114.00G2. A frequent need for treatment such as intravenous immunoglobulin and gamma interferon therapy can be intrusive and interfere with your ability to function. We will also consider whether you have chronic side effects from these or other medications, including fatigue, fever, headaches, high blood pressure, joint swelling, muscle aches, nausea, shortness of breath, or limitations in mental function including cognition (for example, memory) concentration, and mood.

5. *How we evaluate the effects of treatment for HIV infection on your ability to function.*

a. *General.* When we consider the effects of antiretroviral drugs (including the effects of highly active antiretroviral therapy (HAART)) and the effects of treatments for the manifestations of HIV infection on your ability to function, we consider the factors in 114.00G1 and 114.00G2. Side effects of antiretroviral drugs include, but are not limited to: Bone marrow suppression, pancreatitis, gastrointestinal intolerance (nausea, vomiting, diarrhea), neuropathy, rash, hepatotoxicity, lipodystrophy, glucose intolerance, and lactic acidosis. In addition, medications used in the treatment of HIV infection may also have effects on mental function, including cognition (for example, memory), concentration, and mood, and may result in malaise, fatigue, joint and muscle pain, and insomnia. The symptoms of HIV infection and the side effects of medication may be indistinguishable from each other. We will consider all of your functional limitations, whether they result from your symptoms of HIV infection or the side effects of your treatment.

b. *Structured treatment interruptions.* A structured treatment interruption (STI, also called a "drug holiday") is a treatment practice during which your treating source advises you to stop taking your medications temporarily. An STI in itself does not imply that your medical condition has improved or that you are noncompliant with your treatment because you are following your treating source's advice. Therefore, if you have stopped taking medication because your treating source prescribed or recommended an STI, we will not find that you are failing to follow treatment or draw inferences about the severity of your impairment on this fact alone. We will consider why your treating source has prescribed or recommended an STI and all the other information in your case record when we determine the severity of your impairment.

6. *When there is no record of ongoing treatment.* If you have not received ongoing treatment or have not had an ongoing relationship with the medical community despite the existence of a severe impairment(s), we will evaluate the medical severity and duration of your immune system impairment on the basis of the current objective medical evidence and other evidence in your case record, taking into consideration your medical history, symptoms, clinical and laboratory findings, and medical source opinions. If you have just begun treatment and we cannot determine whether you are disabled based on the evidence we have, we may need to wait to determine the effect of the treatment on your ability to function. The amount of time we need to wait will depend on the facts of your case. If you have not received treatment, you may not be able to show an impairment that meets the criteria of one of the immune system listings, but your immune system impairment may medically equal a listing or functionally equal the listings.

H. *How do we consider your symptoms, including your constitutional symptoms or pain?*

Your symptoms, including pain, fatigue, and malaise, may be important factors in our determination whether your immune system disorder(s) meets or medically equals a listing or in our determination whether you otherwise have marked and severe functional limitations. In order for us to consider your symptoms, you must have medical signs or laboratory findings showing the existence of a medically determinable impairment(s) that could reasonably be expected to produce the symptoms. If you have such an impairment(s), we will evaluate the intensity, persistence, and functional effects of your symptoms using the rules throughout 114.00 and in our other regulations. See §§ 416.928, and 416.929.

I. *How do we use the functional criteria in these listings?*

1. The following listings in this body system include standards for evaluating the limitations resulting from manifestations of immune system disorders that do not meet the criteria of the other sections of their respective listings: 114.02B, for systemic lupus erythematosus; 114.03B, for systemic vasculitis; 114.04D, for systemic sclerosis (scleroderma); 114.05E, for polymyositis and dermatomyositis; 114.06B, for undifferentiated and mixed connective tissue disease; 114.07C, for immune deficiency disorders, excluding HIV infection; 114.08L, for HIV infection; 114.09D, for inflammatory arthritides; and 114.10B, for Sjögren's syndrome.

2. When we use one of the listings cited in 114.00I1, we will consider all relevant information in your case record to determine the full impact of your immune system disorder(s) on your ability to function on a sustained basis. Important factors we will consider when we evaluate your functioning under these listings include, but are not limited to: Your symptoms, the frequency and duration of manifestations of your immune system disorder, periods of exacerbation and remission, and the functional impact of your treatment, including the side effects of your medication.

3. To satisfy the functional criterion in a listing, your immune system disorder must result in an "extreme" limitation in one domain of functioning or "marked" limitations in two domains of functioning depending on your age. (See 112.00C for additional discussion of these areas of functioning and §§ 416.924a and 416.926a for additional guidance on the evaluation of functioning in children.) Functional limitation may result from the impact of the disease process itself on your mental functioning, physical functioning, or both your mental and physical functioning. This could result from persistent or intermittent symptoms, such as depression, fatigue, or pain, resulting in a limitation of your ability to do a task, to concentrate, to persevere at a task, or to perform the task at an acceptable rate of speed. You may also have limitations because of your treatment and its side effects (see 114.00G).

J. *How do we evaluate your immune system disorder when it does not meet one of these listings?*

1. These listings are only examples of immune system disorders that we consider severe enough to result in marked and severe functional imitations. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system.

2. Individuals with immune system disorders, including HIV infection, may manifest signs or symptoms of a mental impairment or of another physical impairment. We may evaluate these impairments under any affected body system. For example, we will evaluate:

a. Growth impairment under 100.00ff.

b. Musculoskeletal involvement, such as surgical reconstruction of a joint, under 101.00ff.

c. Ocular involvement, such as dry eye, under 102.00ff

d. Respiratory impairments, such as pleuritis, under 103.00ff.

e. Cardiovascular impairments, such as cardiomyopathy, under 104.00ff.

f. Digestive impairments, such as hepatitis (including hepatitis C), under 105.00ff.

g. Genitourinary impairments, such as nephropathy, under 106.00ff.

h. Hematologic abnormalities, such as anemia, granulocytopenia, and thrombocytopenia, under 107.00ff.

i. Skin impairments, such as persistent fungal and other infectious skin eruptions, and photosensitivity, under 108.00ff.

j. Neurologic impairments, such as neuropathy or seizures, under 111.00ff.

k. Mental disorders, such as depression, anxiety, or cognitive deficits, under 112.00ff.

l. Allergic disorders, such as asthma or atopic dermatitis, under 103.00ff or 108.00ff or under the criteria in another affected body system.

m. Syphilis or neurosyphilis under the criteria for the affected body system; for example, 102.00 Special senses and speech, 104.00 Cardiovascular system, or 111.00 Neurological.

3. If you have a severe medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals a listing. (See § 416.926.) If it does not, we will also consider whether you have an impairment(s) that functionally equals the listings. (See § 416.926a.) We use the rules in § 416.994a when we decide whether you continue to be disabled.

114.01 *Category of Impairments, Immune System Disorders*

114.02 *Systemic lupus erythematosus.* As described in 114.00D1. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Any other manifestation(s) of SLE resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.03 *Systemic vasculitis.* As described in 114.00D2. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Any other manifestation(s) of systemic vasculitis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.04 *Systemic sclerosis (scleroderma).* As described in 114.00D3. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. With one of the following:

1. Toe contractures or fixed deformity of one or both feet, resulting in the inability to ambulate effectively as defined in 114.00C6; or

2. Finger contractures or fixed deformity in both hands, resulting in the inability to perform fine and gross movements effectively as defined in 114.00C7; or

3. Atrophy with irreversible damage in one or both lower extremities, resulting in the inability to ambulate effectively as defined in 114.00C6; or

4. Atrophy with irreversible damage in both upper extremities, resulting in the inability to perform fine and gross movements effectively as defined in 114.00C7.

OR

C. Raynaud's phenomenon, characterized by:

1. Gangrene of a toe or finger in at least two extremities, or of a toe and finger; or

2. Ischemia with ulcerations of toes or fingers, resulting in the inability to ambulate effectively or to perform fine and gross movements effectively as defined in 114.00C6 and 114.00C7; or

D. Any other manifestation(s) of systemic sclerosis (scleroderma) resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.05 *Polymyositis and dermatomyositis.* As described in 114.00D4. With:

A. Proximal limb-girdle (pelvic or shoulder) muscle weakness, resulting in inability to ambulate effectively or inability to perform fine and gross movements effectively as defined in 114.00C6 and 114.00C7.

OR

B. Impaired swallowing (dysphagia) and aspiration due to muscle weakness.

OR

C. Impaired respiration due to intercostal and diaphragmatic muscle weakness.

OR

D. Diffuse calcinosis with limitation of joint mobility or intestinal motility.

OR

E. Any other manifestation(s) of polymyositis or dermatomyositis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.06 *Undifferentiated and mixed connective tissue disease.* As described in 114.00D5. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Any other manifestation(s) of undifferentiated or mixed connective tissue disease resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.07 *Immune deficiency disorders, excluding HIV infection.* As described in 114.00E. With:

A. One or more of the following infections. The infection(s) must either be resistant to treatment, or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

OR

B. Stem cell transplantation as described under 114.00E3. Consider under a disability until at least 12 months from the date of transplantation. Thereafter, evaluate any residual impairment(s) under the criteria for the affected body system.

OR

C. Any other manifestations(s) of an immune deficiency disorder resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A–E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.08 *Human immunodeficiency virus (HIV) infection.* With documentation as

described in 114.00F and one of the following:

A. Bacterial infections:

1. Mycobacterial infection (for example, caused by M. avium-intracellulare, M. kansasii, or M. tuberculosis) at a site other than the lungs, skin, or cervical or hilar lymph nodes, or pulmonary tuberculosis resistant to treatment; or

2. Nocardiosis; or

3. Salmonella bacteremia, recurrent non-typhoid; or

4. In a child less than 13 years of age, multiple or recurrent pyogenic bacterial infection(s) (sepsis, pneumonia, meningitis, bone or joint infection, or abscess of an internal organ or body cavity, but not otitis media or superficial skin or mucosal abscesses) occurring two or more times in 2 years; or

5. Multiple or recurrent bacterial infection(s), including pelvic inflammatory disease, requiring hospitalization or intravenous antibiotic treatment three or more times in a 12-month period.

OR

B. Fungal infections:

1. Aspergillosis; or

2. Candidiasis involving the esophagus, trachea, bronchi, or lungs, or at another site other than the skin, urinary tract, intestinal tract, or oral or vulvovaginal mucous membranes; or

3. Coccidioidomycosis, at a site other than the lungs or lymph nodes; or

4. Cryptococcosis, at a site other than the lungs (for example, cryptococcal meningitis); or

5. Histoplasmosis, at a site other than the lungs or lymph nodes; or

6. Mucormycosis; or

7. Pneumocystis carinii (jiroveci) pneumonia or extrapulmonary pneumocystis carinii (jiroveci) infection.

OR

C. Protozoan or helminthic infections:

1. Cryptosporidiosis, isosporiasis, or microsporidiosis, with diarrhea lasting for 1 month or longer; or

2. Strongyloidiasis, extra-intestinal; or

3. Toxoplasmosis of an organ other than the liver, spleen, or lymph nodes.

OR

D. Viral infections:

1. Cytomegalovirus disease (documented as described in 114.00F3b(ii)) at a site other than the liver, spleen, or lymph nodes; or

2. Herpes simplex virus causing:

a. Mucocutaneous infection (for example, oral, genital, perianal) lasting for 1 month or longer; or

b. Infection at a site other than the skin or mucous membranes (for example, bronchitis, pneumonitis, esophagitis, or encephalitis); or

c. Disseminated infection; or

3. Herpes zoster:

a. Disseminated; or

b. With multidermatomal eruptions that are resistant to treatment; or

4. Progressive multifocal leukoencephalopathy.

OR

E. Malignant neoplasms:

1. Carcinoma of the cervix, invasive, FIGO stage II and beyond; or

2. Kaposi's sarcoma with:

a. Extensive oral lesions; or

b. Involvement of the gastrointestinal tract, lungs, or other visceral organs; or

3. Lymphoma (for example, primary lymphoma of the brain, Burkitt's lymphoma, immunoblastic sarcoma, other non-Hodgkin's lymphoma, Hodgkin's disease); or

4. Squamous cell carcinoma of the anus.

OR

F. Conditions of the skin or mucous membranes (other than described in B2, D2, or D3, above), with extensive fungating or ulcerating lesions not responding to treatment (for example, dermatological conditions such as eczema or psoriasis, vulvovaginal or other mucosal candida, condyloma caused by human papillomavirus, genital ulcerative disease).

OR

G. Neurological manifestations of HIV infection (for example, HIV encephalopathy, peripheral neuropathy) resulting in one of the following:

1. Loss of previously acquired, or marked delay in achieving, developmental milestones or intellectual ability (including the sudden onset of a new learning disability); or

2. Impaired brain growth (acquired microcephaly or brain atrophy—see 114.00F4b); or

3. Progressive motor dysfunction affecting gait and station or fine and gross motor skills.

OR

H. Growth disturbance, with:

1. An involuntary weight loss (or failure to gain weight at an appropriate rate for age) resulting in a fall of 15 percentiles from an established growth curve (on standard growth charts) that persists for 2 months or longer, or

2. An involuntary weight loss (or failure to gain weight at an appropriate rate for age) resulting in a fall to below the third percentile from an established growth curve (on standard growth charts) that persists for 2 months or longer; or

3. Involuntary weight loss of 10 percent or more of baseline that persists for 2 months or longer.

OR

I. Diarrhea, lasting for 1 month or longer, resistant to treatment, and requiring intravenous hydration, intravenous alimentation, or tube feeding.

OR

J. Lymphoid interstitial pneumonia/pulmonary lymphoid hyperplasia (LIP/PLH complex), with respiratory symptoms that significantly interfere with age-appropriate activities, and that cannot be controlled by prescribed treatment.

OR

K. One or more of the following infections (other than described in A-J, above). The infection(s) must either be resistant to treatment, or require hospitalization or intravenous treatment three or more times in a 12-month period.

1. Sepsis; or

2. Meningitis; or

3. Pneumonia; or

4. Septic arthritis; or

5. Endocarditis; or

6. Sinusitis documented by appropriate medically acceptable imaging.

OR

L. Any other manifestation(s) of HIV infection, including those listed in 114.08A–K, but without the requisite findings for those listings (for example, oral candidiasis not meeting the criteria in 114.08F, diarrhea not meeting the criteria in 114.08I), or other manifestation(s) (for example, oral hairy leukoplakia, hepatomegaly), resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A-E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.09 *Inflammatory arthritis. As described in 114.00D6.* With:

A. Persistent inflammation or deformity in two or more major peripheral joints resulting in the inability to ambulate effectively or the inability to perform fine and gross movements effectively as defined in 114.00C6 and 114.00C7.

OR

B. Inflammation or deformity in one or more major peripheral joints, but with less joint involvement than in A and extra-articular features that do not satisfy the criteria of a listing, with:

1. Involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

C. Ankylosing spondylitis or other spondyloarthropathies, with:

1. Ankylosis (fixation) of the dorsolumbar or cervical spines as shown by appropriate medically acceptable imaging and measured on physical examination at 45° or more of flexion from the vertical position (zero degrees); or

2. Ankylosis (fixation) of the dorsolumbar or cervical spine as shown by appropriate medically acceptable imaging and measured on physical examination at 30° or more of flexion (but less than 45°) measured from the vertical position (zero degrees), and involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity.

OR

D. Any other manifestation(s) of inflammatory arthritis resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A-E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

114.10 *Sjögren's syndrome.* As described n 114.00D7. With:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity, and

2. At least two of the following constitutional symptoms or signs: Severe fatigue, fever, malaise, or involuntary weight loss.

OR

B. Any other manifestation(s) of Sjögren's syndrome resulting in one of the following:

1. For children from birth to attainment of age 1, at least one of the criteria in paragraphs A-E of 112.12; or

2. For children age 1 to attainment of age 3, at least one of the appropriate age-group criteria in paragraph B1 of 112.02; or

3. For children age 3 to attainment of age 18, at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

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Part V

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 31

Treatment of Services Under Section 482; Allocation of Income and Deductions From Intangibles; Stewardship Expense; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[TD 9278]

RIN 1545–BB31, 1545–AY38, 1545–BC52

Treatment of Services Under Section 482; Allocation of Income and Deductions From Intangibles; Stewardship Expense

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that provide guidance regarding the treatment of controlled services transactions under section 482 and the allocation of income from intangibles, in particular with respect to contributions by a controlled party to the value of an intangible owned by another controlled party. This document also contains final and temporary regulations that modify the regulations under section 861 concerning stewardship expenses to be consistent with the changes made to the regulations under section 482. These final and temporary regulations potentially affect controlled taxpayers within the meaning of section 482. They provide updated guidance necessary to reflect economic and legal developments since the issuance of the current guidance.

DATES: *Effective Date:* These regulations are effective on January 1, 2007.

Applicability Dates: These regulations apply to taxable years beginning after December 31, 2006.

FOR FURTHER INFORMATION CONTACT: Thomas A. Vidano, (202) 435–5265, or Carol B. Tan, (202) 435–5265 for matters relating to section 482, or David Bergkuist (202) 622–3850 for matters relating to stewardship expenses (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 482 of the Internal Revenue Code generally provides that the Secretary may allocate gross income, deductions and credits between or among two or more taxpayers owned or controlled by the same interests in order to prevent evasion of taxes or to clearly reflect income of a controlled taxpayer. Regulations under section 482 published in the **Federal Register** (33 FR 5849) on April 16, 1968, provided guidance with respect to a wide range of controlled transactions, including transfers of tangible and intangible property and the provision of services. Revised and updated transfer pricing regulations were published in the **Federal Register** (59 FR 34971, 60 FR 65553 and 61 FR 21955) on July 8, 1994, December 20, 1995, and May 13, 1996. A notice of proposed rulemaking and notice of public hearing were published in the **Federal Register** (68 FR 53448) on September 10, 2003. A correction to the notice of proposed rulemaking and notice of public hearing was published in the **Federal Register** (68 FR 70214) on December 17, 2003. A public hearing was held on January 14, 2004.

The Treasury Department and the IRS received a substantial volume of comments on a wide range of issues addressed in the 2003 proposed regulations. These comments were very helpful and substantial changes have been incorporated in response. In order to achieve the goal of updating the 1968 regulations, while facilitating consideration of further public input in refining final rules, these regulations are issued in temporary form with a delayed effective date for taxable years beginning after December 31, 2006.

These regulations are issued a significant amount of time after proposed revisions to the regulations pertaining to cost sharing arrangements were issued. Commentators suggested that this type of timing sequence was important so that each regulation could be assessed properly. Commentators also suggested, among other things, that the services regulations be reissued in temporary and proposed form. By issuing these regulations in temporary and proposed form, the Treasury Department and the IRS provide taxpayers an opportunity to submit additional comments prior to the time these regulations become effective, allowing commentators to consider the potential interaction between these regulations and the cost sharing regulations.

Explanation of Provisions

A. Controlled Services

1. Services Cost Method—Temp. Treas. Reg. § 1.482–9T(b)

a. The Simplified Cost Based Method and Public Comments

The 2003 proposed regulations set forth a simplified cost based method (SCBM). The SCBM was intended to preserve the salutary aspects of the current § 1.482–2(b) cost safe harbor that provide appropriately reduced administrative and compliance burdens for low margin services. At the same time, the existing rules would be brought more in line with the arm's length standard, and various problematic features of those rules would be eliminated. The goal was to provide certainty concerning the pricing of low margin services, thus allowing the compliance efforts of both taxpayers and the IRS to concentrate on those services for which a robust transfer pricing analysis is particularly appropriate. The preamble to the 2003 proposed regulations also indicated that in certain cases, the allocation or sharing among group members of expenses or charges relating to corporate headquarters or other centralized service activities may be consistent with the proposed regulations, but no further guidance was provided on such service sharing arrangements.

A number of commentators argued that the SCBM was actually counterproductive to its stated goals. These commentators contended that to apply the SCBM, taxpayers would potentially need to expend substantial sums to prepare comparability studies, perhaps separately for each of the numerous categories of back office services. They contended that, although taxpayers have in-depth knowledge concerning their businesses and the relative value added by their back offices, the SCBM called for quantitative judgments that business people are not qualified to make by themselves, especially in the prevailing compliance environment. As a matter of proper accountability, taxpayers would be required as a practical matter to devote significant compliance resources to enlist outside consultants or otherwise to develop support for those judgments.

Commentators suggested a range of proposed alternatives to the SCBM regime. One such proposal was simply to return to the approach in the existing regulations under § 1.482–2(b). The 1968 regulations are fairly rudimentary in nature, particularly, in today's tax compliance environment. In addition, those regulations were open to substantial manipulation by taxpayers (both inbound and outbound). Moreover, there have been extensive and far-reaching developments in the services economy since the existing regulations were published in 1968, with real prospects that many intragroup services have values significantly in excess of their cost. As a result, in the course of considering comments on the 2003 proposed regulations, the Treasury Department and the IRS have concluded that it would not be appropriate simply to readopt the standard in the 1968 regulations. Additional proposals by commentators included development of

a list of activities that would qualify to be priced at cost or detailed provisions regarding cost sharing arrangements for low value services performed on a centralized basis, and other options.

The Treasury Department and the IRS may have decided not to return to the 1968 regulations, but have nonetheless taken the full range of comments on the 2003 proposed regulations seriously. Therefore, in light of the extensive comments on these issues, the Treasury Department and the IRS have substantially redesigned the relevant provisions. The Treasury Department and the IRS recognize that the section 482 services regulations potentially affect a large volume of intragroup back office services that are common across many industries. It is in the interest of good tax administration to minimize the compliance burdens applicable to such services, especially to the extent that the arm's length markups are low and the activities do not significantly contribute to business success or failure.

Accordingly, based on the comments, these temporary regulations eliminate the SCBM and replace it with the services cost method (SCM), as set forth in § 1.482–9T(b). The SCM evaluates whether the price for covered services, as defined, is arm's length by reference to the total services costs with no markup. Where the conditions on application of the method are met, the SCM will be considered the best method for purposes of § 1.482–1(c).

b. Services Cost Method: Identification of Covered Services and Other Eligibility Criteria

Section 1.482–9T(b)(4) provides for two categories of covered services that are eligible for the SCM if the other conditions on application of the method are met. If the conditions are satisfied, covered services in each category may be charged at cost with no markup. The first category consists of specified covered services identified in a revenue procedure published by the IRS. This revenue procedure approach is consistent with taxpayer comments. Services will be identified in such revenue procedure based upon the determination of the Treasury Department and the IRS that they constitute support services of a type common across industry sectors and generally do not involve a significant arm's length markup on total services costs. Because the government performs the analysis necessary to determine the eligibility of specified covered services, the compliance burden that was previously imposed by the SCBM is eliminated for a broad class of commonly provided services.

An initial proposed list of specified covered services is contained in an Announcement being published contemporaneously with these temporary regulations. This Announcement will be published in the Internal Revenue Bulletin. For copies of the Internal Revenue Bulletin, see § 601.601(d)(2)(ii)(*b*). The Treasury Department and the IRS solicit public input on whether the list of services sufficiently covers the full range of back office services typical within multinational groups, on the descriptions provided for these covered services, and on other matters related to the Announcement. It is contemplated that a final revenue procedure, reflecting appropriate comments, will be issued to coincide with the effective date of the temporary regulations for taxable years beginning after December 31, 2006. In the future, particular services may be added to, clarified in, or deleted from the list, depending on ongoing developments.

The second category of covered services is certain low margin covered services. Taxpayers objected to the requirement under the SCBM that all services qualify for that method based on a quantitative analysis, but based on comments the Treasury Department and the IRS believe that controlled taxpayers might nonetheless want the discretion to show that particular services—not otherwise covered by the revenue procedure—qualify for the SCM, using a modified quantitative approach. Low margin covered services consist of services for which the median comparable arm's length markup on total services costs is less than or equal to seven percent. As under the SCBM, the median comparable arm's length markup on total services costs means the excess of the arm's length price of the controlled services transaction over total services costs, expressed as a percentage of total services costs. For this purpose, the arm's length price is determined under the general transfer pricing rules without regard to the SCM, using the interquartile range (including any adjustment to the median in the case of results outside such range). Again, if the markup on costs for eligible services is seven percent or less, this category of services can be charged out at cost with no markup.

Under § 1.482–9T(b)(2), specified covered services or low margin covered services otherwise eligible for the SCM will qualify for the method if the taxpayer reasonably concludes in its business judgment that the services do not contribute significantly to key competitive advantages, core capabilities, or fundamental chances of success or failure in one or more trades or businesses of the renderer, the recipient, or both. Unlike the quantitative judgment called for under the SCBM, this is a business judgment preeminently within the business person's own expertise. Exact precision is not needed and it is expected that the taxpayer's judgment will be accepted in most cases. This condition is intended to focus transfer pricing compliance resources of both taxpayers and the IRS principally on significant valuation issues. Thus, it is anticipated that in most cases the examination of relevant services will focus only on verification of total services costs and their appropriate allocation. These are issues even under the 1968 regulations. There will be little need in all but the most unusual cases to challenge the taxpayer's reasonable business judgment in concluding that such typical back office services do not contribute significantly to fundamental risks of success or failure. The condition effectively is reserved to allow the IRS to reject any attempt to claim that a core competency of the taxpayer's business qualifies as a mere back office service. For illustrations of the role performed by this condition, see the contrasting pairs of *Example 1* and *Example 2*, *Example 3* and *Example 4*, *Example 5* and *Example 6*, *Example 8* and *Example 9*, *Example 10* and *Example 11*, and *Example 12* and *Example 13* in § 1.482–9T(b)(6).

As indicated in this preamble, it is expected that in all but unusual cases, the taxpayer's business judgment will be respected. In evaluating the reasonableness of the taxpayer's conclusion, the Commissioner will consider all the relevant facts and circumstances. This provision avoids the need to exclude from the SCM certain back office services that as a general matter and across a range of industry sectors are low margin, but that in the context of a particular business nonetheless constitute high margin services. That is, it permits the Treasury Department and the IRS to include a greater range of service categories under the SCM, even though in specific circumstances an otherwise covered service of a particular taxpayer will be ineligible.

In addition, under § 1.482–9T(b)(3)(i), a single procedural requirement applies under the SCM. The taxpayer must maintain documentation of covered services costs and their allocation. The documentation must include a statement evidencing the taxpayer's intention to apply the SCM.

In § 1.482–9T(b)(3)(ii), the SCM preserves the same list of categories of

controlled transactions that are not eligible to be priced under the method as under the SCBM. The Treasury Department and the IRS continue to believe that these transactions tend to be high margin transactions, transactions for which total services costs constitute an inappropriate reference point, or other types of transactions that should be subject to a more robust arm's length analysis under the general section 482 rules. Comments are requested in this regard in light of the other substantial changes made in the regulations.

Consistent with the purpose of providing for appropriately reduced compliance burdens for services subject to the SCM, the temporary regulations retain provisions in § 1.6662–6T(d)(2) similar to those associated with the SCBM.

c. Shared Services Arrangements

Section 1.482–9T(b)(5) of the temporary regulations provides explicit guidance on shared services arrangements (SSAs). In general, an SSA must include two or more participants; must include as participants all controlled taxpayers that benefit from one or more covered services subject to the SSA; and must be structured such that each covered service (or group of covered services) confers a benefit on at least one participant. A participant is a controlled taxpayer that reasonably anticipates benefits from covered services subject to the SSA and that substantially complies with the SSA requirements.

Under an SSA, the arm's length charge to each participant is the portion of the total costs of the services otherwise determined under the SCM that is properly allocated to such participant under the arrangement. For purposes of an SSA, two or more covered services may be aggregated, provided that the aggregation is reasonable based on the facts and circumstances, including whether it reasonably reflects the relative magnitude of the benefits that the participants reasonably anticipate from the services in question. Such aggregation may, but need not, correspond to the aggregation used in applying other provisions of the SCM. If the taxpayer reasonably concludes that the SSA (including any aggregation for purposes of the SSA) results in an allocation of the costs of covered services that provides the most reliable measure of the participants' respective shares of the reasonably anticipated benefits from those services, then the Commissioner may not adjust such allocation basis.

In addition, as a procedural matter, the taxpayer must maintain documentation concerning the SSA, including a statement that it intends to apply the SCM under the SSA and information on the participants, the allocation basis, and grouping of services for purposes of the SSA. Guidance is also provided on the coordination of cost allocations under an SSA and cost allocations under a qualified cost sharing arrangement.

d. Deleted Provisions

The SCM is considerably streamlined as compared to the SCBM. Upon further consideration, and in light of public comments, many of the conditions, contractual requirements, quantitative screens, and other technicalities associated with the SCBM have been eliminated. The Treasury Department and the IRS believe this streamlined approach serves the interests of both the government and taxpayers by reducing complexity and administrative burden.

2. Comparable Uncontrolled Services Price Method—Temp. Treas. Reg. § 1.482–9T(c)

The 2003 proposed regulations set forth the comparable uncontrolled services price (CUSP) method. This method evaluated whether the consideration in a controlled services transaction is arm's length by comparison to the price charged in a comparable uncontrolled services transaction. This method was closely analogous to the comparable uncontrolled price (CUP) method in existing § 1.482–3(b).

One commentator objected to the statement in § 1.482–9(b)(1) of the 2003 proposed regulations that, to be evaluated under the CUSP method, a controlled service ordinarily needed to be "identical to or have a high degree of similarity" to the uncontrolled comparable transactions. The commentator viewed the comparability analysis in the examples in proposed § 1.482–9(b)(4) as more consistent with the standard in existing § 1.482–3(b)(2)(ii)(A). The Treasury Department and the IRS agree that the comparability standards under the CUSP method for services should run parallel to those under the CUP method for sales of tangible property. Indeed, the provisions are parallel. The commentator misconstrues the purpose of the quoted provision.

Although the provision contains general guidance on situations in which the method ordinarily applies, it is not intended to and does not alter the substantive comparability standards. Just like the CUP method, the standards under the CUSP method emphasize the relative similarity of the controlled services to the uncontrolled transaction and the presence or absence of nonroutine intangibles. Section 1.482–9T(c)(2)(ii) of the temporary regulations also provides, consistent with the best method rule, that the CUSP method generally provides the most direct and reliable measure of an arm's length result if the uncontrolled transaction either has no differences from the controlled services transaction or has only minor differences that have a definite and reasonably ascertainable effect on price, and appropriate adjustments may be made for such differences. If such adjustments cannot be made, or if there are more than minor differences between the controlled and uncontrolled transactions, the comparable uncontrolled services price method may be used, but the reliability of the results as a measure of the arm's length price will be reduced. Further, if there are material differences for which reliable adjustments cannot be made, this method ordinarily will not provide a reliable measure of an arm's length result.

The CUSP provisions in these temporary regulations are substantially similar to the corresponding provisions in the 2003 proposed regulations.

3. Gross Services Margin Method—Temp. Treas. Reg. § 1.482–9T(d)

The 2003 proposed regulations provided for a gross services margin method, which evaluated the amount charged in a controlled services transaction by reference to the gross services profit margin in uncontrolled transactions that involve similar services. The method was analogous to the resale price method for transfers of tangible property in existing § 1.482–3(c).

Under the 2003 proposed regulations, this method would ordinarily be used where a controlled taxpayer performs activities in connection with a "related uncontrolled transaction" between a member of the controlled group and an uncontrolled taxpayer. For example, the method may be used where a controlled taxpayer renders services to another member of the controlled group in connection with a transaction between that other member and an uncontrolled party (agent services), or where a controlled taxpayer contracts to provide services to an uncontrolled taxpayer and another member of the controlled group actually performs the services (intermediary function).

The 2003 proposed regulations defined the terms "related uncontrolled transaction," "applicable uncontrolled

price," and "appropriate gross services profit". A "related uncontrolled transaction" is a transaction between a member of the controlled group and an uncontrolled taxpayer for which a controlled taxpayer performs either agent services or an intermediary function. The "applicable uncontrolled price" is the sales price paid by the uncontrolled party in the related uncontrolled transaction. The "appropriate gross services profit" is the product of the applicable uncontrolled price and the gross services profit margin in comparable uncontrolled services transactions. The gross services profit margin takes into account all functions performed by other members of the controlled group and any other relevant factors.

One commentator mistakenly interpreted the term "related uncontrolled transaction" to suggest that the comparable transaction under this method is one that takes place between controlled parties. While this was not intended, the Treasury Department and the IRS agree that the nomenclature is potentially confusing, and as a result, these regulations substitute the term "relevant uncontrolled transaction" in lieu of "related uncontrolled transaction" wherever that appeared. In other respects, the gross services margin provisions in these temporary regulations are substantially similar to the provisions in the 2003 proposed regulations.

4. Cost of Services Plus Method—Temp. Treas. Reg. § 1.482–9T(e)

The 2003 proposed regulations set forth the cost of services plus method. This method evaluated the amount charged in a controlled services transaction by reference to the gross services profit markup in comparable uncontrolled services transactions. The gross services profit is determined by reference to the markup as a percentage of comparable transactional costs in comparable uncontrolled transactions. This method would ordinarily apply where the renderer of controlled services provides the same or similar services to both controlled and uncontrolled parties. In general, those are the only circumstances in which a controlled taxpayer would likely have the detailed information concerning comparable transactional costs necessary to apply this method reliably.

The cost of services plus method in the 2003 proposed regulations was generally analogous to the cost plus method for transfers of tangible property in existing § 1.482–3(d). The method implicitly recognized that financial accounting standards applicable to services have not developed to the same degree as the standards applicable to other categories of transactions, such as manufacturing or distribution of tangible property. For that reason, the method adopted the concept of "comparable transactional costs," which the 2003 proposed regulations defined as all costs of providing the services taken into account in determining the gross services profit markup in comparable uncontrolled services transactions. In this context, comparable uncontrolled transactions could be either services transactions between the controlled taxpayer and uncontrolled parties (internal comparables), or services transactions between two uncontrolled parties (external comparables).

The 2003 proposed regulations also recognized that comparable transactional costs could be a subset of total services costs. Generally accepted accounting principles (GAAP) or Federal income tax accounting rules (if income tax data for comparable uncontrolled transactions are available) could provide an appropriate platform for analysis under this provision, but neither is necessarily conclusive.

Commentators objected that the concept of comparable transactional costs was imprecise, and they suggested that such costs should in any event include only the direct costs associated with providing a particular service, as determined under GAAP or Federal income tax accounting rules. As noted above, the financial accounting standards for services transactions are not as precise as the standards applicable to other types of transactions. The relative lack of uniformity in turn makes it impractical to derive a single definition of cost that would apply generally to controlled services transactions.

Comparable transactional costs may potentially include direct and indirect costs, if such costs are included in the internal or external uncontrolled transactions that form the basis for comparison. Section 1.482–9T(e)(4) *Example 1* has been modified to clarify this concept.

Several commentators objected to § 1.482–9(d)(3)(ii)(A) of the 2003 proposed regulations. In their view, this provision required the results obtained under the cost of services plus method to be confirmed by means of a separate analysis under the comparable profits method (CPM) for services. If a confirming analysis under the CPM for services were required in all cases, commentators reasoned, the cost of services plus method could not be viewed as a specified method in its own right.

The Treasury Department and the IRS agree and clarify that the intent of the rules is not to require confirmation of the results under the cost of services plus method. In response to public comments, § 1.482–9T(e)(3)(ii)(A) of these temporary regulations incorporates several changes. First, restatement of the price under this method in the form of a markup on total costs of the controlled taxpayer is necessary only if the cost of services plus method utilizes external comparables. If internal comparables are used, this calculation need not be performed. Second, in situations where the price is restated, the sole purpose is to determine whether it is necessary to perform additional evaluation of functional comparability.

For example, if the price under the cost of services plus method, when restated, indicates a markup on the renderer's total services costs that is either low or negative, this may indicate differences in functions that have not been accounted for under the traditional comparability factors. A low or negative markup suggests the need for additional inquiry, the outcome of which may suggest that the cost of services plus method is not the most reliable measure of an arm's length result under the best method rule. Conforming changes have been made in § 1.482–9T(e)(4) *Example 3* of these temporary regulations.

5. Comparable Profits Method for Services—Temp. Treas. Reg. § 1.482–9T(f)

The 2003 proposed regulations provided for a Comparable Profits Method (CPM) for services, which was similar to the CPM in existing § 1.482–5. In general, the CPM for services evaluated whether the amount charged in a controlled services transaction is arm's length by reference to objective measures of profitability (profit level indicators or PLIs) derived from financial information regarding uncontrolled taxpayers that engage in similar services transactions under similar circumstances. The CPM for services applied only where the renderer of controlled services is the tested party.

Section 1.482–9(e) of the 2003 proposed regulations provided that the profit level indicators (PLIs) provided for in existing § 1.482–5(b)(4)(ii) may also be used under the CPM for services. The relative lack of uniformity in financial accounting standards for services, combined with potentially incomplete information regarding the cost accounting practices of the

uncontrolled comparables, strongly suggest that PLIs that require accurate segmentation of costs may have limited reliability.

The 2003 proposed regulations stated that the degree of consistency in accounting practices between the controlled services transaction and the uncontrolled services transaction might affect the reliability of the results under the CPM for services. If appropriate adjustments to account for such differences are not possible, the reliability of the results under this method will be reduced.

Section 1.482–9(e)(2)(ii) of the 2003 proposed regulations provided for a new profit level indicator that may be particularly useful for controlled services transactions: the ratio of operating profits to total services costs, or the markup on total costs (also referred to as the "net cost plus"). Because this profit level indicator evaluates operating profits by reference to the markup on all costs related to the provision of services, it is more likely to use a cost base of the tested party that is comparable to the cost base used by uncontrolled parties in performing similar business activities.

The Treasury Department and the IRS received a number of comments concerning the CPM for services. Commentators questioned whether the definition of "total services costs," which provides the net cost plus cost base under the CPM for services, included stock-based compensation. In response to these comments, the Treasury Department and the IRS clarify their intent that § 1.482–5(c)(2)(iv) of the existing regulations apply to the CPM for services. Accordingly, new *Example 3*, *Example 4*, *Example 5*, and *Example 6* are included in § 1.482–9T(f)(3) of these temporary regulations. These examples show the application of existing § 1.482–5(c)(2)(iv) to fact patterns that involve differences in the utilization of or accounting for stock-based compensation in the context of controlled services transactions.

One commentator expressed reservations concerning a statement in the preamble to the 2003 proposed regulations, which indicated that PLIs based on return on capital or assets might be unreliable for controlled services because the reliability of these PLIs decreases as operating assets play a less prominent role in generating operating profits. This commentator contended that such PLIs are reliable for all firms, including service providers. The Treasury Department and the IRS clarify that, although return on capital PLIs may produce reliable results in the case of certain service providers, in general, such PLIs are subject to the general reservation in existing § 1.482–5(b)(4)(i) to the effect that the reliability of such PLIs increases as operating assets play a greater role in general operating profits.

Aside from the addition of the examples described above, the CPM for services provisions in these temporary regulations are substantially similar to the provisions in the 2003 proposed regulations.

6. Profit Split Method—Temp. Treas. Reg. §§ 1.482–9T(g) and 1.482–6T(c)(3)(i)(B)

The 2003 proposed regulations provided additional guidance concerning application of the comparable profit split and the residual profit split methods to controlled services transactions. Generally, these methods evaluated whether the allocation of the combined operating profit or loss attributable to one or more controlled transactions is arm's length by reference to the relative value of each controlled taxpayer's contributions to the combined operating profit or loss.

The 2003 proposed regulations provided that the guidance regarding the profit split methods in existing § 1.482–6, as amended by proposed § 1.482–6(c)(3)(i)(B) and by other changes, applied to controlled services transactions. Section 1.482–9(g) of the 2003 proposed regulations also provided specific additional guidance concerning application of existing § 1.482–6, as amended, to controlled services transactions.

The Treasury Department and the IRS received numerous comments on the profit split method. Commentators objected in particular to references in the 2003 proposed regulations to "interrelated" transactions in § 1.482–6(c)(3)(i)(B)(*1*), and to "high-value services" and "highly integrated transactions" in § 1.482–9(g)(1). Commentators viewed these terms as vague and subjective. Commentators also sought more specific guidance concerning the circumstances in which the residual profit split method would constitute the best method under the principles of existing § 1.482–1(c). In addition, some commentators suggested that one hallmark of a nonroutine contribution in the context of controlled services is that the renderer bears substantial risks. Another commentator suggested that the arm's length compensation for a function performed by an employee or group of employees should not in any event be evaluated under a profit split method. In this commentator's view, such an activity should be classified as routine because the market return for the function is equivalent to the total compensation paid to the employees. Commentators also raised several objections to the factual assumptions in the proposed analysis concerning § 1.482–9(g)(2) *Example 2* of the 2003 proposed regulations.

The Treasury Department and the IRS agreed with a number of comments and, as a result, have made substantial changes to these provisions. Under these temporary regulations, all references to "interrelated" transactions in § 1.482–6(c)(3)(i)(B)(*1*), as well as references to "high-value services" and "highly integrated transactions" in § 1.482–9(g)(1) have been eliminated. Section 1.482–9T(g)(1) now states that the profit split method is "ordinarily used in controlled services transactions involving a combination of nonroutine contributions by multiple controlled taxpayers." This change from the 2003 proposed regulations (which referred to "high-value" or "highly-integrated" transactions), conforms to the changes to § 1.482–6T(c)(3)(i)(B)(*1*), as described below.

Section 1.482–6T(c)(3)(i)(B)(*1*) of these temporary regulations defines a nonroutine contribution as "a contribution that is not accounted for as a routine contribution." In other words, a nonroutine contribution is one for which the return cannot be determined by reference to market benchmarks. Importantly, in this context, the term "routine" does not necessarily signify that a contribution is low value. In fact, comparable uncontrolled transactions may indicate that the returns to a routine contribution are very significant.

In response to the comments and in accordance with the revised definition of nonroutine contribution in these temporary regulations, the following references were eliminated as unnecessary: (1) Contributions not fully accounted for by market returns; and (2) contributions so interrelated with other transactions that they cannot be reliably evaluated on a separate basis. These changes will bring added clarity to the temporary regulations.

The Treasury Department and the IRS believe that these revised provisions respond to the public comments and offer more specific guidance concerning the circumstances in which the profit split method would likely constitute the best method under existing § 1.482–1(c). In particular, the term "high-value" is not included in temporary § 1.482–9T(g)(1), thus eliminating any implication that the profit split method is a "default" method for controlled services that have value significantly in excess of cost. This shift in emphasis is

also reflected in section B.2 of this preamble, which describes the deletion of language from several examples that some believed suggested that the residual profit split is a default method. The clear intent is that no method, including the profit split, is a default method for purposes of the best method rule. Rather, the profit split method applies if a controlled services transaction has one or more material elements for which it is not possible to determine a market-based return. The Treasury Department and the IRS believe that the above changes address the comments made and so do not believe that it is necessary for the regulations to adopt alternative definitions of nonroutine contribution put forward by commentators, such as definitions based on the degree of risk borne by the renderer of services or the extent to which an activity is performed solely by employees of the taxpayer.

Finally, based on the public comments, and in light of the changes described in this preamble, § 1.482–9(g)(2) *Example 2* of the 2003 proposed regulations has been withdrawn and replaced by a new example that more effectively illustrates application of the profit split method to nonroutine contributions by multiple controlled parties.

7. Unspecified Methods—§ 1.482–9T(h)

The 2003 proposed regulations provided that an unspecified method may provide the most reliable measure of an arm's length result under the best method rule. Such an unspecified method must take into account that uncontrolled taxpayers compare the terms of a particular transaction to the realistic alternatives to that transaction.

No significant comments were received concerning the unspecified method provisions. Consistent with the general aim to coordinate the analyses under the various sections of the regulations under section 482 so that economically similar transactions will be evaluated similarly, however, § 1.482–9T(h) has been modified to provide that in applying an unspecified method to services, the realistic alternatives to be considered include "economically similar transactions structured as other than services transactions." This provision allows flexibility to consider non-services alternatives to a services transaction, for example, a transfer or license of intangible property, if such an approach provides the most reliable measure of an arm's length result. The Treasury Department and the IRS are considering similar changes to §§ 1.482–3(e)(1) and 1.482–4(d)(1) of the existing regulations. Public comments are requested regarding the advisability of such changes and the form they should take. Aside from this change, the unspecified method provisions in these temporary regulations are substantially similar to the provisions in the 2003 proposed regulations.

8. Contingent-Payment Contractual Terms—Temp. Treas. Reg. § 1.482–9T(i)

The contingent-payment contractual term provisions in the 2003 proposed regulations built on the fundamental principle that, in structuring controlled transactions, taxpayers are free to choose from among a wide range of risk allocations. This provision in the 2003 proposed regulations also acknowledged that contingent-payment terms—terms requiring compensation to be paid only if specified results are obtained—may be particularly relevant in the context of controlled services transactions. The 2003 proposed regulations provided detailed guidance concerning contingent-payment contractual terms, including economic substance considerations as well as documentation requirements.

Under § 1.482–9(i)(2) of the 2003 proposed regulations, a contingent-payment arrangement was given effect if it met three basic requirements: (1) The arrangement is contained in a written contract executed prior to the start of the activity; (2) the contract makes payment contingent on a future benefit directly related to the outcome of the controlled services transaction; and (3) the contract provides for payment on a basis that reflects the recipient's benefit from the services rendered and the risks borne by the renderer.

Commentators generally supported the contingent-payment terms provision as providing guidance concerning a contractual structure with particular relevance to controlled services transactions. However, they also raised three fundamental concerns regarding the scope and operation of this provision. First, the commentators questioned whether controlled taxpayers would need to identify uncontrolled comparables for any contingent-payment terms that they seek to adopt. Second, they pointed out that certain references to economic substance provisions and documentation requirements were either unclear or duplicative of provisions in existing § 1.482–1(d)(3). Third, commentators expressed concern that the IRS might improperly impute contingent-payment terms as a means of addressing erroneous transfer pricing in situations that do not involve lack of economic substance, for example, non-arm's length pricing of activities such as marketing or research and development.

The temporary regulations respond to each of these concerns. First, under § 1.482–9(i)(1) of the 2003 proposed regulations, one factor that needed to be considered was whether an uncontrolled taxpayer would have paid a contingent fee if it engaged in a similar transaction under comparable circumstances. In response to comments, the temporary regulations eliminate this requirement and instead emphasize the importance of the economic substance principles under § 1.482–1(d)(3) of the existing regulations. That is, whether a particular arrangement entered into by controlled parties has economic substance is not determined by reference to whether it corresponds to arrangements adopted by uncontrolled parties.

Second, in response to comments, the temporary regulations eliminate duplicative or unnecessary references to the economic substance rules. For example, § 1.482–9T(i)(2)(ii) has been modified to provide that the contingent-payment arrangement as a whole, including both the contingency and the basis of payment, must be consistent with economic substance, as evaluated under existing § 1.482–1(d)(3)(ii)(B). This section eliminates the additional requirement under the 2003 proposed regulations, that the arm's length charge under a contingent-payment arrangement must be evaluated by reference to economic substance principles.

Third, the temporary regulations respond to the concern identified by commentators that the IRS might apply the contingent-payment provisions in an inappropriate manner, for example, to correct erroneous transfer pricing in prior taxable years that are not under examination. As discussed in more detail in section C of this preamble, the temporary regulations include an example to illustrate factual circumstances in which contractual terms pertaining to risk allocations (provided they are otherwise consistent with taxpayers' conduct and arrangements) are fully respected, notwithstanding that on examination the activities were determined to have been priced on a non-arm's length basis. Other concerns, relating to interaction of the contingent-payment terms provision with the commensurate with income standard, are also addressed in section C of this preamble.

New § 1.482–9T(i)(5) *Example 3* illustrates the application of these rules to a situation in which the contingency identified in a contingent-payment

provision is not satisfied. The example responds to a request by commentators for additional guidance to address such a factual scenario.

9. Total Services Costs—Temp. Treas. Reg. § 1.482–9T(j)

Section 1.482–9(j) of the 2003 proposed regulations defined "total services costs" for purposes of the SCBM, the CPM for services, and the cost of services plus method where the gross services profit was restated in the form of a markup on total services costs.

Under the 2003 proposed regulations, total services costs included all costs directly identified with provision of the controlled services, as well as all other costs reasonably allocable to such services under § 1.482–9(k). The Treasury Department and the IRS intended that, in this context, "costs" must comprise provision for all resources expended, used, or made available to render the service. Generally accepted accounting principles (GAAP) or Federal income tax accounting rules may provide an appropriate analytic platform, but neither would necessarily be conclusive in evaluating whether an item must be included in total services costs. The issue of determining total services costs is not a new one; it is relevant under the current 1968 regulations as well.

Commentators objected that § 1.482–9(j) of the 2003 proposed regulations failed to list the specific items that were included in total services costs. Some commentators suggested that, absent more precise guidance in this regard, controlled taxpayers should be permitted to rely on the definition of costs applicable under GAAP or Federal income tax principles. Commentators also requested clarification whether total services costs included stock-based compensation.

The Treasury Department and the IRS view the definition of total services costs in the 2003 proposed regulations as having struck the correct balance between specificity and flexibility. In general, the accounting standards applicable to services do not provide a uniform means of determining all costs that relate to the provision of services. Consequently, the Treasury Department and the IRS conclude that total services costs for purposes of section 482 cannot be determined solely by reference to GAAP or other accounting standards or practices.

In response to comments, however, § 1.482–9T(j) of the temporary regulations clarifies that all contributions in cash or in kind (including stock-based compensation) are included in total services costs. In addition, the third sentence of § 1.482–9T(j) states that "costs for this purpose should comprise provision for all resources expended, used, or made available to achieve the specific objective for which the service is rendered." To better reflect, for example, the inclusion of stock-based compensation in total services costs, the term "provision" is adopted in place of the term "consideration" as used in the 2003 proposed regulations.

Commentators also observed that the definition of total services costs in the 2003 proposed regulations did not address situations in which the costs of a controlled service provider include significant charges from uncontrolled parties. Commentators posited that such third-party costs should be permitted to "pass through," rather than being subject to a markup under the transfer pricing method used to analyze the controlled services transaction. The Treasury Department and the IRS agree that these comments raised an issue that needs to be addressed, but decided to do so in a manner different from that suggested by the commentators. In response to this comment, the temporary regulations add § 1.482–9T(l)(4), which under certain circumstances allows a controlled services transaction that involves third-party costs to be evaluated on a disaggregated basis. See section A.11.e of this preamble.

10. Allocation of Costs—Temp. Treas. Reg. § 1.482–9T(k)

Section 1.482–9(k) of the 2003 proposed regulations retained the flexible approach of existing § 1.482–2(b)(3) through (6), which permitted taxpayers to use any reasonable allocation and apportionment of costs in determining an arm's length charge for services. In evaluating whether the allocation used by the taxpayer is appropriate, the 2003 proposed regulations required that consideration be given to all bases and factors, including practices used by the taxpayer to apportion costs for other (non-tax) purposes. Such practices, although relevant, need not be given conclusive weight by the Commissioner in evaluating the arms length charge for controlled services.

Commentators urged that any technique that a taxpayer uses to allocate costs should be entitled to deference, provided it is consistent with GAAP. For the reasons expressed above concerning § 1.482–9T(j), GAAP may provide an appropriate analytic platform but is not necessarily controlling in evaluating the arm's length charge for controlled services.

In the case of administrative or support services, commentators suggested that the Commissioner should accept any reasonable allocation used by the taxpayer, for example, revenue, sales, or employee headcount. In general, the cost of a service that provides benefits to multiple parties must be allocated in a manner that reliably reflects the proportional benefit received by each of those parties. This standard is intended to be substantially equivalent to the standard in § 1.482–2(b)(2)(i) and 1.482–2(b)(6) of the existing regulations. In response to comments, § 1.482–9T(b)(5)(i)(B) of these temporary regulations also provides rules whereby the costs of covered services subject to a shared services arrangement are allocated to participants in a manner that the taxpayer reasonably concludes will most reliably reflect each participant's reasonably anticipated benefits from the services. See section A.1.c of this preamble.

11. Controlled Services Transactions—Temp. Treas. Reg. § 1.482–9T(l)

a. Definition of Activity—Temp. Treas. Reg. § 1.482–9T(l)(2)

Section 1.482–9(l) of the 2003 proposed regulations set forth a threshold test for determining whether an activity constituted a controlled services transaction subject to the general framework of § 1.482–9. The 2003 proposed regulations broadly defined a controlled services transaction as any activity by a controlled taxpayer that resulted in a benefit to one or more other controlled taxpayers. An "activity" was in turn defined as the use by the renderer, or the making available to the recipient, of any property or other resources of the renderer.

One commentator interpreted this provision as indicating that any activity properly analyzed under one or more other provisions of the transfer pricing regulations should not be subject to §1.482–9 of the 2003 proposed regulations. Other commentators suggested that the "predominant character" of a transaction should control whether it is analyzed as a controlled service under §1.482–9 of the 2003 proposed regulations or under other provisions of the section 482 regulations.

Controlled taxpayers have a great deal of flexibility to structure transactions in various ways that are economically equivalent. In some cases, an overall transaction may include separate elements of differing characters, for example, a transfer of tangible property bundled together with the provision of

a service. The structure adopted may sometimes be more reliably analyzed on either a disaggregated or an aggregated basis under the relevant section of the section 482 regulations, for example, either as a separate transfer of tangible property under the existing section 482 regulations in § 1.482–3 and a separate controlled services transaction under these temporary regulations in § 1.482–9T, or as an overall controlled services transaction under these temporary regulations. To the extent that a controlled transaction is structured so that it is most reliably evaluated as a controlled services transaction, it will be analyzed as such. To the extent that multiple elements of a single overall transaction potentially create an overlap between the section 482 regulations applicable to other types of transactions and these temporary regulations concerning controlled services transactions, the Treasury Department and the IRS believe that the appropriate coordination is achieved by applying the rules in § 1.482–9T(m). See section A.12.a of this preamble.

b. Benefit Test—Temp. Treas. Reg. § 1.482–9T(l)(3)

Section 1.482–9(l)(3) of the 2003 proposed regulations provided rules for determining whether an activity provides a benefit. Under § 1.482–9(l)(3)(i), a benefit is present if the activity directly results in a reasonably identifiable increment of economic or commercial value that enhances the recipient's commercial position, or is reasonably anticipated to do so. Another requirement is that an uncontrolled taxpayer in circumstances comparable to those of the recipient would be willing to pay an uncontrolled party to perform the same or a similar activity, or be willing to perform for itself the same or similar activity. The 2003 proposed regulations thus made significant changes to the benefit test under the existing regulations, which is based on whether an uncontrolled party in the position of the renderer would expect payment for a particular activity. The 2003 proposed regulations adopted the so-called "specific benefit" approach, which mandates an arm's length charge only if a particular activity provides an identifiable benefit to a particular taxpayer. In addition, § 1.482–9(l)(3)(ii) of the 2003 proposed regulations provided that no benefit is present if an activity has only indirect or remote effects.

Commentators viewed the 2003 proposed regulations as providing insufficient guidance concerning methods that controlled taxpayers might use to allocate or share expenses or charges, in particular with respect to centralized services performed on a centralized basis for multiple affiliates.

In response to these comments, the temporary regulations authorize the use of shared services arrangements for centralized services that qualify for the SCM in § 1.482–9T(b). By entering into such arrangements, taxpayers can, among other things, reduce the burden associated with analysis of centralized services, which would presumably include activities that provide benefits on only an occasional or intermittent basis. See section A.1.c of this preamble, concerning shared services arrangements.

One commentator suggested that, because the benefit test in the 2003 proposed regulations focused on the recipient, the arm's length charge should also be analyzed from the perspective of the recipient and economic conditions in the recipient's geographic market. The commentator misunderstands the application of the benefit test. Although the benefit test focuses on the recipient, evaluation of the arm's length charge under the best method rule in a particular case (for example, under a profit split method) may require analysis of the recipient, the renderer, or both (depending, for example, on which party performs the simplest, most easily measurable functions).

c. Specific Applications of the Benefit Test—Temp Treas. Reg. § 1.482–9T(l)(3)(ii) through (v)

The 2003 proposed regulations provided additional rules concerning application of the benefit test to particular circumstances, such as application to activities with indirect or remote effects, duplicative activities, shareholder activities, and passive association. These rules in the 2003 proposed regulations were substantially similar to the rules in existing § 1.482–2(b)(2). For example, § 1.482–9(l)(3)(ii) and (l)(3)(iii) provided that no benefit is present if an activity has only indirect or remote effects or merely duplicates an activity that the recipient has already performed on its own behalf. Section 1.482–9(l)(3)(iv) provided that shareholder activities do not confer a benefit on controlled parties and therefore do not give rise to an arm's length charge. Shareholder activities were defined as activities that primarily benefit the owner-member of a controlled group in its capacity as owner, rather than other controlled parties.

In addition, § 1.482–9(l)(3)(v) of the 2003 proposed regulations provided that certain "passive association" effects do not give rise to a benefit within the meaning of the regulations concerning controlled services. Passive association was defined as an increment of value that a controlled party obtains on account of its membership in the controlled group. Section 1.482–9(l)(3)(v) of the 2003 proposed regulations provided, however, that membership in a controlled group may be considered in evaluating comparability between controlled and uncontrolled transactions.

Concerning indirect or remote effects, one commentator suggested that if a centralized activity by a parent confers only occasional or intermittent benefits on a subsidiary, such benefits should be classified as indirect or remote. As to the shareholder provisions, commentators noted that the 2003 proposed regulations failed to address the potential that an activity that confers a reasonably identifiable increment of value on a controlled party might also be appropriately classified as a shareholder activity. As to the passive association provisions, commentators questioned whether membership in a controlled group is relevant to evaluation of comparability. Commentators raised the concern that virtually any uncontrolled transaction could potentially be considered unreliable, because it generally would not reflect the same efficiencies and synergies as the controlled services transaction.

Regarding the comments concerning indirect or remote effects, the Treasury Department and the IRS believe that to equate occasional or intermittent benefits in all cases with indirect or remote effects would conflict with the specific-benefit rule. That rule requires that any service that produces an identifiable and direct benefit warrants an arm's length charge, even if the service is provided only occasionally or intermittently. Accordingly, the temporary regulations retain this provision without change.

In response to comments relating to shareholder activities, § 1.482–9T(l)(3)(iv) of the temporary regulations refers to the "sole effect" rather than the "primary effect" of an activity. This change clarifies that a shareholder activity is one of which the sole effect is either to protect the renderer's capital investment in one or more members of the controlled group, or to facilitate compliance by the renderer with reporting, legal, or regulatory requirements specifically applicable to the renderer, or both. As modified, the definition in temporary § 1.482–9T(l)(3)(iv) now conforms to the general

definition of benefit in § 1.482–9T(l)(3)(i).

In response to commentators' request for clarification regarding the passive association rules, new § 1.482–9T(l)(5) *Example 19* illustrates a situation in which group membership would be taken into account in evaluating comparability.

The Treasury Department and the IRS have inserted the word "generally" in the description of duplicative activities in § 1.482–9T(l)(3)(iii). This change clarifies that although a duplicative activity does not generally give rise to a benefit, under certain circumstances, such an activity may provide an increment of value to the recipient by reference to the general rule in § 1.482–9T(l)(3)(i). In such cases, the activity would be appropriately classified as a controlled services transaction.

d. Guarantees, Including Financial Guarantees

The proposed regulations appear to have created confusion on the part of some taxpayers regarding the appropriate characterization of financial guarantees for tax purposes. The provision of a financial guarantee does not constitute a service for purposes of determining the source of the guarantee fees. See *Centel Communications, Inc.* v. *Commissioner*, 920 F.2d 1335 (7th Cir. 1990); *Bank of America* v. *United States*, 680 F.2d 142 (Ct. Cl. 1980). Nevertheless, some taxpayers have suggested that guarantees are services that could qualify for the cost safe harbor and that the provision of a guarantee has no cost. This position would mean that in effect guarantees are uniformly non-compensatory. The Treasury Department and the IRS do not agree with this uniform no charge rule for guarantees. As a result, financial transactions, including guarantees, are explicitly excluded from eligibility for the SCM by § 1.482–9T(b)(3)(ii)(H). However, no inference is intended by this exclusion that financial transactions (including guarantees) would otherwise be considered the provision of services for transfer pricing purposes. The Treasury Department and the IRS subsequently intend to issue transfer pricing guidance regarding financial guarantees, in particular, along with other guidance concerning the treatment of global dealing operations. See Section A.12.e of this preamble for a discussion of coordination with global dealing operations. Such guidance will also include rules to determine the source of income from financial guarantees.

e. Third-Party Costs—Temp. Treas. Reg. § 1.482–9T(l)(4)

Commentators observed that the definition of "total services costs" in § 1.482–9(j) of the 2003 proposed regulations did not address situations in which the costs of a controlled service provider included significant charges from uncontrolled parties. Commentators claimed that such third-party costs should be treated as "pass through" items that, in most cases, should not be subject to the markup (if any) applicable to costs incurred by the renderer in its capacity as service provider. This comment was potentially relevant to all cost-based methods in § 1.482–9 of the 2003 proposed regulations. The Treasury Department and the IRS agreed that these comments raised an issue that needed to be addressed, but decided to do so in a manner different from that suggested by the commentators.

In response to this comment, these temporary regulations include a new § 1.482–9T(l)(4). Under this provision, if total services costs include material third-party costs, the controlled services transaction may be analyzed either as a single transaction or as two separate transactions, depending on which approach provides the most reliable measure of the arm's length result under the best method rule in existing § 1.482–1(c). Consistent with the best method rule, in determining which approach provides the most reliable indication of the arm's length result, the primary factors are the degree of comparability between the controlled services transaction and the uncontrolled comparables and the quality of the data and assumptions used. New § 1.482–9T(l)(5) *Example 20* and *Example 21* provide illustrations of this rule.

The rule in § 1.482–9T(l)(4) of the temporary regulations applies to all specified methods that use cost to evaluate the arm's length charge for controlled services, including the SCM in § 1.482–9T(b). A determination that a controlled services transaction is more reliably evaluated on a disaggregated basis may have an effect on the analysis of that transaction under other provisions of these regulations.

f. Examples, Temp. Treas. Reg. § 1.482–9T(l)(5)

Section 1.482–9T(l)(5) of the temporary regulations provides numerous examples that illustrate applications of the rules in § 1.482–9T(l). Changes have been made to certain of these examples to conform to the modifications described under the previous headings in this section.

12. Coordination With Other Transfer Pricing Rules—Temp. Treas. Reg. § 1.482–9T(m)

Section 1.482–9(m) of the 2003 proposed regulations provided coordination rules applicable to a controlled services transaction that is combined with, or includes elements of, a non-services transaction. These coordination rules relied on the best method rule in existing § 1.482–1(c)(1) to determine which method or methods would provide the most reliable measure of an arm's length result for a particular controlled transaction.

a. Services Transactions That Include Other Types of Transactions—Temp. Treas. Reg. § 1.482–9T(m)(1)

A transaction structured as a controlled services transaction may include material elements that do not constitute controlled services. Section 1.482–9(m)(1) of the 2003 proposed regulations provided that, the decision whether to evaluate such a transaction in an integrated manner under the transfer pricing methods in § 1.482–9 or to evaluate one or more elements separately under services and non-services methods depends on which of these approaches would provide the most reliable measure of an arm's length result. If the non-services component(s) of an integrated transaction could be adequately accounted for in evaluating the comparability of the controlled transaction to the uncontrolled comparables, then the transaction could generally be evaluated solely as a controlled service under § 1.482–9.

One commentator criticized this coordination rule as inherently subjective and proposed that a "predominant character" test be adopted instead. Another commentator interpreted certain statements in the preamble as indicating that any controlled transaction that was reliably analyzed under one of the transfer pricing methods applicable to tangible or intangible property would necessarily be outside the scope of the regulations regarding controlled services.

Upon further consideration, the Treasury Department and the IRS believe that no changes are necessary to the coordination rule in § 1.482–9T(m)(1) because these commentators have misconstrued the application of this rule to integrated transactions. The coordination rule in § 1.482–9T(m)(1) focuses on the underlying economics of such transactions and the most reliable means of evaluating those economics under the best method rule. The Treasury Department and the IRS recognize that controlled taxpayers have

substantial flexibility to structure transactions in a variety of economically equivalent ways. Provided that the structure adopted has economic substance, the coordination rule is designed to respect that structure and to seek the most reliable means of evaluating the arm's length price. Consequently, if a taxpayer structures a transaction so that it constitutes a controlled service, the transaction will generally be analyzed under the principles of § 1.482–9T, without regard to other provisions of the section 482 regulations.

b. Services Transactions That Effect a Transfer of Intangible Property—Temp. Treas. Reg. § 1.482–9T(m)(2)

Section 1.482–9(m)(2) of the 2003 proposed regulations provided that a transaction structured as a controlled service may result in the transfer of intangible property, may include an element that constitutes the transfer of intangible property, or may have an effect similar to the transfer of intangible property. In such cases, if the element of the transaction that related to intangible property was material, the arm's length result for that element would be determined or corroborated under a method provided for in the regulations applicable to transfers of intangible property. See existing § 1.482–4.

Commentators viewed this rule as potentially authorizing the Commissioner to recharacterize a controlled services transaction as a transaction that involved a transfer of intangible property. Such authority, commentators claimed, was inconsistent with existing § 1.482–4(b), which defines an intangible as an item that has "substantial value independent of the services of any individual." Commentators also contended that the coordination rules impermissibly extended the commensurate with income standard to controlled services transactions. Commentators suggested that, assuming each component of a controlled services transaction may be reliably accounted for under a specified transfer pricing method, no additional analysis is necessary concerning elements that arguably pertain to intangible property.

The Treasury Department and the IRS agree with the commentators that the phrase "may have an effect similar to the transfer of intangible property" could be interpreted as improperly expanding § 1.482–4 of the existing regulations to non-intangible transactions. This is not the intent of this provision. Consequently, to make this clear, the temporary regulations omit this phrase.

Other concerns raised by commentators misinterpret the interaction between this coordination rule and the definition of intangibles in § 1.482–4(b). Section 1.482–4(b) of the existing regulations contains a list of specified intangibles and a residual category of other similar items, all of which must have "substantial value independent of the services of any individual." In contrast, the coordination rule in § 1.482–9T(m)(2) applies after it is determined that an integrated transaction includes an intangible component that is material. Because the coordination rule in § 1.482–9T(m)(2) applies only to transactions that incorporate a material intangible component, it is not inconsistent with existing § 1.482–4(b), nor does it apply the commensurate with income standard of existing § 1.482–4(f)(2) to transactions that do not have a material element that constitutes an intangible transfer.

Section 1.482–9(m)(6) *Example 4* of the 2003 proposed regulations illustrated the application of this rule to a controlled services transaction that included an element constituting the transfer of an intangible. Several commentators questioned the factual assumptions in *Example 4*. Commentators contended that a controlled party performing R&D for another controlled party generally would not have rights in any know-how or technical data arising out of the R&D activity; instead the contract would specify that the party that paid for the research would obtain such rights.

The Treasury Department and the IRS agree with these comments and have concluded that the factual assumptions in this example are unclear. Consequently, *Example 4* has been redrafted to illustrate a situation in which the controlled party performing the R&D is the owner of know-how or technical data that resulted from that R&D activity. The controlled party then transfers its rights to another controlled party. As revised, this example more clearly illustrates application of the rule in § 1.482–9T(m)(2).

c. Services Subject to a Qualified Cost Sharing Arrangement—Temp. Treas. Reg. § 1.482–9T(m)(3)

Section 1.482–9(m)(3) of the 2003 proposed regulations provided that services provided by a controlled participant under a qualified cost sharing arrangement are subject to existing § 1.482–7. The Treasury Department and the IRS are in the process of comprehensively revising the regulations applicable to cost sharing. In the interim, and pending issuance of final regulations that coordinate these two provisions, the rule § 1.482–9T(m)(3) retains this coordination rule.

d. Other Types of Transaction That Include a Services Transaction—Temp. Treas. Reg. § 1.482–9T(m)(4)

Section 1.482–9T(m)(4) is adopted in substantially the same form as in the 2003 proposed regulations. A transaction structured other than as a controlled services transaction may include material elements that constitute controlled services. Section 1.482–9T(m)(4) of these temporary regulations provides rules for evaluating such integrated transactions. As with the corresponding rules in the 2003 proposed regulations, these rules complement the more general rule in § 1.482–9(m)(1), which relates to integrated transactions structured as controlled services transactions.

e. Global Dealing Operations

In § 1.482–9(m)(5) of the 2003 proposed regulations, the section for coordination with the global dealing regulations was "reserved." In response to comments, this provision is omitted in these temporary regulations, based on the view that reserved treatment is not appropriate. The Treasury Department and the IRS are presently working on new global dealing regulations. The intent of the Treasury Department and the IRS is that when final regulations are issued, those regulations, not § 1.482–9T, will govern the evaluation of the activities performed by a global dealing operation within the scope of those regulations. Pending finalization of the global dealing regulations, taxpayers may rely on the proposed global dealing regulations, not the temporary services regulations, to govern financial transactions entered into in connection with a global dealing operation as defined in proposed § 1.482–8. Therefore, proposed regulations under § 1.482–9(m)(5) issued elsewhere in the **Federal Register** clarify that a controlled services transaction does not include a financial transaction entered into in connection with a global dealing operation.

B. Income Attributable to Intangibles—Temp. Treas. Reg. § 1.482–4T(f)(3) and (4)

The 2003 proposed regulations substantially replaced § 1.482–4(f)(3) of the existing regulations, which dealt with issues relating to the allocation of income from intangibles. The 2003 proposed regulations adopted new § 1.482–4(f)(3) and (f)(4), which

provided modified rules for determining the owner of an intangible for purposes of section 482 and also provided rules for determining the arm's length compensation in situations where a controlled party other than the owner makes contributions to the value of an intangible.

1. Ownership of Intangible Property—Temp. Treas. Reg. § 1.482–4T(f)(3)

Section 1.482–4(f)(3)(i)(A) of the 2003 proposed regulations contained modified rules for determining the owner of intangible property for purposes of section 482. In general, under these rules, the controlled party that was identified as the owner of a legally protected intangible under the intellectual property laws of the relevant jurisdiction or other legal provision was treated as the owner of that intangible for purposes of section 482.

The 2003 proposed regulations also clarified that a license or other right to use an intangible may constitute an item of intangible property for purposes of section 482. This provision, which contemplated the identification of a single owner for each discrete set of rights that constitutes an intangible, replaced provisions in the existing regulations that could be interpreted as providing for multiple owners of an intangible. See Proposed § 1.482–4(f)(3)(i) and (f)(3)(iv), *Example 4*.

The 2003 proposed regulations also adopted a provision that parallels the requirement in the existing regulations, to the effect that ownership for purposes of section 482 must be consistent with the economic substance of the controlled transaction. Intellectual property law generally places relatively few limitations on the ability of members of a controlled group to assign or transfer legal ownership among themselves. As a result, this rule is a safeguard against purely formal assignments of ownership that, if given effect for purposes of section 482, could produce results that are inconsistent with the arm's length standard.

Under § 1.482–4(f)(3)(i)(A) of the 2003 proposed regulations, in situations where it was not possible to identify the owner of an intangible under the intellectual property law of the relevant jurisdiction, contractual term, or other legal provision, the controlled taxpayer with practical control over the intangible would be treated as the owner for purposes of section 482. This provision replaced the so-called "developer-assister" rule in existing § 1.482–4(f)(3)(ii)(B). In the case of non-legally protected intangibles, the developer-assister rule assigned ownership of an intangible to the controlled taxpayer that bore the largest portion of the costs of development.

The 2003 proposed regulations did not adopt the developer-assister rule, so they also eliminated related provisions pertaining to assistance to the owner of intangible property. In place of those rules, the 2003 proposed regulations contained new provisions relating to contributions to the value of intangible property owned by another controlled party. See Proposed § 1.482–4(f)(4)(i). These rules are discussed in greater detail in section B.2 of this preamble.

Section 1.482–4(f)(3)(i)(B) of the 2003 proposed regulations excluded certain intangibles that are subject to the cost sharing provisions of § 1.482–7. The Treasury Department and the IRS are currently revising the existing regulations related to cost sharing. When final cost sharing regulations are issued, § 1.482–4(f)(3) and (4) will take into account the changes made to the cost sharing provisions.

Extensive comments were received concerning the revised approach to determining ownership of intangibles under section 482. To varying degrees, many commentators supported the new ownership standard, noting that it should be easier to apply and should produce more certainty of results in this area. Other commentators, however, took issue with the proposed rules. Some of these commentators took the position that legal ownership does not provide an appropriate basis for determining ownership under section 482, while others believed that the determination of ownership under section 482 should include a full-scale application of substantive intellectual property law, including relevant statutory provisions as well as judicial doctrines and common law principles that may bear on the issue of ownership.

After considering the public comments, the Treasury Department and the IRS conclude that legal ownership provides the appropriate framework for determining ownership of intangibles under section 482. In this specific context, the Treasury Department and the IRS intend that the "legal owner" under these rules will be the controlled party that possesses title to the intangible, based on consideration of the facts and circumstances. This analysis would take into account applications filed with a central government registry (such as the U.S. Patent and Trademark Office or the Copyright Office in the United States), any contractual provisions in effect between the controlled parties, and other legal provisions. Legal ownership, understood in this manner, provides a practical and administrable framework for determining ownership of intangibles for purposes of section 482.

The suggestions that the ownership rules under section 482 should in effect incorporate by reference the substantive intellectual property rules have not been adopted. In the view of the Treasury Department and the IRS, it would be counterproductive to require an in-depth application of intellectual property law in determining which controlled party is treated as the owner under section 482. The primary function of intellectual property law is to define the rights of a legal entity, which in some cases might be a controlled group, as compared with one or more uncontrolled parties that have competing claims to the same item of intangible property. For this reason, application of the substantive provisions of intellectual property law would not be useful, and might in fact produce inappropriate results, given that under section 482 the relevant determination is which of several controlled parties should be classified as the owner of an intangible.

The Treasury Department and the IRS anticipate that ownership of an intangible as determined under the legal owner standard will not conflict with the simultaneous requirement that ownership under section 482 be determined in accordance with the economic substance. For example, if the economic substance of the controlled parties' dealings conflicts with treatment of the legal owner as the owner under section 482, the Commissioner may determine ownership by reference to the economic substance of the transaction. In other cases, ownership for purposes of section 482 should be consistent with the ownership determined by reference to either legal ownership or practical control.

The Treasury Department and the IRS also believe that the 2003 proposed regulations properly adopted a practical control standard for "non-legally protected" intangibles. The control standard should not displace valid contractual terms intended to specify that a particular controlled party is the owner of an existing intangible or an intangible under development. Because a contractual term constitutes a "legal provision," the intangible would be analyzed as a legally protected intangible, as opposed to a non-legally protected intangible subject to the practical control rule.

Commentators suggested that certain statements in the 2003 proposed regulations incorrectly equated a licensee of intangible property with a

distributor of tangible property. In response to these comments, the Treasury Department and the IRS have revised the examples in § 1.482–4T(f)(4)(ii) to avoid any implication that these regulations equate or distinguish these business relationships.

2. Contributions to the Value of an Intangible—Temp. Treas. Reg. § 1.482–4T(f)(4)

Under § 1.482–4(f)(4)(i) of the 2003 proposed regulations, the rules of section 482 were applied to determine the arm's length compensation for any activity that was reasonably anticipated to increase the value of an intangible owned by another controlled party. Such an activity was defined as a "contribution" under this provision. This provision replaced certain rules in the existing regulations that required arm's length compensation to be provided for any assistance by a controlled party to the owner of the intangible.

This new guidance concerning contributions to the value of an intangible was intended to provide a more refined framework than the rules in existing § 1.482–4(f)(3), in particular by reducing the potential for inappropriate, all-or-nothing results. Moreover, because the revised rules afforded heightened deference to contractual arrangements, they were intended to give controlled taxpayers incentives to document transactions on a contemporaneous basis and to adhere to the contractual terms agreed upon at the outset of the arrangement.

Section 1.482–4(f)(4)(i) of the 2003 proposed regulations provided that compensation for a contribution may be embedded within the terms of another transaction, may be stated separately as a fee for services, or may be provided for as a reduction in the royalty or the transfer price of tangible property. The regulations also recognized that if a controlled party's activities are reasonably anticipated to enhance only the value of its own rights under a license or exclusive distribution arrangement, no compensation is due under the arm's length standard. The rules addressed the most commonly encountered factual scenarios that potentially give rise to contributions on the part of a controlled party.

Section 1.482–4(f)(4)(i) of the 2003 proposed regulations provided that in general a separate allocation is not appropriate if the compensation for a contribution was embedded within the terms of a related controlled transaction. In such cases, the contribution is taken into account in evaluating the comparability of the controlled transaction to the uncontrolled comparables and in determining the arm's length consideration for the controlled transaction that includes the embedded contribution.

This rule potentially interacted with § 1.482–3(f) of the existing regulations, concerning transfers of tangible property together with an embedded intangible. For example, assume that a reseller of trademarked goods performs activities that are classified as contributions within the meaning of § 1.482–4(f)(4). If no separate compensation for these activities is provided for by a contractual term, then ordinarily no allocation would be appropriate either for the embedded trademark or for the underlying activities. Both elements would, however, be taken into account in evaluating the comparability of the controlled transfer to the uncontrolled comparables and in determining the arm's length consideration for the controlled transfer of the trademarked goods. See § 1.482–4T(f)(4)(ii) *Example 2*.

Commentators objected to certain aspects of *Example 2*, *Example 3*, *Example 5*, and *Example 6* in § 1.482–4(f)(4)(ii) of the 2003 proposed regulations. Those examples stated that, if it is not possible to identify uncontrolled transactions that incorporated a similar range of interrelated elements as the nonroutine contributions by the controlled parties, it may be appropriate to apply a residual profit split analysis. In the opinion of commentators, these statements implied that profit split methods were preferred methods in any case that involved a contribution to the value of an intangible.

The Treasury Department and the IRS agree with these comments. There was no intention to imply any such treatment of the residual profit split method. As a result, these statements in the examples have been eliminated. In addition, the examples in the temporary regulations specifically refer to the best method rule and cross-reference new *Example 10*, *Example 11*, and *Example 12* in § 1.482–8, which show application of the best method rule to intangible development activities. See also section A.6 of this preamble, concerning definition of nonroutine contribution for purposes of the profit split methods.

In addition, and in response to comments, a new *Example 5* in § 1.482–1T(d)(3)(ii)(C) illustrates factual circumstances in which contractual terms pertaining to intangible development activities are respected, although on examination the activities are found to be priced on a non-arm's length basis. Together, these changes clarify that, subject to the best method rule and satisfaction of economic substance requirements, controlled parties may adopt contractual terms that provide for marketing, research and development, or other intangible development activities to be compensated based on reimbursement of specified costs plus a profit element. The underlying contractual compensation terms will be given effect for purposes of section 482 as long as they have economic substance.

Commentators sought clarification regarding the term "incremental marketing activities," which was used in several examples in § 1.482–4(f)(4)(ii) of the 2003 proposed regulations.

In the examples, the term "incremental marketing activities" referred to activities by a controlled party that are quantitatively greater (in terms of volume, expense, etc.) than the activities undertaken by comparable uncontrolled parties in the transactions used to analyze the controlled transaction. Such activities must be taken into account by either evaluating a separate transaction that accounts for such incremental activities or analyzing the underlying transaction and making necessary adjustments to the uncontrolled transactions to incorporate such activities into the comparability analysis. Discrete changes were made to the examples to clarify these principles. As a result, apart from this additional clarification, these comments are not adopted.

Commentators proposed that the Treasury Department and the IRS adopt discounted cash-flow analysis (DCF) as a specified method for analysis of contributions. The Treasury Department and the IRS find it unnecessary to do so because they already recognize DCF as one of several approaches that may be reliably applied to evaluate intangible property. This method may be particularly useful, either as an unspecified method or in conjunction with one of the specified methods, in evaluating contributions within the meaning of § 1.482–4T(f)(4)(i). Further consideration is being given to the suggestion to adopt DCF as a specified method in its own right.

C. Contractual Terms Imputed From Economic Substance—§ 1.482–1(d)(3)(ii)(C), Examples 3, 4, 5, and 6

Central to the approach taken in the 2003 proposed regulations were the concepts that controlled taxpayers have substantial freedom to adopt contractual terms, and that such contractual terms are given effect under section 482, provided they are in accord with the economic substance of the controlled

parties' dealings. An important corollary of these principles, however, applies where controlled parties fail to specify contractual terms, or specify terms that are not consistent with economic substance. In such cases, the Commissioner may impute contractual terms to accord with the economic substance of the controlled parties' activities. See § 1.482–1(d)(3) of the existing regulations.

Commentators raised several concerns regarding the potential interaction between the economic substance rules in existing § 1.482–1(d)(3) and certain provisions in the 2003 proposed regulations, including those relating to contributions to the value of intangibles and contingent-payment contractual terms. Some commentators suggested that application of these provisions together with the existing economic substance rules could create incentives for the Commissioner to make inappropriate adjustments, e.g., to impute contingent-payment terms or transfers of intangibles in any situation in which non-arm's length pricing was identified.

It bears emphasis that the Commissioner may invoke his authority under § 1.482–1(d)(3)(ii) in only two situations: (1) Controlled taxpayers fail to specify contractual terms for the transaction; or (2) controlled taxpayers specify contractual terms that are not in accordance with economic substance. Clearly, if contributions within the meaning of § 1.482–4T(f)(4)(i) are present, the contractual terms of the controlled transaction should address those contributions in a manner that accords with economic substance. If this is not the case, the Commissioner must impute an arrangement that best conforms to the economic substance of the transaction. In given facts and circumstances, it may be possible to rely on evidence that the taxpayer brings forward. In other circumstances, the Commissioner will impute an arrangement based on economic substance, taking into account the facts and circumstances, the parties' conduct, and other relevant evidence, including any that the taxpayer brings forward on examination. See *Example 3*, *Example 4*, and *Example 6* in § 1.482–1T(d)(3)(ii)(C).

In response to comments, § 1.482–1T(d)(3)(ii)(C) includes a new *Example 5*, which illustrates the interaction of the economic substance rule with general transfer pricing rules in the context of intangible development activities. In the example, the contractual terms specify that intangible development activities are priced by reference to reimbursement of specified costs plus a markup or profit component. On examination, the Commissioner determines that the specified compensation falls outside the arm's length range, as determined by comparison to uncontrolled transactions. The example illustrates that this determination, without more, does not support a conclusion that the contractual terms lacked economic substance. If, however, the compensation paid is outside the arm's length range by a substantial amount, the Commissioner may take that fact into account in determining whether the contractual arrangement as a whole possessed economic substance.

The examples in § 1.482–1(d)(3)(ii)(C) of the 2003 proposed regulations described alternative constructions that the Commissioner might adopt if the contractual terms for the controlled transaction were not in accordance with economic substance: These alternatives included: (1) Imputation of a separate services arrangement, with contingent-payment terms; (2) imputation of a long-term, exclusive distribution arrangement; or (3) requiring compensation for termination of an imputed long-term license arrangement. The Treasury Department and the IRS believe that one or more of these arrangements may be appropriate, depending on the facts of the specific case.

Commentators expressed concerns regarding the scope of the Commissioner's authority to impute arrangements based on economic substance. Some commentators suggested that a single set of contractual terms should apply in any situation where the Commissioner determines that the controlled parties' contractual terms lack economic substance. Another commentator recommended that the Commissioner should impute only contractual terms similar to those observed in comparable uncontrolled transactions. After much consideration, the Treasury Department and the IRS have not adopted these comments. The determination of the economic substance of a transaction between related parties necessarily turns on an examination of all the facts and circumstances. Under the regulations, the taxpayer is in control of this issue in the first instance to the extent it expressly sets forth the economic substance in contractual terms and its conduct and arrangements are consistent with these terms. Otherwise, the IRS is forced to try and impute the economic substance based on whatever facts and circumstances are available, including any information the taxpayer brings forward on examination.

Commentators also suggested that under the 2003 proposed regulations, the Commissioner's authority to impute contingent-payment contractual terms was unnecessarily broad. In the commentators' view, this authority would lead the Commissioner to apply commensurate with income principles to controlled transactions that have no significant intangible property component. The Commissioner's authority to impute contingent-payment contractual terms was appropriately tailored to result in application of economic substance principles in those situations where it was warranted. The Treasury Department and the IRS believe that the commensurate with income principle of the statute is consistent with the arm's length principle and fundamentally relates to the underlying economic substance and true risk allocations inherent in the relevant controlled transactions. Related parties may, with economic substance, agree to compensate one another for services with compensation payable only in future periods contingent on the success or failure of the services to produce the contemplated results. Related parties may expressly enter into those contractual terms and, in the absence of express terms or where the related parties' conduct and arrangements are inconsistent with their contractual terms, the IRS may in appropriate facts and circumstances impute contingent-payment contractual terms.

D. Stewardship Expenses—§ 1.861–8T

The temporary regulations would modify the present regulations under § 1.861–8(e)(4) to conform to, and to be consistent with, the revised language relating to controlled services transactions as set forth in § 1.482–9T(l).

E. Effective Date—§ 1.482–9T(n)

In order to achieve the goal of updating the 1968 regulations, while facilitating consideration of further public input in refining final rules, these regulations are issued in temporary form with a delayed effective date for taxable years beginning after December 31, 2006. Controlled taxpayers may also elect to apply these temporary regulations to any taxable year beginning after September 10, 2003, the date of publication of the 2003 proposed regulations. Where such an election is made, the temporary regulations will apply in full to such taxable year and all subsequent taxable years of the taxpayer making the election. Such an election must be made by attaching a statement to the taxpayer's timely filed U.S. tax return

(including extensions) for its first taxable year after December 31, 2006.

These regulations are issued after proposed revisions to the regulations pertaining to cost sharing arrangements. By issuing regulations in temporary and proposed form concerning controlled services and the allocation of income from intangibles, the Treasury Department and the IRS also provide taxpayers an opportunity to submit comments that take into account the potential interaction between these two sets of regulations.

The initial list of specified covered services for purposes of the SCM is being issued for public input in the form of an Announcement in tandem with these temporary regulations. This Announcement will be published in the Internal Revenue Bulletin. For copies of the Internal Revenue Bulletin, see § 601.601(d)(2)(ii)(b). The Treasury Department and the IRS intend to take all public comments into account and issue a final revenue procedure that will be effective coincident with the delayed effective date of these temporary regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Thomas A. Vidano and Carol B. Tan, Office of Associate Chief Counsel (International) for matters relating to section 482, and David Bergkuist, Office of Associate Chief Counsel (International) for matters relating to stewardship.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security and Unemployment compensation.

Amendment to the Regulations

■ Accordingly, 26 CFR parts 1 and 31 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.482–9 also issued under 26 U.S.C. 482. * * *

■ **Par. 2.** Section 1.482–0 is amended as follows:

■ 1. The section heading is revised.

■ 2. The entries for 1.482–1(a)(1), (b)(2)(i), (d)(3)(ii)(C), (d)(3)(v), (f)(2)(ii)(A), (f)(2)(ii)(B), (g)(4)(iii), (i) and (j) are revised.

■ 3. The entries for § 1.482–2(b) are revised.

■ 4. The entries for § 1.482–4(f)(3), (f)(4) and (f)(5) are revised and new entries for § 1.482–4(f)(6) and (f)(7) are added.

■ 5. The entries for 1.482–6(c)(2)(ii)(B)(*1*), (c)(2)(ii)(D), (c)(3)(i)(A), (c)(3)(i)(B) and (c)(3)(ii)(D) are revised and the entry for 1.482–6(d) is added.

■ 6. The entry for 1.482–8(a) is revised.

■ 7. The entries for 1.482–9 are added.

The additions and revisions read as follows:

§ 1.482–0 Outline of regulations under section 482.

* * * * *

§ 1.482–1 Allocation of income and deductions among taxpayers.

(a)(1) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(a)(1).

* * * * *

(b) * * *

(2) * * *

(i) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(b)(2)(i).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(C) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(d)(3)(ii)(C).

(v) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(d)(3)(v).

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(f)(2)(ii)(A).

(iii) * * *

(B) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(f)(2)(iii)(B).

* * * * *

(g) * * *

(4) * * *

(iii) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(g)(4)(iii).

* * * * *

(i) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(i).

* * * * *

(j) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–1T(j).

§ 1.482–2 Determination of taxable income in specific situations.

* * * * *

(b) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–2T(b).

* * * * *

§ 1.482–4 Methods to determine taxable income in connection with a transfer of intangible property.

* * * * *

(f) * * *

(3) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–4T(f)(3).

(4) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–4T(f)(4).

(5) Consideration not artificially limited.

(6) Lump sum payments

(i) In general.

(ii) Exceptions.

(iii) Example.

(7) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–4T(f)(7).

§ 1.482–6 Profit split method.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) * * *

(*1*) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(c)(2)(ii)(B)(*1*).

* * * * *

(D) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(c)(2)(ii)(D).

(3) * * *

(i) * * *

(A) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(c)(3)(i)(A).

(B) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(c)(3)(i)(B).

(ii) * * *

(D) [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(c)(3)(ii)(D).

* * * * *

(d) Effective date. [Reserved]. For further guidance, see § 1.482–0T, the entry for § 1.482–6T(d).

§ 1.482–8 Examples of the best method rule.

(a) Introduction.

* * * * *

§ 1.482–9 Methods to determine taxable income in connection with a controlled services transaction. [Reserved].

For further guidance, see § 1.482–0T, the entries for § 1.482–9T.

■ **Par. 3.** Section 1.482–0T is added to read as follows:

§ 1.482–0T Outline of regulations under section 482.

This section contains major captions for §§ 1.482–1T, 1.482–2T, 1.482–4T, 1.482–6T, 1.482–8T, and § 1.482–9T.

§ 1.482–1T Allocation of income and deductions among taxpayers.

(a) In general.
(1) Purpose and scope.
(2) through (b)(1) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(a)(2) through (b)(1).
(b)(2) Arm's length methods.
(i) Methods.
(b)(2)(ii) through (d)(3)(ii)(B) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(b)(2)(ii) through (c)(3)(ii)(B).
(C) Examples.
(d)(3)(iii) and (iv) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(d)(3)(iii) and (iv).
(v) Property or services.
(d)(4) through (f)(2)(i) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(d)(4) through (f)(2)(i).
(ii) Allocation based on taxpayer's actual transactions.
(A) In general.
(f)(2)(ii)(B) through (f)(2)(iii)(A) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(f)(2)(ii)(B) through (f)(2)(iii)(A).
(B) Circumstances warranting consideration of multiple year data.
(f)(2)(iii)(C) through (g)(3) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(f)(2)(iii)(C) through (g)(3).
(4) Setoffs.
(i) In general.
(g)(4)(ii) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(g)(4)(ii).
(iii) Examples.
(g)(4)(iii) Example 2 through (h) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(g)(4)(iii) Example 2 through (h).
(i) Definitions.
(i)(1) through (10) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–1(i)(1) through (10).
(j) Effective date.
(1) In general.
(2) Election to apply regulation to earlier years.
(3) Expiration date.

§ 1.482–2T Determination of taxable income in specific situations.

(a) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–2(a).
(b) Rendering of services.
(c) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–2(c).
(d) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–2(d).
(e) Effective date.
(1) In general.
(2) Election to apply regulation to earlier years.
(3) Expiration date.

§ 1.482–4T Methods to determine taxable income in connection with a transfer of intangible property.

(a) through (f)(2) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–4(a) through (f)(2).
(3) Ownership of intangible property.
(i) Identification of owner.
(A) In general.
(B) Cost sharing arrangements.
(ii) Examples.
(4) Contribution to the value of an intangible owned by another.
(i) In general.
(ii) Examples.
(f)(5) and (f)(6) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–4(f)(5) and (f)(6).
(7) Effective date.
(i) In general.
(ii) Election to apply regulation to earlier years.
(iii) Expiration date.

§ 1.482–6T Profit split method.

(a) through (c)(2)(ii)(A) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–6(a) through (c)(2)(ii)(A).
(B) Comparability.
(*1*) In general.
(c)(2)(ii)(B)(*2*) through (C) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–6(c)(2)(ii)(B)(*2*) through (C).
(D) Other factors affecting reliability.
(c)(3)(i) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–6(c)(3)(i).
(A) Allocate income to routine contributions.
(B) Allocate residual profit.
(*1*) Nonroutine contributions generally.
(*2*) Nonroutine contributions of intangible property.
(c)(3)(ii)(A) through (C) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–6(c)(3)(ii)(A) through (C).
(D) Other factors affecting reliability.
(c)(3)(iii) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–6(c)(3)(iii).
(d) Effective date.
(1) In general.
(2) Election to apply regulation to earlier taxable years.
(3) Expiration date.

§ 1.482–8T Examples of the best method rule.

(a) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–8(a).
(b) [Reserved]. For further guidance, see § 1.482–0, the entry for § 1.482–8(b)
(c) Effective date.
(1) In general.
(2) Election to apply regulation to earlier taxable years.
(3) Expiration date.

§ 1.482–9T Methods to determine taxable income in connection with a controlled services transaction.

(a) In general.
(b) Services cost method
(1) In general.
(2) Not services that contribute significantly to fundamental risks of business success or failure.
(3) Other conditions on application of services cost method.
(i) Adequate books and records.
(ii) Excluded transactions.
(4) Covered services.
(i) Specified covered services.
(ii) Low margin covered services.
(5) Shared services arrangement.
(i) In general.
(ii) Requirements for shared services arrangement.
(A) Eligibility.
(B) Allocation.
(C) Documentation.
(iii) Definition and special rules.
(A) Participant.
(B) Aggregation.
(C) Coordination with cost sharing arrangements.
(6) Examples.
(c) Comparable uncontrolled services price method.
(1) In general.
(2) Comparability and reliability considerations.
(i) In general.
(ii) Comparability.
(A) In general.
(B) Adjustments for differences between controlled and uncontrolled transactions.
(iii) Data and assumptions.
(3) Arm's length range.
(4) Examples.
(5) Indirect evidence of the price of a comparable uncontrolled services transaction.
(i) In general.
(ii) Example.
(d) Gross services margin method.
(1) In general.
(2) Determination of arm's length price.
(i) In general.
(ii) Relevant uncontrolled transaction.
(iii) Applicable uncontrolled price.
(iv) Appropriate gross services profit.
(v) Arm's length range.
(3) Comparability and reliability considerations.
(i) In general.
(ii) Comparability.
(A) Functional comparability.
(B) Other comparability factors.
(C) Adjustments for differences between controlled and uncontrolled transactions.
(D) Buy-sell distributor.
(iii) Data and assumptions.
(A) In general.
(B) Consistency in accounting.
(4) Examples.
(e) Cost of services plus method.
(1) In general.
(2) Determination of arm's length price.
(i) In general.
(ii) Appropriate gross services profit.
(iii) Comparable transactional costs.
(iv) Arm's length range.
(3) Comparability and reliability considerations.
(i) In general.
(ii) Comparability.
(A) Functional comparability.
(B) Other comparability factors.
(C) Adjustments for differences between the controlled and uncontrolled transactions.

(iii) Data and assumptions.
(A) In general.
(B) Consistency in accounting.
(4) Examples.
(f) Comparable profits method.
(1) In general.
(2) Determination of arm's length result.
(i) Tested party.
(ii) Profit level indicators.
(iii) Comparability and reliability considerations—Data and assumptions—Consistency in accounting.
(3) Examples.
(g) Profit split method.
(1) In general.
(2) Examples.
(h) Unspecified methods.
(i) Contingent-payment contractual terms for services.
(1) Contingent-payment contractual terms recognized in general.
(2) Contingent-payment arrangement.
(i) General Requirements
(A) Written contract.
(B) Specified contingency.
(C) Basis for payment.
(ii) Economic Substance and Conduct
(3) Commissioner's authority to impute contingent-payment terms.
(4) Evaluation of arm's length charge.
(5) Examples.
(j) Total services costs.
(k) Allocation of costs.
(1) In general.
(2) Appropriate method of allocation and apportionment.
(i) Reasonable method standard.
(ii) Use of general practices.
(3) Examples.
(l) Controlled services transaction.
(1) In general.
(2) Activity.
(3) Benefit.
(i) In general.
(ii) Indirect or remote benefit.
(iii) Duplicative activities.
(iv) Shareholder activities.
(v) Passive association.
(4) Disaggregation of Transactions
(5) Examples.
(m) Coordination with transfer pricing rules for other transactions.
(1) Services transactions that include other types of transactions.
(2) Services transactions that effect a transfer of intangible property.
(3) Services subject to a qualified cost sharing arrangement.
(4) Other types of transactions that include controlled services transactions.
(5) Examples.
(n) Effective date.
(1) In general.
(2) Election to apply regulations to earlier taxable years.
(3) Expiration date.

■ **Par. 4.** Section 1.482–1 is amended as follows:

■ 1. Paragraphs (a)(1), (b)(2)(i), (d)(3)(ii)(C) *Example 3*, (d)(3)(v), (f)(2)(ii)(A), (f)(2)(iii)(B), (g)(4)(i), (g)(4)(iii) and paragraph (i) are revised.

■ 2. Paragraph (d)(3)(ii)(C) *Examples 4* through *6* are added.

■ 3. Paragraph (j)(6) is added.

The addition and revisions read as follows:

§ 1.482–1 Allocation of income and deductions among taxpayers.

(a)(1) [Reserved]. For further guidance, see § 1.482–1T(a)(1).

* * * * *

(b) * * * (1) * * *

(b)(2)(i) [Reserved]. For further guidance, see § 1.482–1T(b)(2)(i).

* * * * *

(d) * * *

(3) * * *

(ii) * * *

(C) * * *

Example 3. [Reserved]. For further guidance, see § 1.482–1T(d)(3)(ii)(C), Example 3.

Examples 4 through *6.* [Reserved]. For further guidance, see 1.482–1T(d)(3)(ii)(C) *Examples 4* through *6.*

* * * * *

(v) [Reserved]. For further guidance, see § 1.482–1T(d)(3)(v).

* * * * *

(f) * * *

(2) * * *

(ii)(A) [Reserved]. For further guidance, see § 1.482–1T(f)(2)(ii)(A).

* * * * *

(iii) * * *

(B) [Reserved]. For further guidance, see § 1.482–1T(f)(3)(iii)(B).

* * * * *

(g) * * *

(4) * * * (i) * * * [Reserved]. For further guidance, see § 1.482–1T(g)(4)(i).

(iii) * * *

Example 1. [Reserved]. For further guidance, see § 1.482–1T(g)(4)(iii), *Example 1.*

* * * * * *

(i) [Reserved]. For further guidance, see § 1.482–1T(i).

(j) * * *

(6) [Reserved]. For further guidance, see § 1.482–1T(j)(6).

Par. 5. Section 1.482–1T is added to read as follows:

§ 1.482–1T Allocation of income and deductions among taxpayers (temporary).

(a) *In general*—(1) *Purpose and scope.* The purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions. Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer. This section sets forth general principles and guidelines to be followed under section 482. Section 1.482–2 provides rules for the determination of the true taxable income of controlled taxpayers in specific situations, including controlled transactions involving loans or advances or the use of tangible property. Sections 1.482–3 through 1.482–6 provide rules for the determination of the true taxable income of controlled taxpayers in cases involving the transfer of property. Section 1.482–7T sets forth the cost sharing provisions applicable to taxable years beginning on or after October 6, 1994, and before January 1, 1996. Section 1.482–7 sets forth the cost sharing provisions applicable to taxable years beginning on or after January 1, 1996. Section 1.482–8 provides examples illustrating the application of the best method rule. Finally, § 1.482–9T provides rules for the determination of the true taxable income of controlled taxpayers in cases involving the performance of services.

(a)(2) through (b)(1) [Reserved]. For further guidance, see § 1.482–1(a)(2) through (b)(1).

(b)(2) *Arm's length methods*—(i) *Methods.* Sections 1.482–2 through 1.482–6 and § 1.482–9T provide specific methods to be used to evaluate whether transactions between or among members of the controlled group satisfy the arm's length standard and, if they do not, to determine the arm's length result. Section 1.482–7 provides the specific method to be used to evaluate whether a qualified cost sharing arrangement produces results consistent with an arm's length result.

(b)(2)(ii) through (d)(3)(ii)(C), *Examples 1,* and *2* [Reserved]. For further guidance, see § 1.482–1(b)(2)(ii) through (d)(3)(ii)(C), *Examples 1* and *2.*

Example 3. Contractual terms imputed from economic substance. (i) FP, a foreign producer of wristwatches, is the registered holder of the YY trademark in the United States and in other countries worldwide. In year 1, FP enters the United States market by selling YY wristwatches to its newly organized United States subsidiary, USSub, for distribution in the United States market. USSub pays FP a fixed price per wristwatch. USSub and FP undertake, without separate compensation, marketing activities to establish the YY trademark in the United States market. Unrelated foreign producers of trademarked wristwatches and their authorized United States distributors respectively undertake similar marketing activities in independent arrangements involving distribution of trademarked wristwatches in the United States market. In years 1 through 6, USSub markets and sells YY wristwatches in the United States. Further, in years 1 through 6, USSub undertakes incremental marketing activities in addition to the activities similar to those observed in the independent distribution transactions in the United States market. FP does not directly or indirectly compensate USSub for performing these incremental activities during years 1 through 6. Assume

that, aside from these incremental activities, and after any adjustments are made to improve the reliability of the comparison, the price paid per wristwatch by the independent, authorized distributors of wristwatches would provide the most reliable measure of the arm's length price paid per YY wristwatch by USSub.

(ii) By year 7, the wristwatches with the YY trademark generate a premium return in the United States market, as compared to wristwatches marketed by the independent distributors. In year 7, substantially all the premium return from the YY trademark in the United States market is attributed to FP, for example through an increase in the price paid per watch by USSub, or by some other means.

(iii) In determining whether an allocation of income is appropriate in year 7, the Commissioner may consider the economic substance of the arrangements between USSub and FP, and the parties' course of conduct throughout their relationship. Based on this analysis, the Commissioner determines that it is unlikely that, ex ante, an uncontrolled taxpayer operating at arm's length would engage in the incremental marketing activities to develop or enhance an intangible owned by another party unless it received contemporaneous compensation or otherwise had a reasonable anticipation of receiving a future benefit from those activities. In this case, USSub's undertaking the incremental marketing activities in years 1 through 6 is a course of conduct that is inconsistent with the parties' attribution to FP in year 7 of substantially all the premium return from the enhanced YY trademark in the United States market. Therefore, the Commissioner may impute one or more agreements between USSub and FP, consistent with the economic substance of their course of conduct, which would afford USSub an appropriate portion of the premium return from the YY trademark wristwatches. For example, the Commissioner may impute a separate services agreement that affords USSub contingent-payment compensation for its incremental marketing activities in years 1 through 6, which benefited FP by contributing to the value of the trademark owned by FP. In the alternative, the Commissioner may impute a long-term, exclusive agreement to exploit the YY trademark in the United States that allows USSub to benefit from the incremental marketing activities it performed. As another alternative, the Commissioner may require FP to compensate USSub for terminating USSub's imputed long-term, exclusive agreement to exploit the YY trademark in the United States, an agreement that USSub made more valuable at its own expense and risk. The taxpayer may present additional facts that could indicate which of these or other alternative agreements best reflects the economic substance of the underlying transactions, consistent with the parties' course of conduct in the particular case.

Example 4. Contractual terms imputed from economic substance. (i) FP, a foreign producer of athletic gear, is the registered holder of the AA trademark in the United States and in other countries worldwide. In year 1, FP enters into a licensing agreement that affords its newly organized United States subsidiary, USSub, exclusive rights to certain manufacturing and marketing intangibles (including the AA trademark) for purposes of manufacturing and marketing athletic gear in the United States under the AA trademark. The contractual terms of this agreement obligate USSub to pay FP a royalty based on sales, and also obligate both FP and USSub to undertake without separate compensation specified types and levels of marketing activities. Unrelated foreign businesses license independent United States businesses to manufacture and market athletic gear in the United States, using trademarks owned by the unrelated foreign businesses. The contractual terms of these uncontrolled transactions require the licensees to pay royalties based on sales of the merchandise, and obligate the licensors and licensees to undertake without separate compensation specified types and levels of marketing activities. In years 1 through 6, USSub manufactures and sells athletic gear under the AA trademark in the United States. Assume that, after adjustments are made to improve the reliability of the comparison for any material differences relating to marketing activities, manufacturing or marketing intangibles, and other comparability factors, the royalties paid by independent licensees would provide the most reliable measure of the arm's length royalty owed by USSub to FP, apart from the additional facts in paragraph (ii) of this example.

(ii) In years 1 through 6, USSub performs incremental marketing activities with respect to the AA trademark athletic gear, in addition to the activities required under the terms of the license agreement with FP, that are also incremental as compared to those observed in the comparables. FP does not directly or indirectly compensate USSub for performing these incremental activities during years 1 through 6. By year 7, AA trademark athletic gear generates a premium return in the United States, as compared to similar athletic gear marketed by independent licensees. In year 7, USSub and FP enter into a separate services agreement under which FP agrees to compensate USSub on a cost basis for the incremental marketing activities that USSub performed during years 1 through 6, and to compensate USSub on a cost basis for any incremental marketing activities it may perform in year 7 and subsequent years. In addition, the parties revise the license agreement executed in year 1, and increase the royalty to a level that attributes to FP substantially all the premium return from sales of the AA trademark athletic gear in the United States.

(iii) In determining whether an allocation of income is appropriate in year 7, the Commissioner may consider the economic substance of the arrangements between USSub and FP and the parties' course of conduct throughout their relationship. Based on this analysis, the Commissioner determines that it is unlikely that, ex ante, an uncontrolled taxpayer operating at arm's length would engage in the incremental marketing activities to develop or enhance an intangible owned by another party unless it received contemporaneous compensation or otherwise had a reasonable anticipation of a future benefit. In this case, USSub's undertaking the incremental marketing activities in years 1 through 6 is a course of conduct that is inconsistent with the parties' adoption in year 7 of contractual terms by which FP compensates USSub on a cost basis for the incremental marketing activities that it performed. Therefore, the Commissioner may impute one or more agreements between USSub and FP, consistent with the economic substance of their course of conduct, which would afford USSub an appropriate portion of the premium return from the AA trademark athletic gear. For example, the Commissioner may impute a separate services agreement that affords USSub contingent-payment compensation for the incremental activities it performed during years 1 through 6, which benefited FP by contributing to the value of the trademark owned by FP. In the alternative, the Commissioner may impute a long-term, exclusive United States license agreement that allows USSub to benefit from the incremental activities. As another alternative, the Commissioner may require FP to compensate USSub for terminating USSub's imputed long-term United States license agreement, a license that USSub made more valuable at its own expense and risk. The taxpayer may present additional facts that could indicate which of these or other alternative agreements best reflects the economic substance of the underlying transactions, consistent with the parties' course of conduct in this particular case.

Example 5. Non-arm's length compensation. (i) The facts are the same as in paragraph (i) of *Example 4*. As in *Example 4*, assume that, after adjustments are made to improve the reliability of the comparison for any material differences relating to marketing activities, manufacturing or marketing intangibles, and other comparability factors, the royalties paid by independent licensees would provide the most reliable measure of the arm's length royalty owed by USSub to FP, apart from the additional facts described in paragraph (ii) of this example.

(ii) In years 1 through 4, USSub performs certain incremental marketing activities with respect to the AA trademark athletic gear, in addition to the activities required under the terms of the basic license agreement, that are also incremental as compared with those activities observed in the comparables. At the start of year 1, FP enters into a separate services agreement with USSub, which states that FP will compensate USSub quarterly, in an amount equal to specified costs plus X%, for these incremental marketing functions. Further, these written agreements reflect the intent of the parties that USSub receive such compensation from FP throughout the term of the agreement, without regard to the success or failure of the promotional activities. During years 1 though 4, USSub performs marketing activities pursuant to the separate services agreement and in each year USSub receives the specified compensation from FP on a cost of services plus basis.

(iii) In evaluating year 4, the Commissioner performs an analysis of independent parties that perform promotional activities comparable to those performed by USSub

and that receive separately-stated compensation on a current basis without contingency. The Commissioner determines that the magnitude of the specified cost plus X% is outside the arm's length range in each of years 1 through 4. Based on an evaluation of all the facts and circumstances, the Commissioner makes an allocation to require payment of compensation to USSub for the promotional activities performed in year 4, based on the median of the interquartile range of the arm's length markups charged by the uncontrolled comparables described in § 1.482–1(e)(3).

(iv) Given that based on facts and circumstances, the terms agreed by the controlled parties were that FP would bear all risks associated with the promotional activities performed by USSub to promote the AA trademark product in the United States market, and given that the parties' conduct during the years examined was consistent with this allocation of risk, the fact that the cost of services plus markup on USSub's services was outside the arm's length range does not, without more, support imputation of additional contractual terms based on alternative views of the economic substance of the transaction, such as terms indicating that USSub, rather than FP, bore the risk associated with these activities. In other facts and circumstances, had the compensation paid to USSub been significantly outside the arm's length range, that might lead the Commissioner to examine further whether, despite the contractual terms that require cost-plus reimbursement of USSub, the economic substance of the transaction was not consistent with FP's bearing the risk associated with promotional activities in the United States market.

Example 6. Contractual terms imputed from economic substance. (i) Company X is a member of a controlled group that has been in operation in the pharmaceutical sector for many years. In years 1 through 4, Company X undertakes research and development activities. As a result of those activities, Company X developed a compound that may be more effective than existing medications in the treatment of certain conditions.

(ii) Company Y is acquired in year 4 by the controlled group that includes Company X. Once Company Y is acquired, Company X makes available to Company Y a large amount of technical data concerning the new compound, which Company Y uses to register patent rights with respect to the compound in several jurisdictions, making Company Y the legal owner of such patents. Company Y then enters into licensing agreements with group members that afford Company Y 100% of the premium return attributable to use of the intangible by its subsidiaries.

(iii) In determining whether an allocation is appropriate in year 4, the Commissioner may consider the economic substance of the arrangements between Company X and Company Y, and the parties' course of conduct throughout their relationship. Based on this analysis, the Commissioner determines that it is unlikely that an uncontrolled taxpayer operating at arm's length would make available the results of its research and development or perform services that resulted in transfer of valuable know how to another party unless it received contemporaneous compensation or otherwise had a reasonable anticipation of receiving a future benefit from those activities. In this case, Company X's undertaking the research and development activities and then providing technical data and know-how to Company Y in year 4 is inconsistent with the registration and subsequent exploitation of the patent by Company Y. Therefore, the Commissioner may impute one or more agreements between Company X and Company Y consistent with the economic substance of their course of conduct, which would afford Company X an appropriate portion of the premium return from the patent rights. For example, the Commissioner may impute a separate services agreement that affords Company X contingent-payment compensation for its services in year 4 for the benefit of Company Y, consisting of making available to Company Y technical data, know-how, and other fruits of research and development conducted in previous years. These services benefited Company Y by giving rise to and contributing to the value of the patent rights that were ultimately registered by Company Y. In the alternative, the Commissioner may impute a transfer of patentable intangible rights from Company X to Company Y immediately preceding the registration of patent rights by Company Y. The taxpayer may present additional facts that could indicate which of these or other alternative agreements best reflects the economic substance of the underlying transactions, consistent with the parties' course of conduct in the particular case.

(d)(3)(iii) and (iv) [Reserved]. For further guidance, see § 1.482–1(d)(3)(iii) and (d)(3)(iv).

(d)(3)(v) *Property or services.* Evaluating the degree of comparability between controlled and uncontrolled transactions requires a comparison of the property or services transferred in the transactions. This comparison may include any intangibles that are embedded in tangible property or services being transferred. The comparability of the embedded intangibles will be analyzed using the factors listed in § 1.482–4(c)(2)(iii)(B)(*1*) (comparable intangible property). The relevance of product comparability in evaluating the relative reliability of the results will depend on the method applied. For guidance concerning the specific comparability considerations applicable to transfers of tangible and intangible property and performance of services, see §§ 1.482–3 through 1.482–6 and § 1.482–9T; see also § 1.482–3(f), § 1.482–4T(f)(4), and § 1.482–9T(m), dealing with the coordination of the intangible and tangible property and performance of services rules.

(d)(4) through (f)(2)(i) [Reserved]. For further guidance, see § 1.482–1(d)(4) through (f)(2)(i).

(f)(2)(ii) *Allocation based on taxpayer's actual transactions*—(A) *In general.* The Commissioner will evaluate the results of a transaction as actually structured by the taxpayer unless its structure lacks economic substance. However, the Commissioner may consider the alternatives available to the taxpayer in determining whether the terms of the controlled transaction would be acceptable to an uncontrolled taxpayer faced with the same alternatives and operating under comparable circumstances. In such cases the Commissioner may adjust the consideration charged in the controlled transaction based on the cost or profit of an alternative as adjusted to account for material differences between the alternative and the controlled transaction, but will not restructure the transaction as if the alternative had been adopted by the taxpayer. See § 1.482–1(d)(3) (factors for determining comparability; contractual terms and risk); §§ 1.482–3(e), 1.482–4(d), and 1.482–9T(h) (unspecified methods).

(f)(2)(ii)(B) through (f)(2)(iii)(A) [Reserved]. For further guidance, see § 1.482–1(f)(2)(ii)(B) through (f)(2)(iii)(A).

(f)(2)(iii)(B) *Circumstances warranting consideration of multiple year data.* The extent to which it is appropriate to consider multiple year data depends on the method being applied and the issue being addressed. Circumstances that may warrant consideration of data from multiple years include the extent to which complete and accurate data are available for the taxable year under review, the effect of business cycles in the controlled taxpayer's industry, or the effects of life cycles of the product or intangible being examined. Data from one or more years before or after the taxable year under review must ordinarily be considered for purposes of applying the provisions of paragraph (d)(3)(iii) of this section (risk), paragraph (d)(4)(i) of this section (market share strategy), § 1.482–4(f)(2) (periodic adjustments), § 1.482–5 (comparable profits method), § 1.482–9T(f) (comparable profits method for services), and § 1.482–9T(i) (contingent-payment contractual terms for services). On the other hand, multiple year data ordinarily will not be considered for purposes of applying the comparable uncontrolled price method of § 1.482–3(b) or the comparable uncontrolled services price method of § 1.482–9T(c) (except to the extent that risk or market share strategy issues are present).

(f)(2)(iii)(C) through (g)(3) [Reserved]. For further guidance, see § 1.482–1(f)(2)(iii)(C) through (g)(3).

(g)(4) *Setoffs*—(i) *In general.* If an allocation is made under section 482 with respect to a transaction between

controlled taxpayers, the Commissioner will take into account the effect of any other non-arm's length transaction between the same controlled taxpayers in the same taxable year which will result in a setoff against the original section 482 allocation. Such setoff, however, will be taken into account only if the requirements of paragraph (g)(4)(ii) of this section are satisfied. If the effect of the setoff is to change the characterization or source of the income or deductions, or otherwise distort taxable income, in such a manner as to affect the U.S. tax liability of any member, adjustments will be made to reflect the correct amount of each category of income or deductions. For purposes of this setoff provision, the term arm's length refers to the amount defined in paragraph (b) of this section (Arm's length standard), without regard to the rules in § 1.482–2(a) that treat certain interest rates as arm's length rates of interest.

(g)(4)(ii) [Reserved]. For further guidance, see § 1.482–1(g)(4)(ii).

(g)(4)(iii) *Examples.* The following examples illustrate this paragraph (g)(4):

Example 1. P, a U.S. corporation, renders construction services to S, its foreign subsidiary in Country Y, in connection with the construction of S's factory. An arm's length charge for such services determined under § 1.482–9T would be $100,000. During the same taxable year P makes available to S the use of a machine to be used in the construction of the factory, and the arm's length rental value of the machine is $25,000. P bills S $125,000 for the services, but does not charge S for the use of the machine. No allocation will be made with respect to the undercharge for the machine if P notifies the district director of the basis of the claimed setoff within 30 days after the date of the letter from the district director transmitting the examination report notifying P of the proposed adjustment, establishes that the excess amount charged for services was equal to an arm's length charge for the use of the machine and that the taxable income and income tax liabilities of P are not distorted, and documents the correlative allocations resulting from the proposed setoff.

(g)(4)(iii) *Example 2* through (h) [Reserved]. For further guidance, see § 1.482–1(g)(4)(iii) *Example 2* through (h).

(i) *Definitions.* The definitions set forth in paragraphs (i)(1) through (i)(10) of this section apply to this section and §§ 1.482–2T through 1.482–9T.

(j)(1) through (j)(5) [Reserved]. For further guidance, see 1.482–1(j)(1) through (j)(5).

(j)(6)(i) The provisions of paragraphs (a)(1), (b)(2)(i), (d)(3)(ii)(C) *Example 3, Example 4, Example 5,* and *Example 6,* (d)(3)(v), (f)(2)(ii)(A), (f)(2)(iii)(B), (g)(4)(i), (g)(4)(iii), and (i) of this section are generally applicable for taxable years beginning after December 31, 2006.

(ii) A person may elect to apply the provisions of paragraphs (a)(1), (b)(2)(i), (d)(3)(ii)(C) *Example 3, Example 4, Example 5,* and *Example 6,* (d)(3)(v), (f)(2)(ii)(A), (f)(2)(iii)(B), (g)(4)(i), (g)(4)(iii), and (i) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(iii) The applicability of § 1.482–1T expires on or before July 31, 2009.

■ **Par. 6.** Section 1.482–2 is amended as follows:

■ 1. Paragraph (b) is revised.

■ 2. Paragraph (e) is added.

The addition and revision read as follows:

§ 1.482–2 Determination of taxable income in specific situations.

* * * * *

(b) *Rendering of services.* [Reserved]. For further guidance, see § 1.482–2T(b).

* * * * *

(e) *Effective date.* [Reserved]. For further guidance, see § 1.482–2T(e).

■ **Par. 7.** Section 1.482–2T is added to read as follows:

§ 1.482–2T Determination of taxable income in specific situations (temporary).

(a) [Reserved]. For further guidance, see § 1.482–2(a).

(b) *Rendering of services.* For rules governing allocations under section 482 to reflect an arm's length charge for controlled transactions involving the rendering of services, see § 1.482–9T.

(c) [Reserved]. For further guidance, see § 1.482–2(c).

(d) [Reserved]. For further guidance, see § 1.482–2(d).

(e) *Effective date*—(1) *In general.* The provision of paragraph (b) of this section is generally applicable for taxable years beginning after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of paragraph (b) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(3) *Expiration date.* The applicability of § 1.482–2T expires on or before July 31, 2009.

■ **Par. 8.** Section 1.482–4 is amended as follows:

■ 1. Paragraph (f)(3) is revised.

■ 2. Paragraphs (f)(4) and (f)(5) are redesignated as paragraphs (f)(5) and (f)(6), respectively.

■ 3. New paragraphs (f)(4) and (f)(7) are added.

The revision and additions read as follows:

§ 1.482–4 Methods to determine taxable income in connection with a transfer of intangible property.

* * * * *

(f) * * *

(3) [Reserved]. For further guidance, see § 1.482–4T(f)(3).

(4) [Reserved]. For further guidance, see § 1.482–4T(f)(4).

* * * * *

(7) [Reserved]. For further guidance, see § 1.482–4T(f)(7).

■ **Par. 9.** Section 1.482–4T is added to read as follows:

§ 1.482–4T Methods to determine taxable income in connection with a transfer of intangible property (temporary).

(a) through (f)(2) [Reserved]. For further guidance, see § 1.482–4(a) through (f)(2).

(f)(3) *Ownership of intangible property*—(i) *Identification of owner*—(A) *In general.* The legal owner of an intangible pursuant to the intellectual property law of the relevant jurisdiction, or the holder of rights constituting an intangible pursuant to contractual terms (such as the terms of a license) or other legal provision, will be considered the sole owner of the respective intangible for purposes of this section unless such ownership is inconsistent with the economic substance of the underlying transactions. See § 1.482–1(d)(3)(ii)(B) (identifying contractual terms). If no owner of the respective intangible is identified under the intellectual property law of the relevant jurisdiction, or pursuant to contractual terms (including terms imputed pursuant to § 1.482–1(d)(3)(ii)(B)) or other legal provision, then the controlled taxpayer who has control of the intangible, based on all the facts and circumstances, will be considered the sole owner of the intangible for purposes of this section.

(B) *Cost sharing arrangements.* The rule in paragraph (f)(3)(i)(A) of this section will apply to interests in covered intangibles, as defined in § 1.482–7(b)(4)(iv), only as provided in § 1.482–7 (sharing of costs).

(ii) *Examples.* The principles of this paragraph (f)(3) are illustrated by the following examples:

Example 1. FP, a foreign corporation, is the registered holder of the AA trademark in the United States. FP licenses to its U.S. subsidiary, USSub, the exclusive rights to manufacture and market products in the United States under the AA trademark. FP is the owner of the trademark pursuant to intellectual property law. USSub is the owner of the license pursuant to the terms of the license, but is not the owner of the trademark. See paragraphs (b)(3) and (4) of this section (defining an intangible as, among other things, a trademark or a license).

Example 2. The facts are the same as in *Example 1.* As a result of its sales and marketing activities, USSub develops a list of several hundred creditworthy customers that regularly purchase AA trademarked products. Neither the terms of the contract between FP and USSub nor the relevant intellectual property law specify which party owns the customer list. Because USSub has knowledge of the contents of the list, and has practical control over its use and dissemination, USSub is considered the sole owner of the customer list for purposes of this paragraph (f)(3).

(4) *Contribution to the value of an intangible owned by another*—(i) *In general.* The arm's length consideration for a contribution by one controlled taxpayer that develops or enhances the value, or may be reasonably anticipated to develop or enhance the value, of an intangible owned by another controlled taxpayer will be determined in accordance with the applicable rules under section 482. If the consideration for such a contribution is embedded within the contractual terms for a controlled transaction that involves such intangible, then ordinarily no separate allocation will be made with respect to such contribution. In such cases, pursuant to § 1.482–1(d)(3), the contribution must be accounted for in evaluating the comparability of the controlled transaction to uncontrolled comparables, and accordingly in determining the arm's length consideration in the controlled transaction.

(ii) *Examples.* The principles of this paragraph (f)(4) are illustrated by the following examples:

Example 1. A, a member of a controlled group, allows B, another member of the controlled group, to use tangible property, such as laboratory equipment, in connection with B's development of an intangible that B owns. By furnishing tangible property, A makes a contribution to the development of an intangible owned by another controlled taxpayer, B. Pursuant to paragraph (f)(4)(i) of this section, the arm's length charge for A's furnishing of tangible property will be determined under the rules for use of tangible property in § 1.482–2(c).

Example 2. (i) *Facts.* FP, a foreign producer of wristwatches, is the registered holder of the YY trademark in the United States and in other countries worldwide. FP enters into an exclusive, five-year, renewable agreement with its newly organized U.S. subsidiary, USSub. The contractual terms of the agreement grant USSub the exclusive right to re-sell trademark YY wristwatches in the United States, obligate USSub to pay a fixed price per wristwatch throughout the entire term of the contract, and obligate both FP and USSub to undertake without separate compensation specified types and levels of marketing activities.

(ii) The consideration for FP's and USSub's marketing activities, as well as the consideration for the exclusive right to re-sell YY trademarked merchandise in the United States, are embedded in the transfer price paid for the wristwatches. Accordingly, pursuant to paragraph (f)(4)(i) of this section, ordinarily no separate allocation would be appropriate with respect to these embedded contributions.

(iii) Whether an allocation is warranted with respect to the transfer price for the wristwatches is determined under §§ 1.482–1, 1.482–3, and this section through § 1.482–6. The comparability analysis would include consideration of all relevant factors, including the nature of the intangible embedded in the wristwatches and the nature of the marketing activities required under the agreement. This analysis would also take into account that the compensation for the activities performed by USSub and FP, as well as the consideration for USSub's use of the YY trademark, is embedded in the transfer price for the wristwatches, rather than provided for in separate agreements. See §§ 1.482–3(f) and 1.482–9T(m)(4).

Example 3. (i) *Facts.* FP, a foreign producer of athletic gear, is the registered holder of the AA trademark in the United States and in other countries. In year 1, FP licenses to a newly organized U.S. subsidiary, USSub, the exclusive rights to use certain manufacturing and marketing intangibles to manufacture and market athletic gear in the United States under the AA trademark. The license agreement obligates USSub to pay a royalty based on sales of trademarked merchandise. The license agreement also obligates FP and USSub to perform without separate compensation specified types and levels of marketing activities. In year 1, USSub manufactures and sells athletic gear under the AA trademark in the United States.

(ii) The consideration for FP's and USSub's respective marketing activities is embedded in the contractual terms of the license for the AA trademark. Accordingly, pursuant to paragraph (f)(4)(i) of this section, ordinarily no separate allocation would be appropriate with respect to the embedded contributions in year 1. See § 1.482–9T(m)(4).

(iii) Whether an allocation is warranted with respect to the royalty under the license agreement would be analyzed under § 1.482–1 and this section through § 1.482–6. The comparability analysis would include consideration of all relevant factors, such as the term and geographical exclusivity of the license, the nature of the intangibles subject to the license, and the nature of the marketing activities required to be undertaken pursuant to the license. Pursuant to paragraph (f)(4)(i) of this section, the analysis would also take into account the fact that the compensation for the marketing services is embedded in the royalty paid for use of the AA trademark, rather than provided for in a separate services agreement. For illustrations of application of the best method rule, see § 1.482–8T *Example 10*, *Example 11*, and *Example 12*.

Example 4. (i) *Facts.* The year 1 facts are the same as in *Example 3*, with the following exceptions. In year 2, USSub undertakes certain incremental marketing activities, in addition to those required by the contractual terms of the license for the AA trademark executed in year 1. The parties do not execute a separate agreement with respect to these incremental marketing activities performed by USSub The license agreement executed in year 1 is of sufficient duration that it is reasonable to anticipate that USSub will obtain the benefit of its incremental activities, in the form of increased sales or revenues of trademarked products in the U.S. market.

(ii) To the extent that it was reasonable to anticipate that USSub's incremental marketing activities would increase the value only of USSub's intangible (that is, USSub's license to use the AA trademark for a specified term), and not the value of the AA trademark owned by FP, USSub's incremental activities do not constitute a contribution for which an allocation is warranted under paragraph (f)(4)(i) of this section.

Example 5. (i) *Facts.* The year 1 facts are the same as in *Example 3.* In year 2, FP and USSub enter into a separate services agreement that obligates USSub to perform certain incremental marketing activities to promote AA trademark athletic gear in the United States, above and beyond the activities specified in the license agreement executed in year 1. In year 2, USSub begins to perform these incremental activities, pursuant to the separate services agreement with FP.

(ii) Whether an allocation is warranted with respect to USSub's incremental marketing activities covered by the separate services agreement would be evaluated under §§ 1.482–1 and 1.482–9T, including a comparison of the compensation provided for the services with the results obtained under a method pursuant to § 1.482–9T, selected and applied in accordance with the best method rule of § 1.482–1(c).

(iii) Whether an allocation is warranted with respect to the royalty under the license agreement is determined under § 1.482–1 and this section through § 1.482–6. The comparability analysis would include consideration of all relevant factors, such as the term and geographical exclusivity of the license, the nature of the intangibles subject to the license, and the nature of the marketing activities required to be undertaken pursuant to the license. The comparability analysis would take into account that the compensation for the incremental activities by USSub is provided for in the separate services agreement, rather than embedded in the royalty paid for use of the AA trademark. For illustrations of application of the best method rule, see § 1.482–8T *Example 10*, *Example 11*, and *Example 12*.

Example 6. (i) *Facts.* The year 1 facts are the same as in *Example 3.* In year 2, FP and USSub enter into a separate services agreement that obligates FP to perform incremental marketing activities, not specified in the year 1 license, by advertising AA trademarked athletic gear in selected international sporting events, such as the Olympics and the soccer World Cup. FP's corporate advertising department develops and coordinates these special promotions. The separate services agreement obligates USSub to pay an amount to FP for the benefit

to USSub that may reasonably be anticipated as the result of FP's incremental activities. The separate services agreement is not a qualified cost sharing arrangement under § 1.482–7. FP begins to perform the incremental activities in year 2 pursuant to the separate services agreement.

(ii) Whether an allocation is warranted with respect to the incremental marketing activities performed by FP under the separate services agreement would be evaluated under § 1.482–9T. Under the circumstances, it is reasonable to anticipate that FP's activities would increase the value of USSub's license as well as the value of FP's trademark. Accordingly, the incremental activities by FP may constitute in part a controlled services transaction for which USSub must compensate FP. The analysis of whether an allocation is warranted would include a comparison of the compensation provided for the services with the results obtained under a method pursuant to § 1.482–9T, selected and applied in accordance with the best method rule of § 1.482–1(c).

(iii) Whether an allocation is appropriate with respect to the royalty under the license agreement would be evaluated under § 1.482–1 through § 1.482–6 of this section. The comparability analysis would include consideration of all relevant factors, such as the term and geographical exclusivity of USSub's license, the nature of the intangibles subject to the license, and the marketing activities required to be undertaken by both FP and USSub pursuant to the license. This comparability analysis would take into account that the compensation for the incremental activities performed by FP was provided for in the separate services agreement, rather than embedded in the royalty paid for use of the AA trademark. For illustrations of application of the best method rule, see § 1.482–8T, *Example 10*, *Example 11*, and *Example 12*.

(f)(5) and (f)(6) [Reserved]. For further guidance, see § 1.482–4(f)(5) and (f)(6).

(f)(7) *Effective date.* (i) *In general.* The provisions of paragraphs (f)(3) and (f)(4) are generally applicable for taxable years beginning after December 31, 2006.

(ii) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of paragraphs (f)(3) and (f)(4) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(iii) *Expiration date.* The applicability of § 1.482–4T expires on or before July 31, 2009.

■ **Par. 10.** Section 1.482–6 is amended by revising paragraphs (c)(2)(ii)(B)(*1*), (c)(2)(ii)(D), (c)(3)(i)(A), (c)(3)(i)(B), and (c)(3)(ii)(D) to read as follows:

The revisions and addition read as follows:

§ 1.482–6 Profit split method.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(B) * * * (*1*) * * * [Reserved]. For further guidance, see § 1.482–6T(c)(2)(ii)(B)(*1*).

* * * * *

(D) [Reserved]. For further guidance, see § 1.482–6T(c)(2)(ii)(D).

* * * * *

(3) * * *

(i) * * *

(A) [Reserved]. For further guidance, see § 1.482–6T(c)(3)(i)(A).

(B) [Reserved]. For further guidance, see § 1.482–6T(c)(3)(i)(B).

(ii) * * *

(D) [Reserved]. For further guidance, see § 1.482–6T(c)(3)(ii)(D).

* * * * *

■ **Par. 11.** Section 1.482–6T is added to read as follows:

§ 1.482–6T Profit split method (temporary).

(a) through (c)(2)(ii)(A) [Reserved]. For further guidance, see § 1.482–6(a) through (c)(2)(ii)(A).

(c)(2)(ii)(B) *Comparability*—(*1*) *In general.* The degree of comparability between the controlled and uncontrolled taxpayers is determined by applying the comparability provisions of § 1.482–1(d). The comparable profit split compares the division of operating profits among the controlled taxpayers to the division of operating profits among uncontrolled taxpayers engaged in similar activities under similar circumstances. Although all of the factors described in § 1.482–1(d)(3) must be considered, comparability under this method is particularly dependent on the considerations described under the comparable profits method in § 1.482–5(c)(2) or § 1.482–9T(f)(2)(iii) because this method is based on a comparison of the operating profit of the controlled and uncontrolled taxpayers. In addition, because the contractual terms of the relationship among the participants in the relevant business activity will be a principal determinant of the allocation of functions and risks among them, comparability under this method also depends particularly on the degree of similarity of the contractual terms of the controlled and uncontrolled taxpayers. Finally, the comparable profit split may not be used if the combined operating profit (as a percentage of the combined assets) of the uncontrolled comparables varies significantly from that earned by the controlled taxpayers.

(c)(2)(ii)(B)(*2*) through (C) [Reserved]. For further guidance, see § 1.482–6(c)(2)(ii)(B)(*2*) through (C).

(c)(2)(ii)(D) *Other factors affecting reliability.* Like the methods described in §§ 1.482–3, 1.482–4, 1.482–5 and 1.482–9T, the comparable profit split relies exclusively on external market benchmarks. As indicated in § 1.482–1(c)(2)(i), as the degree of comparability between the controlled and uncontrolled transactions increases, the relative weight accorded the analysis under this method will increase. In addition, the reliability of the analysis under this method may be enhanced by the fact that all parties to the controlled transaction are evaluated under the comparable profit split. However, the reliability of the results of an analysis based on information from all parties to a transaction is affected by the reliability of the data and the assumptions pertaining to each party to the controlled transaction. Thus, if the data and assumptions are significantly more reliable with respect to one of the parties than with respect to the others, a different method, focusing solely on the results of that party, may yield more reliable results.

(c)(3)(i) [Reserved]. For further guidance, see § 1.482–6(c)(3)(i).

(c)(3)(i)(A) *Allocate income to routine contributions.* The first step allocates operating income to each party to the controlled transactions to provide a market return for its routine contributions to the relevant business activity. Routine contributions are contributions of the same or a similar kind to those made by uncontrolled taxpayers involved in similar business activities for which it is possible to identify market returns. Routine contributions ordinarily include contributions of tangible property, services and intangibles that are generally owned by uncontrolled taxpayers engaged in similar activities. A functional analysis is required to identify these contributions according to the functions performed, risks assumed, and resources employed by each of the controlled taxpayers. Market returns for the routine contributions should be determined by reference to the returns achieved by uncontrolled taxpayers engaged in similar activities, consistent with the methods described in §§ 1.482–3, 1.482–4, 1.482–5 and 1.482–9T.

(B) *Allocate residual profit*—(*1*) *Nonroutine contributions generally.* The allocation of income to the controlled taxpayer's routine contributions will not reflect profits attributable to each controlled taxpayer's contributions to the relevant business activity that are not routine (nonroutine contributions). A nonroutine contribution is a contribution that is not accounted for as a routine contribution. Thus, in cases where such nonroutine contributions are present there normally will be an unallocated residual profit after the allocation of income described in

paragraph (c)(3)(i)(A) of this section. Under this second step, the residual profit generally should be divided among the controlled taxpayers based upon the relative value of their nonroutine contributions to the relevant business activity. The relative value of the nonroutine contributions of each taxpayer should be measured in a manner that most reliably reflects each nonroutine contribution made to the controlled transaction and each controlled taxpayer's role in the nonroutine contributions. If the nonroutine contribution by one of the controlled taxpayers is also used in other business activities (such as transactions with other controlled taxpayers), an appropriate allocation of the value of the nonroutine contribution must be made among all the business activities in which it is used.

(*2*) *Nonroutine contributions of intangible property.* In many cases, nonroutine contributions of a taxpayer to the relevant business activity may be contributions of intangible property. For purposes of paragraph (c)(3)(i)(B)(*1*) of this section, the relative value of nonroutine intangible property contributed by taxpayers may be measured by external market benchmarks that reflect the fair market value of such intangible property. Alternatively, the relative value of nonroutine intangible property contributions may be estimated by the capitalized cost of developing the intangible property and all related improvements and updates, less an appropriate amount of amortization based on the useful life of each intangible. Finally, if the intangible development expenditures of the parties are relatively constant over time and the useful life of the intangible property contributed by all parties is approximately the same, the amount of actual expenditures in recent years may be used to estimate the relative value of nonroutine intangible property contributions.

(c)(3)(ii)(A) through (C) [Reserved]. For further guidance, see § 1.482–6(c)(3)(ii)(A) through (C).

(c)(3)(ii)(D) *Other factors affecting reliability.* Like the methods described in §§ 1.482–3, 1.482–4, 1.482–5 and 1.482–9T, the first step of the residual profit split relies exclusively on external market benchmarks. As indicated in § 1.482–1(c)(2)(i), as the degree of comparability between the controlled and uncontrolled transactions increases, the relative weight accorded the analysis under this method will increase. In addition, to the extent the allocation of profits in the second step is not based on external market benchmarks, the reliability of the analysis will be decreased in relation to an analysis under a method that relies on market benchmarks. Finally, the reliability of the analysis under this method may be enhanced by the fact that all parties to the controlled transaction are evaluated under the residual profit split. However, the reliability of the results of an analysis based on information from all parties to a transaction is affected by the reliability of the data and the assumptions pertaining to each party to the controlled transaction. Thus, if the data and assumptions are significantly more reliable with respect to one of the parties than with respect to the others, a different method, focusing solely on the results of that party, may yield more reliable results.

(c)(3)(iii) [Reserved]. For further guidance, see § 1.482–6(c)(3)(iii).

(d) *Effective date*—(1) *In general.* The provisions of paragraphs (c)(2)(ii)(B)(*1*) and (D), (c)(3)(i)(A) and (B), and (c)(3)(ii)(D) of this section are generally applicable for taxable years beginning after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of paragraphs (c)(2)(ii)(B)(*1*) and (D), (c)(3)(i)(A) and (B), and (c)(3)(ii)(D) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(3) *Expiration date.* The applicability of § 1.482–6T expires on or before July 31, 2009.

■ **Par. 12.** Section 1.482–8 is amended as follows:

■ 1. Designating the undesignated introductory text as paragraph (a) and adding a paragraph heading.

■ 2. Adding paragraph (b) designation, heading, and *Examples 10* through *12*.

The additions read as follows:

§ 1.482–8 Examples of the best method rule.

(a) *Introduction.* * * *

(b) *Examples.* * * *

Examples 10 through *12*. [Reserved]. For further guidance, see 1.482–8T(b) *Examples 10* through *12*.

■ **Par. 13.** Section 1.482–8T is added to read as follows:

§ 1.482–8T Examples of the best method rule (temporary).

(a) [Reserved]. For further guidance, see § 1.482–8(a).

(b) [Reserved]. For further guidance, see § 1.482–8(b), *Examples 1* through *9*.

Example 10. Cost of services plus method preferred to other methods. (i) FP designs and manufactures consumer electronic devices that incorporate advanced technology. In year 1, FP introduces Product X, an entertainment device targeted primarily at the youth market. FP's wholly-owned, exclusive U.S. distributor, USSub, sells Product X in the U.S. market. USSub hires an independent marketing firm, Agency A, to promote Product X in the U.S. market. Agency A has successfully promoted other electronic products on behalf of other uncontrolled parties. USSub executes a one-year, renewable contract with Agency A that requires it to develop the market for Product X, within an annual budget set by USSub. In years 1 through 3, Agency A develops advertising, buys media, and sponsors events featuring Product X. Agency A receives a markup of 25% on all expenses of promoting Product X, with the exception of media buys, which are reimbursed at cost. During year 3, sales of Product X decrease sharply, as Product X is displaced by competitors' products. At the end of year 3, sales of Product X are discontinued.

(ii) Prior to the start of year 4, FP develops a new entertainment device, Product Y. Like Product X, Product Y is intended for sale to the youth market, but it is marketed under a new trademark distinct from that used for Product X. USSub decides to perform all U.S. market promotion for Product Y. USSub hires key Agency A staff members who handled the successful Product X campaign. To promote Product Y, USSub intends to use methods similar to those used successfully by Agency A to promote Product X (print advertising, media, event sponsorship, etc.). FP and USSub enter into a one-year, renewable agreement concerning promotion of Product Y in the U.S. market. Under the agreement, FP compensates USSub for promoting Product Y, based on a cost of services plus markup of A%. Third-party media buys by USSub in connection with Product Y are reimbursed at cost.

(iii) Assume that under the contractual arrangements between FP and USSub, the arm's length consideration for Product Y and the trademark or other intangibles may be determined reliably under one or more transfer pricing methods. At issue in this example is the separate evaluation of the arm's length compensation for the year 4 promotional activities performed by USSub pursuant to its contract with FP.

(iv) USSub's accounting records contain reliable data that separately state the costs incurred to promote Product Y. A functional analysis indicates that USSub's activities to promote Product Y in year 4 are similar to activities performed by Agency A during years 1 through 3 under the contract with FP. In other respects, no material differences exist in the market conditions or the promotional activities performed in year 4, as compared to those in years 1 through 3.

(v) It is possible to identify uncontrolled distributors or licensees of electronic products that perform, as one component of their business activities, promotional activities similar to those performed by USSub. However, it is unlikely that publicly available accounting data from these companies would allow computation of the comparable transactional costs or total services costs associated with the marketing or promotional activities that these entities perform, as one component of business

activities. If that were possible, the comparable profits method for services might provide a reliable measure of an arm's length result. The functional analysis of the marketing activities performed by USSub in year 4 indicates that they are similar to the activities performed by Agency A in years 1 through 3 for Product X. Because reliable information is available concerning the markup on costs charged in a comparable uncontrolled transaction, the most reliable measure of an arm's length price is the cost of services plus method in § 1.482–9T(e).

Example 11. CPM for services preferred to other methods. (i) FP manufactures furniture and accessories for residential use. FP sells its products to retailers in Europe under the trademark, "Moda." FP holds all worldwide rights to the trademark, including in the United States. USSub is FP's wholly-owned subsidiary in the U.S. market and the exclusive U.S. distributor of FP's merchandise. Historically, USSub dealt only with specialized designers in the U.S. market and advertised in trade publications targeted to this market. Although items sold in the U.S. and Europe are physically identical, USSub's U.S. customers generally resell the merchandise as non-branded merchandise.

(ii) FP retains an independent firm to evaluate the feasibility of selling FP's trademarked merchandise in the general wholesale and retail market in the United States. The study concludes that this segment of the U.S. market, which is not exploited by USSub, may generate substantial profits. Based on this study, FP enters into a separate agreement with USSub, which provides that USSub will develop this market in the United States for the benefit of FP. USSub separately accounts for personnel expenses, overhead, and out-of-pocket costs attributable to the initial stage of the marketing campaign (Phase I). USSub receives as compensation its costs, plus a markup of X%, for activities in Phase I. At the end of Phase I, FP will evaluate the program. If success appears likely, USSub will begin full-scale distribution of trademarked merchandise in the new market segment, pursuant to agreements negotiated with FP at that time.

(iii) Assume that under the contractual arrangements in effect between FP and USSub, the arm's length consideration for the merchandise and the trademark or other intangibles may be determined reliably under one or more transfer pricing methods. At issue in this example is the separate evaluation of the arm's length compensation for the marketing activities conducted by USSub in years 1 and following.

(iv) A functional analysis reveals that USSub's activities consist primarily of modifying the promotional materials created by FP, negotiating media buys, and arranging promotional events. FP separately compensates USSub for all Phase I activities, and detailed accounting information is available regarding the costs of these activities. The Phase I activities of USSub are similar to those of uncontrolled companies that perform, as their primary business activity, a range of advertising and media relations activities on a contract basis for uncontrolled parties.

(v) No information is available concerning the comparable uncontrolled prices for services in transactions similar to those engaged in by FP and USSub. Nor is any information available concerning uncontrolled transactions that would allow application of the cost of services plus method. It is possible to identify uncontrolled distributors or licensees of home furnishings that perform, as one component of their business activities, promotional activities similar to those performed by USSub. However, it is unlikely that publicly available accounting data from these companies would allow computation of the comparable transactional costs or total services costs associated with the marketing or promotional activities that these entities performed, as one component of their business activities. On the other hand, it is possible to identify uncontrolled advertising and media relations companies, the principal business activities of which are similar to the Phase I activities of USSub. Under these circumstances, the most reliable measure of an arm's length price is the comparable profits method of § 1.482–9T(f). The uncontrolled advertising comparables' treatment of material items, such as classification of items as cost of goods sold or selling, general, and administrative expenses, may differ from that of USSub. Such inconsistencies in accounting treatment between the uncontrolled comparables and the tested party, or among the comparables, are less important when using the ratio of operating profit to total services costs under the comparable profits method for services in § 1.482–9T(f). Under this method, the operating profit of USSub from the Phase I activities is compared to the operating profit of uncontrolled parties that perform general advertising and media relations as their primary business activity.

Example 12. Residual profit split preferred to other methods. (i) USP is a manufacturer of athletic apparel sold under the AA trademark, to which FP owns the worldwide rights. USP sells AA trademark apparel in countries throughout the world, but prior to year 1, USP did not sell its merchandise in Country X. In year 1, USP acquires an uncontrolled Country X company which becomes its wholly-owned subsidiary, XSub. USP enters into an exclusive distribution arrangement with XSub in Country X. Before being acquired by USP in year 1, XSub distributed athletic apparel purchased from uncontrolled suppliers and resold that merchandise to retailers. After being acquired by USP in year 1, XSub continues to distribute merchandise from uncontrolled suppliers and also begins to distribute AA trademark apparel. Under a separate agreement with USP, XSub uses its best efforts to promote the AA trademark in Country X, with the goal of maximizing sales volume and revenues from AA merchandise.

(ii) Prior to year 1, USP executed long-term endorsement contracts with several prominent professional athletes. These contracts give USP the right to use the names and likenesses of the athletes in any country in which AA merchandise is sold during the term of the contract. These contracts remain in effect for five years, starting in year 1. Before being acquired by USP, XSub renewed a long-term agreement with SportMart, an uncontrolled company that owns a nationwide chain of sporting goods retailers in Country X. XSub has been SportMart's primary supplier from the time that SportMart began operations. Under the agreement, SportMart will provide AA merchandise preferred shelf-space and will feature AA merchandise at no charge in its print ads and seasonal promotions. In consideration for these commitments, USP and XSub grant SportMart advance access to new products and the right to use the professional athletes under contract with USP in SportMart advertisements featuring AA merchandise (subject to approval of content by USP).

(iii) Assume that it is possible to segregate all transactions by XSub that involve distribution of merchandise acquired from uncontrolled distributors (non-controlled transactions). In addition, assume that, apart from the activities undertaken by USP and XSub to promote AA apparel in Country X, the arm's length compensation for other functions performed by USP and XSub in the Country X market in years 1 and following can be reliably determined. At issue in this *Example 12* is the application of the residual profit split analysis to determine the appropriate division between USP and XSub of the balance of the operating profits from the Country X market, that is the portion attributable to nonroutine contributions to the marketing and promotional activities.

(iv) A functional analysis of the marketing and promotional activities conducted in the Country X market, as described in this example, indicates that both USP and XSub made nonroutine contributions to the business activity. FP contributed the long-term endorsement contracts with professional athletes. XSub contributed its long-term contractual rights with SportMart, which were made more valuable by its successful, long-term relationship with SportMart.

(v) Because both USP and XSub made valuable, nonroutine contributions to the marketing and promotional activities in Country X, neither the comparable uncontrolled services price method, the cost of services plus method, nor the comparable profits method for services will provide a reliable measure of an arm's length result. On account of the valuable, nonroutine contributions made by both parties, the most reliable measure of an arm's length result is the residual profit split method in § 1.482–9T(g). The residual profit split analysis would take into account both routine and nonroutine contributions by USP and XSub, in order to determine an appropriate allocation of the combined operating profits in the Country X market from the sale of AA merchandise and from related promotional and marketing activities.

(c) *Effective date*—(1) *In general.* The provisions of § 1.482–8T *Example 10*, *Example 11*, and *Example 12* are generally applicable for taxable years beginning after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of § 1.482–8T *Example 10*, *Example 11*, and *Example*

12 to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(3) *Expiration date.* The applicability of § 1.482–8T expires on or before July 31, 2009.

■ **Par. 14.** Section 1.482–9T is added to read as follows:

§ 1.482–9T Methods to determine taxable income in connection with a controlled services transaction (temporary).

(a) *In general.* The arm's length amount charged in a controlled services transaction must be determined under one of the methods provided for in this section. Each method must be applied in accordance with the provisions of § 1.482–1, including the best method rule of § 1.482–1(c), the comparability analysis of § 1.482–1(d), and the arm's length range of § 1.482–1(e), except as those provisions are modified in this section. The methods are—

(1) The services cost method, described in paragraph (b) of this section;

(2) The comparable uncontrolled services price method, described in paragraph (c) of this section;

(3) The gross services margin method, described in paragraph (d) of this section;

(4) The cost of services plus method, described in paragraph (e) of this section;

(5) The comparable profits method, described in § 1.482–5 and in paragraph (f) of this section;

(6) The profit split method, described in § 1.482–6 and in paragraph (g) of this section; and

(7) Unspecified methods, described in paragraph (h) of this section.

(b) *Services cost method*—(1) *In general.* The services cost method evaluates whether the amount charged for covered services meeting the requirements of paragraphs (b)(2) and (b)(3) of this section is arm's length by reference to the total services costs (as defined in paragraph (j) of this section) with no markup. If covered services meet the conditions of this paragraph (b), then the services cost method will be considered the best method for purposes of § 1.482–1(c), and the Commissioner's allocations will be limited to adjusting the amount charged for such services to the properly determined amount of such total services costs.

(2) *Not services that contribute significantly to fundamental risks of business success or failure.* Services are not covered services unless the taxpayer reasonably concludes in its business judgment that the covered services do not contribute significantly to key competitive advantages, core capabilities, or fundamental risks of success or failure in one or more trades or businesses of the renderer, the recipient, or both. In evaluating the reasonableness of the conclusion required by this paragraph (b)(2), consideration will be given to all the facts and circumstances.

(3) *Other conditions on application of services cost method.* The arm's length amount charged in a controlled services transaction may be evaluated under the services cost method if it meets the requirements of paragraph (b)(3)(i) of this section and is not described in paragraph (b)(3)(ii) of this section.

(i) *Adequate books and records.* Permanent books of account and records are maintained for as long as the costs with respect to the covered services are incurred by the renderer. Such books and records must include a statement evidencing the taxpayer's intention to apply the services cost method to evaluate the arm's length charge for such services. Such books and records must be adequate to permit verification by the Commissioner of the total services costs incurred by the renderer, including a description of the services in question, identification of the renderer and the recipient of such services, and sufficient documentation to allow verification of the methods used to allocate and apportion such costs to the services in question in accordance with paragraph (k) of this section.

(ii) *Excluded transactions.* The following categories of transactions, in whole or part, are not covered services:

(A) Manufacturing;

(B) Production;

(C) Extraction, exploration or processing of natural resources;

(D) Construction;

(E) Reselling, distribution, acting as a sales or purchasing agent, or acting under a commission or other similar arrangement;

(F) Research, development, or experimentation;

(G) Engineering or scientific;

(H) Financial transactions, including guarantees; and

(I) Insurance or reinsurance.

(4) *Covered services.* For purposes of this paragraph (b), covered services consist of a controlled transaction or a group of controlled service transactions (see § 1.482–1(f)(2)(i) (aggregation of transactions)) that meets the definition of specified covered services or low margin covered services.

(i) *Specified covered services.* Specified covered services are controlled services transactions that the Commissioner specifies by revenue procedure. Services will be included in such revenue procedure based upon the Commissioner's determination that the specified covered services are support services common among taxpayers across industry sectors and generally do not involve a significant median comparable markup on total services costs. For the definition of the median comparable markup on total services costs, see paragraph (b)(4)(ii) of this section. The Commissioner may add to, subtract from, or otherwise revise the specified covered services described in the revenue procedure by subsequent revenue procedure, which amendments will ordinarily be prospective only in effect.

(ii) *Low margin covered services.* Low margin covered services are controlled services transactions for which the median comparable markup on total services costs is less than or equal to seven percent. For purposes of this paragraph (b), the median comparable markup on total services costs means the excess of the arm's length price of the controlled services transaction determined under the general section 482 regulations without regard to this paragraph (b), using the interquartile range described in § 1.482–1(e)(2)(iii)(C) and as necessary adjusting to the median of such interquartile range, over total services costs, expressed as a percentage of total services costs.

(5) *Shared services arrangement*—(i) *In general.* If covered services are the subject of a shared services arrangement, then the arm's length charge to each participant for such services will be the portion of the total costs of the services otherwise determined under the services cost method of this paragraph (b) that is properly allocated to such participant pursuant to the arrangement.

(ii) *Requirements for shared services arrangement.* A shared services arrangement must meet the requirements described in this paragraph (b)(5).

(A) *Eligibility.* To be eligible for treatment under this paragraph (b)(5), a shared services arrangement must—

(*1*) Include two or more participants;

(*2*) Include as participants all controlled taxpayers that reasonably anticipate a benefit (as defined under paragraph (l)(3)(i) of this section) from one or more covered services specified in the shared services arrangement; and

(*3*) Be structured such that each covered service (or each reasonable aggregation of services within the meaning of paragraph (b)(5)(iii)(B) of this section) confers a benefit on at least one participant in the shared services arrangement.

(B) *Allocation.* The costs for covered services must be allocated among the participants based on their respective shares of the reasonably anticipated benefits from those services, without regard to whether the anticipated benefits are in fact realized. Reasonably anticipated benefits are benefits as defined in paragraph (l)(3)(i) of this section. The allocation of costs must provide the most reliable measure of the participants' respective shares of the reasonably anticipated benefits under the principles of the best method rule. See § 1.482–1(c). The allocation must be applied on a consistent basis for all participants and services. The allocation to each participant in each taxable year must reasonably reflect that participant's respective share of reasonably anticipated benefits for such taxable year. If the taxpayer reasonably concluded that the shared services arrangement (including any aggregation pursuant to paragraph (b)(5)(iii)(B) of this section) allocated costs for covered services on a basis that most reliably reflects the participants' respective shares of the reasonably anticipated benefits attributable to such services, as provided for in this paragraph (b)(5), then the Commissioner may not adjust such allocation basis.

(C) *Documentation.* The taxpayer must maintain sufficient documentation to establish that the requirements of this paragraph (b)(5) are satisfied, and include—

(*1*) A statement evidencing the taxpayer's intention to apply the services cost method to evaluate the arm's length charge for covered services pursuant to a shared services arrangement;

(*2*) A list of the participants and the renderer or renderers of covered services under the shared services arrangement;

(*3*) A description of the basis of allocation to all participants, consistent with the participants' respective shares of reasonably anticipated benefits; and

(*4*) A description of any aggregation of covered services for purposes of the shared services arrangement, and an indication whether this aggregation (if any) differs from the aggregation used to evaluate the median comparable markup for any low margin covered services described in paragraph (b)(4)(ii) of this section.

(iii) *Definitions and special rules*—(A) *Participant.* A participant is a controlled taxpayer that reasonably anticipates benefits from covered services subject to a shared services arrangement that substantially complies with the requirements described in this paragraph (b)(5).

(B) *Aggregation.* Two or more covered services may be aggregated in a reasonable manner taking into account all the facts and circumstances, including whether the relative magnitude of reasonably anticipated benefits of the participants sharing the costs of such aggregated services may be reasonably reflected by the allocation basis employed pursuant to paragraph (b)(5)(ii)(B) of this section. The aggregation of services under a shared services arrangement may differ from the aggregation used to evaluate the median comparable markup for any low margin covered services described in paragraph (b)(4)(ii) of this section, provided that such alternative aggregation can be implemented on a reasonable basis, including appropriately identifying and isolating relevant costs, as necessary.

(C) *Coordination with cost sharing arrangements.* To the extent that an allocation is made to a participant in a shared services arrangement that is also a participant in a cost sharing arrangement subject to § 1.482–7, such amount with respect to covered services is first allocated pursuant to the shared services arrangement under this paragraph (b)(5). Costs allocated pursuant to a shared services arrangement may (if applicable) be further allocated between the intangible development activity under § 1.482–7 and other activities of the participant.

(6) *Examples.* The application of this section is illustrated by the following examples. No inference is intended whether the presence or absence of one or more facts is determinative of the conclusion in any example. For purposes of *Examples 1* through *14*, assume that Company P and its subsidiaries, Company Q and Company R, are corporations and members of the same group of controlled entities (PQR Controlled Group). For purposes of *Examples 15* through *17*, assume that Company P and its subsidiary, Company S, are corporations and members of the same group of controlled entities (PS Controlled Group). For purposes of *Examples 18* through *26*, assume that Company P and its subsidiaries, Company X, Company Y, and Company Z, are corporations and members of the same group of controlled entities (PXYZ Group) and that Company P and its subsidiaries satisfy all of the requirements for a shared services arrangement specified in paragraphs (b)(5)(ii) and (iii) of this section.

Example 1. Data entry services. (i) Company P, Company Q and Company R own and operate hospitals. Company P also owns and operates a computer system for maintaining medical information gathered by doctors and nurses during interviews and treatment of patients. Company P uses a scanning device to convert medical information from various paper records into a digital format. Company Q and Company R do not have a computer system that allows them to input or maintain this information, but they have access to this information through their computer systems. Since Company Q and Company R do not have the requisite computer infrastructure, Company P maintains this medical information for itself as well as for Company Q and Company R.

(ii) Assume that these services relating to data entry are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of paragraph (b) of this section, Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 2. Data entry services. (i) Company P owns and operates several gambling establishments. Company Q and Company R own and operate travel agencies. Company P provides its customers with a "player's card," which is a smart card device used in Company P's gambling establishments to track a player's bets, winnings, losses, hotel accommodations, and food and drink purchases. Using their customer lists, Company Q and Company R request marketing information about their customers that Company P has gathered from these player's cards. Company Q and Company R use the smart card data to sell customized vacation packages to their customers, taking into account their individual preferences and spending patterns. Annual reports for the PQR Controlled Group state that these smart card data constitute an important element of the group's overall strategic business planning, including advertising and accommodations.

(ii) Assume that these services relating to data entry are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 3. Recruiting services. (i) Company P, Company Q and Company R are manufacturing companies that sell their products to unrelated retail establishments. Company P's human resources department recruits mid-level managers and engineers for itself as well as for Company Q and Company R by attending job fairs and other recruitment events. For recruiting higher-level managers and engineers, each of these companies uses

recruiters from unrelated executive search firms.

(ii) Assume that these services relating to recruiting are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of paragraph (b) of this section, Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 4. Recruiting services. (i) Company P, Company Q and Company R are agencies that represent celebrities in the entertainment industry. Among the most important resources of these companies are the highly compensated agents who have close personal relationships with celebrities in the entertainment industry. Company P implements a recruiting plan to hire highly compensated agents for itself, and other highly compensated agents for each of its wholly-owned subsidiaries in foreign countries, Company Q and Company R.

(ii) Assume that these services relating to recruiting are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 5. Credit analysis services. (i) Company P is a manufacturer and distributor of clothing for retail stores. Company Q and Company R are distributors of clothing for retail stores. As part of its operations, personnel in Company P perform credit analysis on its customers. Most of the customers have a history of purchases from Company P, and the credit analysis involves a review of the recent payment history of the customer's account. For new customers, the personnel in Company P perform a basic credit check of the customer, using reports from a business credit reporting agency. On behalf of Company Q and Company R, Company P performs credit analysis on customers who order clothing from Company Q and Company R, using the same method as Company P uses for itself.

(ii) Assume that these services relating to credit analysis are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of this paragraph (b), Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 6. Credit analysis services. (i) Company P, Company Q and Company R lease furniture to retail customers who present a significant credit risk and are generally unable to lease furniture from other providers. As part of its leasing operations, personnel in Company P perform credit analysis on each of the potential lessees. The personnel have developed special expertise in determining whether a particular customer who presents a significant credit risk (as indicated by credit reporting agencies) will be likely to make the requisite lease payments on a timely basis. In order to compensate for the specialized analysis of a customer's default risk, as well as the default risk itself, Company P charges more than the market lease rate charged to customers with average credit ratings. Also, as part of its operations, Company P performs similar credit analysis services for Company Q and Company R, which charge correspondingly high monthly lease payments.

(ii) Assume that these services relating to credit analysis are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 7. Credit analysis services. (i) Company P is a large full-service bank, which provides products and services to corporate and consumer markets, including unsecured loans, secured loans, lines of credit, letters of credit, conversion of foreign currency, consumer loans, trust services, and sales of certificates of deposit. Company Q makes routine consumer loans to individuals, such as auto loans and home equity loans. Company R makes only business loans to small businesses.

(ii) Company P performs credit analysis and prepares credit reports for itself, as well as for Company Q and Company R. Company P, Company Q and Company R regularly employ these credit reports in the ordinary course of business in making decisions regarding extensions of credit to potential customers (including whether to lend, rate of interest, and loan terms).

(iii) Assume that these services relating to credit analysis are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the credit analysis services constitute part of a "financial transaction" described in paragraph (b)(3)(ii)(H) of this section. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 8. Data verification services. (i) Company P, Company Q and Company R are manufacturers of industrial supplies. Company P's accounting department performs periodic reviews of the accounts payable information of Company P, Company Q and Company R, and identifies any inaccuracies in the records, such as double-payments and double-charges.

(ii) Assume that these services relating to verification of data are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of this paragraph (b), Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 9. Data verification services. (i) Company P gathers from unrelated customers information regarding accounts payable and accounts receivable and utilizes its own computer system to analyze that information for purposes of identifying errors in payment and receipts (data mining). Company P is compensated for these services based on a fee that reflects a percentage of amounts collected by customers as a result of the data mining services. These activities constitute a significant portion of Company P's business. Company P performs similar activities for Company Q and Company R by analyzing their accounts payable and accounts receivable records.

(ii) Assume that these services relating to data mining are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 10. Legal services. (i) Company P is a domestic corporation with two wholly-owned foreign subsidiaries, Company Q and Company R. Company P and its subsidiaries manufacture and distribute equipment used by industrial customers. Company P maintains an in-house legal department consisting of attorneys experienced in a wide range of business and commercial matters. Company Q and Company R maintain small legal departments, consisting of attorneys experienced in matters that most frequently arise in the normal course of business of Company Q and Company R in their respective jurisdictions.

(ii) Company P seeks to maintain in-house legal staff with the ability to address the majority of legal matters that arise in the United States with respect to the operations of Company P, as well as any U.S. reporting or compliance obligations of Company Q or Company R. The in-house legal staffs of Company Q and Company R are much more limited. It is necessary for Company P to retain several local law firms to handle litigation and business disputes arising from the activities of Company Q and Company R.

Although Company Q and Company R pay the fees of these law firms, the hiring authority and general oversight of the firms' representation is in the legal department of Company P.

(iii) In determining what portion of the legal expenses of Company P may be allocated to Company Q and Company R, Company P first excludes any expenses relating to legal services that constitute shareholder activities and other items that are not properly analyzed as controlled services. Assume that the remaining services relating to general legal functions performed by in-house legal counsel are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these latter services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of this paragraph (b), Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 11. Legal services. (i) Company P is a domestic holding company whose operating companies generate electric power for consumers by operating nuclear plants. Company P has several domestic operating companies, including Companies Q and R. Assume that, although Company P owns 100% of the stock of Companies Q and R, the companies do not elect to file a consolidated Federal income tax return with Company P.

(ii) Company P maintains an in-house legal department consisting of experienced attorneys in the areas of Federal utilities regulation, Federal labor and environmental law, securities law, and general commercial law. Companies Q and R maintain their own, smaller in-house legal staffs comprised of experienced attorneys in the areas of state and local utilities regulation, state labor and employment law, and general commercial law. The legal department of Company P performs general oversight of the legal affairs of the company and determines whether a particular matter would be more efficiently handled by the Company P legal department, by the legal staffs in the operating companies, or in rare cases, by retained outside counsel. In general, Company P has succeeded in minimizing duplication and overlap of functions between the legal staffs of the various companies or by retained outside counsel.

(iii) The domestic nuclear power plant operations of Companies Q and R are subject to extensive regulation by the U.S. Nuclear Regulatory Commission (NRC). Operators are required to obtain pre-construction approval, operating licenses, and, at the end of the operational life of the nuclear reactor, nuclear decommissioning certificates. Company P files consolidated financial statements on behalf of itself, as well as Companies Q and R, with the United States Securities and Exchange Commission (SEC). In these SEC filings, Company P discloses that failure to obtain any of these licenses (and the related periodic renewals) or agreeing to licenses on terms less favorable than those granted to competitors would have a material adverse impact on the operations of Company Q or Company R. Company P maintains a group of experienced attorneys that exclusively represents Company Q and Company R before the NRC. Although Company P occasionally hires an outside law firm or industry expert to assist on particular NRC matters, the majority of the work is performed by the specialized legal staff of Company P.

(iv) Certain of the legal services performed by Company P constitute duplicative or shareholder activities that do not confer a benefit on the other companies and therefore do not need to be allocated to the other companies, while certain other legal services are eligible to be charged to Company Q and Company R in accordance with the services cost method.

(v) Assume that the specialized legal services relating to nuclear licenses performed by in-house legal counsel of Company P are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 12. Group of services. (i) Company P, Company Q and Company R are manufacturing companies that sell their products to unrelated retail establishments. Company P has an enterprise resource planning (ERP) system that maintains data relating to accounts payable and accounts receivable information for all three companies. Company P's personnel perform the daily operations on this ERP system such as inputting data relating to accounts payable and accounts receivable into the system and extracting data relating to accounts receivable and accounts payable in the form of reports or electronic media and providing those data to all three companies. Periodically, Company P's computer specialists also modify the ERP system to adapt to changing business functions in all three companies. Company P's computer specialists make these changes by either modifying the underlying software program or by purchasing additional software or hardware from unrelated third party vendors.

(ii) Assume that these services relating to accounts payable and accounts receivable are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of this paragraph (b), Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

(iii) Assume that the services performed by Company P's computer specialists that relate to modifying the ERP system are specifically excluded from the services described in a revenue procedure referenced in paragraph (b)(4) of this section as developing hardware or software solutions (such as systems integration, Web site design, writing computer programs, modifying general applications software, or recommending the purchase of commercially available hardware or software). Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 13. Group of services. (i) Company P manufactures and sells widgets under an exclusive contract to Customer 1. Company Q and Company R sell widgets under exclusive contracts to Customer 2 and Customer 3, respectively. At least one year in advance, each of these customers can accurately forecast its need for widgets. Using these forecasts, each customer over the course of the year places orders for widgets with the appropriate company, Company P, Company Q or Company R. A customer's actual need for widgets seldom deviates from that customer's forecasted need.

(ii) It is most efficient for the PQR Controlled Group companies to manufacture and store an inventory of widgets in advance of delivery. Although all three companies sell widgets, only Company P maintains a centralized warehouse for widgets. Pursuant to a contract, Company P provides storage of these widgets to Company Q and Company R at an arm's length price.

(iii) Company P's personnel also obtain orders from all three companies customers to draw up purchase orders for widgets as well as make payment to suppliers for widget replacement parts. In addition, Company P's personnel use data entry to input information regarding orders and sales of widgets and replacement parts for all three companies into a centralized computer system. Company P's personnel also maintain the centralized computer system and extract data for all three companies when necessary.

(iv) Assume that these services relating to tracking purchases and sales of inventory are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances of the business of the PQR Controlled Group, the taxpayer could reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. If these services meet the other requirements of this paragraph (b), Company P will be eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 14. Group of services. (i) Company P, Company Q and Company R assemble and sell gadgets to unrelated customers. Each of these companies purchases the components necessary for assembly of the gadgets from unrelated suppliers. As a service to its subsidiaries, Company P's personnel obtain orders for components from all three companies, prepare purchase orders, and make payment

to unrelated suppliers for the components. In addition, Company P's personnel use data entry to input information regarding orders and sales of gadgets for all three companies into a centralized computer. Company P's personnel also maintain the centralized computer system and extract data for all three companies on an as-needed basis. The services provided by Company P personnel, in conjunction with the centralized computer system, constitute a state-of-the-art inventory management system that allows Company P to order components necessary for assembly of the gadgets on a "just-in-time" basis.

(ii) Unrelated suppliers deliver the components directly to Company P, Company Q and Company R. Each of the companies stores the components in its own facilities for use in filling specific customer orders. The companies do not maintain any inventory that is not identified in specific customer orders. Because of the efficiencies associated with services provided by personnel of Company P, all three companies are able to significantly reduce their inventory-related costs. Company P's Chief Executive Officer makes a statement in one of its press conferences with industry analysts that its inventory management system is critical to the company's success.

(iii) Assume that these services that relate to tracking purchase and sales of inventory are specified covered services within the meaning of paragraph (b)(4)(i) of this section. Under the facts and circumstances, the taxpayer is unable to reasonably conclude that these services do not contribute significantly to the controlled group's key competitive advantages, core capabilities, or fundamental risks of success or failure in the group's business. Company P is not eligible to charge these services to Company Q and Company R in accordance with the services cost method.

Example 15. Low margin covered services. Company P renders certain accounting services to Company S. Company P uses the services cost method for the accounting services, and determines the amount charged as Company P's total cost of rendering the services, with no markup. Based on an application of the section 482 regulations without regard to this paragraph (b), the interquartile range of arm's length markups on total services costs is between 3% and 6%, and the median is 4%. Because the median comparable markup on total services costs is 4%, which is less than 7%, the accounting services constitute low margin covered services within the meaning of paragraph (b)(4)(ii) of this section.

Example 16. Low margin covered services. Company P performs logistics-coordination services for its subsidiaries, including Company S. Company P uses the services cost method for the logistics services, and determines the amount charged as Company P's total cost of rendering the services, with no markup. Based on an application of the section 482 regulations without regard to this paragraph (b), the interquartile range of arm's length markups on total services costs is between 6% and 13%, and the median is 9%. Because the median comparable markup on total services costs is 9%, which exceeds 7%, the logistics-coordination services do not constitute low margin covered services within the meaning of paragraph (b)(4)(ii) of this section. With respect to the determination and application of the interquartile range, see § 1.482–1(e)(2)(iii)(C).

Example 17. Low margin covered services. Company P performs certain custodial and maintenance services for certain office properties owned by Company S. Company P uses the services cost method for the services, and determines the amount charged as Company P's total cost of providing the services plus no markup. Uncontrolled comparables perform a similar range of custodial and maintenance services for uncontrolled parties and charge those parties an annual fee based on the total square footage of the property. These transactions meet the criteria for application of the comparable uncontrolled services price method of paragraph (c) of this section. The arm's length price for the custodial and maintenance services is determined under the general section 482 regulations without regard to this paragraph (b), using the interquartile range described in § 1.482–1(e)(2)(iii)(C) and as necessary adjusting to the median of such interquartile range. Based on reliable accounting information, the total services costs (as defined in paragraph (j) of this section) attributable to the custodial and maintenance services are subtracted from such price. The resulting excess of such price of the controlled services transaction over total services costs, as expressed as a percentage of total services costs, is determined to be 4%. Because the median comparable markup on total services costs as determined by an application of the section 482 regulations without regard to this paragraph (b) is 4%, which is less than 7%, the custodial and maintenance services constitute low margin covered services within the meaning of paragraph (b)(4)(ii) of this section.

Example 18. Shared services arrangement and reliable measure of reasonably anticipated benefit (allocation key). (i) Company P operates a centralized data processing facility that performs automated invoice processing and order generation for all of its subsidiaries, Companies X, Y, Z, pursuant to a shared services arrangement.

(ii) In evaluating the shares of reasonably anticipated benefits from the centralized data processing services, the total value of the merchandise on the invoices and orders may not provide the most reliable measure of reasonably anticipated benefits shares, because value of merchandise sold does not bear a relationship to the anticipated benefits from the underlying covered services.

(iii) The total volume of orders and invoices processed may provide a more reliable basis for evaluating the shares of reasonably anticipated benefits from the data processing services. Alternatively, depending on the facts and circumstances, total central processing unit time attributable to the transactions of each subsidiary may provide a more reliable basis on which to evaluate the shares of reasonably anticipated benefits.

Example 19. Shared services arrangement and reliable measure of reasonably anticipated benefit (allocation key). (i) Company P operates a centralized center that performs human resources functions, such as administration of pension, retirement, and health insurance plans that are made available to employees of its subsidiaries, Companies X, Y, Z, pursuant to a shared services arrangement.

(ii) In evaluating the shares of reasonably anticipated benefits from these centralized services, the total revenues of each subsidiary may not provide the most reliable measure of reasonably anticipated benefit shares, because total revenues do not bear a relationship to the shares of reasonably anticipated benefits from the underlying services.

(iii) Employee headcount or total compensation paid to employees may provide a more reliable basis for evaluating the shares of reasonably anticipated benefits from the covered services.

Example 20. Shared services arrangement and reliable measure of reasonably anticipated benefit (allocation key). (i) Company P performs human resource services (service A) on behalf of the PXYZ Group that qualify for the services cost method. Under that method, Company P determines the amount charged for these services pursuant to a shared services arrangement based on an application of paragraph (b)(5) of this section. Service A constitutes a specified covered service described in a revenue procedure pursuant to paragraph (b)(4)(i) of this section. The total services costs for service A otherwise determined under the services cost method is 300.

(ii) Companies X, Y and Z reasonably anticipate benefits from service A. Company P does not reasonably anticipate benefits from service A. Assume that if relative reasonably anticipated benefits were precisely known, the appropriate allocation of charges pursuant to § 1.482–9T(k) to Company X, Y and Z for service A is as follows:

SERVICE A

[Total cost 300]

Company	
X	150
Y	75
Z	75

(iii) The total number of employees (employee headcount) in each company is as follows:

Company X—600 employees.
Company Y—250 employees.
Company Z—250 employees.

(iv) Company P allocates the 300 total services costs of service A based on employee headcount as follows:

SERVICE A

[Total cost 300]

Allocation key	Company	
	Headcount	Amount
X	600	164
Y	250	68

SERVICE A—Continued

[Total cost 300]

Allocation key	Company	
	Headcount	Amount
Z	250	68

(v) Based on these facts, Company P may reasonably conclude that the employee headcount allocation basis most reliably reflects the participants' respective shares of the reasonably anticipated benefits attributable to service A.

Example 21. Shared services arrangement and reliable measure of reasonably anticipated benefit (allocation key). (i) Company P performs accounts payable services (service B) on behalf of the PXYZ Group and determines the amount charged for the services under such method pursuant to a shared services arrangement based on an application of paragraph (b)(5) of this section. Service B is a specified covered service described in a revenue procedure pursuant to paragraph (b)(4)(i) of this section. The total services costs for service B otherwise determined under the services cost method is 500.

(ii) Companies X, Y and Z reasonably anticipate benefits from service B. Company P does not reasonably anticipate benefits from service B. Assume that if relative reasonably anticipated benefits were precisely known, the appropriate allocation of charges pursuant to § 1.482–9T(k) to Companies X, Y and Z for service B is as follows:

SERVICE B

[Total cost 500]

Company	
X	125
Y	205
Z	170

(iii) The total number of employees (employee headcount) in each company is as follows:

Company X—600.
Company Y—200.
Company Z—200.

(iv) The total number of transactions (transaction volume) with uncontrolled customers by each company is as follows:

Company X—2,000.
Company Y—4,000.
Company Z—3,500.

(v) If Company P allocated the 500 total services costs of service B based on employee headcount, the resulting allocation would be as follows:

SERVICE B

[Total cost 500]

Allocation key	Company	
	Headcount	Amount
X	600	300
Y	200	100
Z	200	100

(vi) In contrast, if Company P used volume of transactions with uncontrolled customers as the allocation basis under the shared services arrangement, the allocation would be as follows:

SERVICE B

[Total cost 500]

Allocation key	Company	
	Transaction volume	Amount
X	2,000	105
Y	4,000	211
Z	3,500	184

(vi) Based on these facts, Company P may reasonably conclude that the transaction volume, but not the employee headcount, allocation basis most reliably reflects the participants' respective shares of the reasonably anticipated benefits attributable to service B.

Example 22. Shared services arrangement and aggregation. (i) Company P performs human resource services (service A) and accounts payable services (service B) on behalf of the PXYZ Group that qualify for the services cost method. Company P determines the amount charged for these services under such method pursuant to a shared services arrangement based on an application of paragraph (b)(5) of this section. Service A and service B are specified covered services described in a revenue procedure pursuant to paragraph (b)(4)(i) of this section. The total services costs otherwise determined under the services cost method for service A is 300 and for service B is 500; total services costs for services A and B are 800. Company P determines that aggregation of services A and B for purposes of the arrangement is appropriate.

(ii) Companies X, Y and Z reasonably anticipate benefits from services A and B. Company P does not reasonably anticipate benefits from services A and B. Assume that if relative reasonably anticipated benefits were precisely known, the appropriate allocation of total charges pursuant to § 1.482–9T(k) to Companies X, Y and Z for services A and B is as follows:

SERVICES A AND B

[Total cost 800]

Company	
X	350
Y	100
Z	350

(iii) The total volume of transactions with uncontrolled customers in each company is as follows:

Company X—2,000.
Company Y—4,000.
Company Z—4,000.

(iv) The total number of employees in each company is as follows:

Company X—600.
Company Y—200.
Company Z—200.

(v) If Company P allocated the 800 total services costs of services A and B based on transaction volume or employee headcount, the resulting allocation would be as follows:

AGGREGATED SERVICES AB

[Total cost 800]

Company	Allocation key		Allocation key	
	Transaction volume	Amount	Headcount	Amount
X	2,000	160	600	480
Y	4,000	320	200	160
Z	4,000	320	200	160

(vi) In contrast, if aggregated services AB were allocated reference to the total U.S. dollar value of sales to uncontrolled parties (trade sales) by each company, the following results would obtain:

AGGREGATED SERVICES AB

[Total costs 800]

Company	Allocation key	
	Trade sales (millions)	Amount
X	$400	314
Y	120	94
Z	500	392

(vii) Based on these facts, Company P may reasonably conclude that the trade sales, but not the transaction volume or the employee headcount, allocation basis most reliably reflects the participants' respective shares of the reasonably anticipated benefits attributable to services AB.

Example 23. Shared services arrangement and aggregation. (i) Company P performs services A through P on behalf of the PXYZ Group that qualify for the services cost method. Company P determines the amount charged for these services under such method pursuant to a shared services arrangement based on an application of paragraph (b)(5) of this section. All of these services A through Z constitute either specified covered services or low margin covered services described in paragraph (b)(4) of this section. The total services costs for services A through Z otherwise determined under the services cost method is 500. Company P determines that aggregation of services A through Z for purposes of the arrangement is appropriate.

(ii) Companies X and Y reasonably anticipate benefits from services A through Z and Company Z reasonably anticipates benefits from services A through X but not from services Y or Z (Company Z performs services similar to services Y and Z on its own behalf). Company P does not reasonably anticipate benefits from services A through Z. Assume that if relative reasonably anticipated benefits were precisely known, the appropriate allocation of total charges pursuant to § 1.482–9T(k) to Company X, Y and Z for services A through Z is as follows:

Company	Services A–M (cost 490)	Services N–P (cost 10)	Services A–P (total cost 500)
X	90	5	95
Y	240	5	245
Z	160		160

(iii) The total volume of transactions with uncontrolled customers in each company is as follows:

Company X—2,000.
Company Y—4,500.
Company Z—3,500.

(iv) Company P allocates the 500 total services costs of services A through Z based on transaction volume as follows:

AGGREGATED SERVICES A–Z

[Total costs 500]

Company	Allocation key	
	Transaction volume	Amount
X	2,000	100
Y	4,500	225
Z	3,500	175

(v) Based on these facts, Company P may reasonably conclude that the transaction volume allocation basis most reliably reflects the participants' respective shares of the reasonably anticipated benefits attributable to services A through Z.

Example 24. Renderer reasonably anticipates benefits. (i) Company P renders services on behalf of the PXYZ Group that qualify for the services cost method. Company P determines the amount charged for these services under such method. Company P's share of reasonably anticipated benefits from services A, B, C, and D is 20% of the total reasonably anticipated benefits of all participants. Company P's total services cost for services A, B, C, and D charged within the Group is 100.

(ii) Based on an application of paragraph (b)(5) of this section, Company P charges 80 which is allocated among Companies X, Y and Z. No charge is made to Company P under the shared services arrangement for activities that it performs on its own behalf.

Example 25. Coordination with cost sharing arrangement. (i) Company P performs human resource services (service A) on behalf of the PXYZ Group that qualify for the services cost method. Company P determines the amount charged for these services under such method pursuant to a shared services arrangement based on an application of paragraph (b)(5) of this section. Service A constitutes a specified covered service described in a revenue procedure pursuant to paragraph (b)(4)(i) of this section. The total services costs for service A otherwise determined under the services cost method is 300.

(ii) Company X, Y, Z and P reasonably anticipate benefits from service A. Using a basis of allocation that is consistent with the controlled participants' respective shares of the reasonably anticipated benefits from the shared services, the total charge of 300 is allocated as follows:

X—100.
Y—50.
Z—25.
P—125.

(iii) In addition to performing services, P undertakes 500 of R&D and incurs manufacturing and other costs of 1,000.

(iv) Companies P and X enter into a cost sharing arrangement in accordance with § 1.482–7. Under the arrangement, Company P will undertake all intangible development activities. All of Company P's research and development (R&D) activity is devoted to the intangible development activity under the cost sharing arrangement. Company P will manufacture, market, and otherwise exploit the product in its defined territory. Companies P and X will share intangible development costs in accordance with their reasonably anticipated benefits from the intangibles, and Company X will make payments to Company P as required under § 1.482–7. Company X will manufacture, market, and otherwise exploit the product in the rest of the world.

(v) A portion of the charge under the shared services arrangement is in turn allocable to the intangible development activity undertaken by Company P. The most reliable estimate of the proportion allocable to the intangible development activity is determined to be 500 (Company P's R&D expenses) divided by 1,500 (Company P's total non-covered services costs), or one-third. Accordingly, one-third of Company P's charge of 125, or 42, is allocated to the intangible development activity. Companies P and X must share the intangible development costs of the cost shared intangibles (including the charge of 42 that is allocated under the shared services arrangement) in proportion to their respective shares of reasonably anticipated benefits under the cost sharing arrangement. That is, the reasonably anticipated benefit shares under the cost sharing arrangement are determined separately from reasonably anticipated benefit shares under the shared services arrangement.

Example 26. Coordination with cost sharing arrangement. (i) The facts and analysis are the same as in *Example 25*, except that Company X also performs intangible development activities related to the cost sharing arrangement. Using a basis of allocation that is consistent with the controlled participants' respective shares of the reasonably anticipated benefits from the shared services, the 300 of service costs is allocated as follows:

X—100.
Y—50.
Z—25.
P—125.

(ii) In addition to performing services, Company P undertakes 500 of R&D and incurs manufacturing and other costs of 1,000. Company X undertakes 400 of R&D and incurs manufacturing and other costs of 600.

(iii) Companies P and X enter into a cost sharing arrangement in accordance with § 1.482–7. Under the arrangement, both

Companies P and X will undertake intangible development activities. All of the research and development activity conducted by Companies P and X is devoted to the intangible development activity under the cost sharing arrangement. Both Companies P and X will manufacture, market, and otherwise exploit the product in their respective territories and will share intangible development costs in accordance with their reasonably anticipated benefits from the intangibles, and both will make payments as required under § 1.482–7.

(iv) A portion of the charge under the shared services arrangement is in turn allocable to the intangible development activities undertaken by Companies P and X. The most reliable estimate of the portion allocable to Company P's intangible development activity is determined to be 500 (Company P's R&D expenses) divided by 1,500 (P's total non-covered services costs), or one-third. Accordingly, one-third of Company P's allocated services cost method charge of 125, or 42, is allocated to its intangible development activity.

(v) In addition, it is necessary to determine the portion of the charge under the shared services arrangement to Company X that should be further allocated to Company X's intangible development activities under the cost sharing arrangement. The most reliable estimate of the portion allocable to Company X's intangible development activity is 400 (Company X's R&D expenses) divided by 1,000 (Company X's costs), or 40%. Accordingly, 40% of the 100 that was allocated to Company X, or 40, is allocated in turn to Company X's intangible development activities. Company X makes a payment to Company P of 100 under the shared services arrangement and includes 40 of services cost method charges in the pool of intangible development costs.

(vi) The parties' respective contributions to intangible development costs under the cost sharing arrangement are as follows:

P: 500 + (0.333 * 125) = 542

X: 400 + (0.40 * 100) = 440

(c) *Comparable uncontrolled services price method*—(1) *In general.* The comparable uncontrolled services price method evaluates whether the amount charged in a controlled services transaction is arm's length by reference to the amount charged in a comparable uncontrolled services transaction. The comparable uncontrolled services price method is ordinarily used where the controlled services either are identical to or have a high degree of similarity to the services in the uncontrolled transaction.

(2) *Comparability and reliability considerations*—(i) *In general.* Whether results derived from application of this method are the most reliable measure of the arm's length result must be determined using the factors described under the best method rule in § 1.482–1(c). The application of these factors under the comparable uncontrolled services price method is discussed in paragraphs (c)(2)(ii) and (iii) of this section.

(ii) *Comparability*—(A) *In general.* The degree of comparability between controlled and uncontrolled transactions is determined by applying the provisions of § 1.482–1(d). Although all of the factors described in § 1.482–1(d)(3) must be considered, similarity of the services rendered, and of the intangibles (if any) used in performing the services, generally will have the greatest effects on comparability under this method. In addition, because even minor differences in contractual terms or economic conditions could materially affect the amount charged in an uncontrolled transaction, comparability under this method depends on close similarity with respect to these factors, or adjustments to account for any differences. The results derived from applying the comparable uncontrolled services price method generally will be the most direct and reliable measure of an arm's length price for the controlled transaction if an uncontrolled transaction has no differences from the controlled transaction that would affect the price, or if there are only minor differences that have a definite and reasonably ascertainable effect on price and for which appropriate adjustments are made. If such adjustments cannot be made, or if there are more than minor differences between the controlled and uncontrolled transactions, the comparable uncontrolled services price method may be used, but the reliability of the results as a measure of the arm's length price will be reduced. Further, if there are material differences for which reliable adjustments cannot be made, this method ordinarily will not provide a reliable measure of an arm's length result.

(B) *Adjustments for differences between controlled and uncontrolled transactions.* If there are differences between the controlled and uncontrolled transactions that would affect price, adjustments should be made to the price of the uncontrolled transaction according to the comparability provisions of § 1.482–1(d)(2). Specific examples of factors that may be particularly relevant to application of this method include—

(*1*) Quality of the services rendered;

(*2*) Contractual terms (for example, scope and terms of warranties or guarantees regarding the services, volume, credit and payment terms, allocation of risks, including any contingent-payment terms and whether costs were incurred without a provision for current reimbursement);

(*3*) Intangibles (if any) used in rendering the services;

(*4*) Geographic market in which the services are rendered or received;

(*5*) Risks borne (for example, costs incurred to render the services, without provision for current reimbursement);

(*6*) Duration or quantitative measure of services rendered;

(*7*) Collateral transactions or ongoing business relationships between the renderer and the recipient, including arrangement for the provision of tangible property in connection with the services; and

(*8*) Alternatives realistically available to the renderer and the recipient.

(iii) *Data and assumptions.* The reliability of the results derived from the comparable uncontrolled services price method is affected by the completeness and accuracy of the data used and the reliability of the assumptions made to apply the method. See § 1.482–1(c) (best method rule).

(3) *Arm's length range.* See § 1.482–1(e)(2) for the determination of an arm's length range.

(4) *Examples.* The principles of this paragraph (c) are illustrated by the following examples:

Example 1. Internal comparable uncontrolled services price. Company A, a United States corporation, performs shipping, stevedoring, and related services for controlled and uncontrolled parties on a short-term or as-needed basis. Company A charges uncontrolled parties in Country X a uniform fee of $60 per container to place loaded cargo containers in Country X on oceangoing vessels for marine transportation. Company A also performs identical services in Country X for its wholly-owned subsidiary, Company B, and there are no substantial differences between the controlled and uncontrolled transactions. In evaluating the appropriate measure of the arm's length price for the container-loading services performed for Company B, because Company A renders substantially identical services in Country X to both controlled and uncontrolled parties, it is determined that the comparable uncontrolled services price constitutes the best method for determining the arm's length price for the controlled services transaction. Based on the reliable data provided by Company A concerning the price charged for services in comparable uncontrolled transactions, a loading charge of $60 per cargo container will be considered the most reliable measure of the arm's length price for the services rendered to Company B. See paragraph (c)(2)(ii)(A) of this section.

Example 2. External comparable uncontrolled services price. (i) The facts are the same as in *Example 1*, except that Company A performs services for Company B, but not for uncontrolled parties. Based on information obtained from unrelated parties (which is determined to be reliable under the comparability standards set forth in paragraph (c)(2) of this section), it is determined that uncontrolled parties in Country X perform services comparable to those rendered by Company A to Company

B, and that such parties charge $60 per cargo container.

(ii) In evaluating the appropriate measure of an arm's length price for the loading services that Company A renders to Company B, the $60 per cargo container charge is considered evidence of a comparable uncontrolled services price. See paragraph (c)(2)(ii)(A) of this section.

Example 3. External comparable uncontrolled services price. The facts are the same as in *Example 2*, except that uncontrolled parties in Country X render similar loading and stevedoring services, but only under contracts that have a minimum term of one year. If the difference in the duration of the services has a material effect on prices, adjustments to account for these differences must be made to the results of the uncontrolled transactions according to the provisions of § 1.482–1(d)(2), and such adjusted results may be used as a measure of the arm's length result.

Example 4. Use of valuable intangibles. (i) Company A, a United States corporation in the biotechnology sector, renders research and development services exclusively to its affiliates. Company B is Company A's wholly-owned subsidiary in Country X. Company A renders research and development services to Company B.

(ii) In performing its research and development services function, Company A uses proprietary software that it developed internally. Company A uses the software to evaluate certain genetically engineered compounds developed by Company B. Company A owns the copyright on this software and does not license it to uncontrolled parties.

(iii) No uncontrolled parties can be identified that perform services identical or with a high degree of similarity to those performed by Company A. Because there are material differences for which reliable adjustments cannot be made, the comparable uncontrolled services price method is unlikely to provide a reliable measure of the arm's length price. See paragraph (c)(2)(ii)(A) of this section.

Example 5. Internal comparable. (i) Company A, a United States corporation, and its subsidiaries render computer consulting services relating to systems integration and networking to business clients in various countries. Company A and its subsidiaries render only consulting services, and do not manufacture computer hardware or software nor distribute such products. The controlled group is organized according to industry specialization, with key industry specialists working for Company A. These personnel typically form the core consulting group that teams with consultants from the local-country subsidiaries to serve clients in the subsidiaries' respective countries.

(ii) Company A and its subsidiaries sometimes undertake engagements directly for clients, and sometimes work as subcontractors to unrelated parties on more extensive supply-chain consulting engagements for clients. In undertaking the latter engagements with third party consultants, Company A typically prices its services based on consulting hours worked multiplied by a rate determined for each category of employee. The company also charges, at no markup, for out-of-pocket expenses such as travel, lodging, and data acquisition charges. The Company has established the following schedule of hourly rates:

Category	Rate
Project managers	$400 per hour.
Technical staff	$300 per hour.

(iii) Thus, for example, a project involving 100 hours of the time of project managers and 400 hours of technical staff time would result in the following project fees (without regard to any out-of-pocket expenses): ([100 hrs. × $400/hr.] + [400 hrs. × $300/hr.]) = $40,000 + $120,000 = $160,000.

(iv) Company B, a Country X subsidiary of Company A, contracts to perform consulting services for a Country X client in the banking industry. In undertaking this engagement, Company B uses its own consultants and also uses Company A project managers and technical staff that specialize in the banking industry for 75 hours and 380 hours, respectively. In determining an arm's length charge, the price that Company A charges for consulting services as a subcontractor in comparable uncontrolled transactions will be considered evidence of a comparable uncontrolled services price. Thus, in this case, a payment of $144,000; (or [75 hrs. × $400/hr.] + [380 hrs. × $300/hr.] = $30,000 + $114,000) may be used as a measure of the arm's length price for the work performed by Company A project mangers and technical staff. In addition, if the comparable uncontrolled services price method is used, then, consistent with the practices employed by the comparables with respect to similar types of expenses, Company B must reimburse Company A for appropriate out-of-pocket expenses. See paragraph (c)(2)(ii)(A) of this section.

Example 6. Adjustments for differences. (i) The facts are the same as in *Example 5*, except that the engagement is undertaken with the client on a fixed fee basis. That is, prior to undertaking the engagement Company B and Company A estimate the resources required to undertake the engagement, and, based on hourly fee rates, charge the client a single fee for completion of the project. Company A's portion of the engagement results in fees of $144,000.

(ii) The engagement, once undertaken, requires 20% more hours by each of Companies A and B than originally estimated. Nevertheless, the unrelated client pays the fixed fee that was agreed upon at the start of the engagement. Company B pays Company A $144,000, in accordance with the fixed fee arrangement.

(iii) Company A often enters into similar fixed fee engagements with clients. In addition, Company A's records for similar engagements show that when it experiences cost overruns, it does not collect additional fees from the client for the difference between projected and actual hours. Accordingly, in evaluating whether the fees paid by Company B to Company A are arm's length, it is determined that no adjustments to the intercompany service charge are warranted. See § 1.482–1(d)(3)(ii) and paragraph (c)(2)(ii)(A) of this section.

(5) *Indirect evidence of the price of a comparable uncontrolled services transaction*—(i) *In general.* The price of a comparable uncontrolled services transaction may be derived based on indirect measures of the price charged in comparable uncontrolled services transactions, but only if—

(A) The data are widely and routinely used in the ordinary course of business in the particular industry or market segment for purposes of determining prices actually charged in comparable uncontrolled services transactions;

(B) The data are used to set prices in the controlled services transaction in the same way they are used to set prices in uncontrolled services transactions of the controlled taxpayer, or in the same way they are used by uncontrolled taxpayers to set prices in uncontrolled services transactions; and

(C) The amount charged in the controlled services transaction may be reliably adjusted to reflect differences in quality of the services, contractual terms, market conditions, risks borne (including contingent-payment terms), duration or quantitative measure of services rendered, and other factors that may affect the price to which uncontrolled taxpayers would agree.

(ii) *Example.* The following example illustrates this paragraph (c)(5):

Example. Indirect evidence of comparable uncontrolled services price. (i) Company A is a United States insurance company. Company A's wholly-owned Country X subsidiary, Company B, performs specialized risk analysis for Company A as well as for uncontrolled parties. In determining the price actually charged to uncontrolled entities for performing such risk analysis, Company B uses a proprietary, multi-factor computer program, which relies on the gross value of the policies in the customer's portfolio, the relative composition of those policies, their location, and the estimated number of personnel hours necessary to complete the project. Uncontrolled companies that perform comparable risk analysis in the same industry or market-segment use similar proprietary computer programs to price transactions with uncontrolled customers (the competitors' programs may incorporate different inputs, or may assign different weights or values to individual inputs, in arriving at the price).

(ii) During the taxable year subject to audit, Company B performed risk analysis for uncontrolled parties as well as for Company A. Because prices charged to uncontrolled customers reflected the composition of each customer's portfolio together with other factors, the prices charged in Company B's uncontrolled transactions do not provide a reliable basis for determining the comparable uncontrolled services price for the similar services rendered to Company A. However, in evaluating an arm's length price for the

studies performed by Company B for Company A, Company B's proprietary computer program may be considered as indirect evidence of the comparable uncontrolled services price that would be charged to perform the services for Company A. The reliability of the results obtained by application of this internal computer program as a measure of an arm's length price for the services will be increased to the extent that Company A used the internal computer program to generate actual transaction prices for risk-analysis studies performed for uncontrolled parties during the same taxable year under audit; Company A used data that are widely and routinely used in the ordinary course of business in the insurance industry to determine the price charged; and Company A reliably adjusted the price charged in the controlled services transaction to reflect differences that may affect the price to which uncontrolled taxpayers would agree.

(d) *Gross services margin method*—(1) *In general.* The gross services margin method evaluates whether the amount charged in a controlled services transaction is arm's length by reference to the gross profit margin realized in comparable uncontrolled transactions. This method ordinarily is used in cases where a controlled taxpayer performs services or functions in connection with an uncontrolled transaction between a member of the controlled group and an uncontrolled taxpayer. This method may be used where a controlled taxpayer renders services (agent services) to another member of the controlled group in connection with a transaction between that other member and an uncontrolled taxpayer. This method also may be used in cases where a controlled taxpayer contracts to provide services to an uncontrolled taxpayer (intermediary function) and another member of the controlled group actually performs a portion of the services provided.

(2) *Determination of arm's length price*—(i) *In general.* The gross services margin method evaluates whether the price charged or amount retained by a controlled taxpayer in the controlled services transaction in connection with the relevant uncontrolled transaction is arm's length by determining the appropriate gross profit of the controlled taxpayer.

(ii) *Relevant uncontrolled transaction.* The relevant uncontrolled transaction is a transaction between a member of the controlled group and an uncontrolled taxpayer as to which the controlled taxpayer performs agent services or an intermediary function.

(iii) *Applicable uncontrolled price.* The applicable uncontrolled price is the price paid or received by the uncontrolled taxpayer in the relevant uncontrolled transaction.

(iv) *Appropriate gross services profit.* The appropriate gross services profit is computed by multiplying the applicable uncontrolled price by the gross services profit margin in comparable uncontrolled transactions. The determination of the appropriate gross services profit will take into account any functions performed by other members of the controlled group, as well as any other relevant factors described in § 1.482–1(d)(3). The comparable gross services profit margin may be determined by reference to the commission in an uncontrolled transaction, where that commission is stated as a percentage of the price charged in the uncontrolled transaction.

(v) *Arm's length range.* See § 1.482–1(e)(2) for determination of the arm's length range.

(3) *Comparability and reliability considerations*—(i) *In general.* Whether results derived from application of this method are the most reliable measure of the arm's length result must be determined using the factors described under the best method rule in § 1.482–1(c). The application of these factors under the gross services margin method is discussed in paragraphs (d)(3)(ii) and (iii) of this section.

(ii) *Comparability*—(A) *Functional comparability.* The degree of comparability between an uncontrolled transaction and a controlled transaction is determined by applying the comparability provisions of § 1.482–1(d). A gross services profit provides compensation for services or functions that bear a relationship to the relevant uncontrolled transaction, including an operating profit in return for the investment of capital and the assumption of risks by the controlled taxpayer performing the services or functions under review. Therefore, although all of the factors described in § 1.482–1(d)(3) must be considered, comparability under this method is particularly dependent on similarity of services or functions performed, risks borne, intangibles (if any) used in providing the services or functions, and contractual terms, or adjustments to account for the effects of any such differences. If possible, the appropriate gross services profit margin should be derived from comparable uncontrolled transactions by the controlled taxpayer under review, because similar characteristics are more likely found among different transactions by the same controlled taxpayer than among transactions by other parties. In the absence of comparable uncontrolled transactions involving the same controlled taxpayer, an appropriate gross services profit margin may be derived from transactions of uncontrolled taxpayers involving comparable services or functions with respect to similarly related transactions.

(B) *Other comparability factors.* Comparability under this method is not dependent on close similarity of the relevant uncontrolled transaction to the related transactions involved in the uncontrolled comparables. However, substantial differences in the nature of the relevant uncontrolled transaction and the relevant transactions involved in the uncontrolled comparables, such as differences in the type of property transferred or service provided in the relevant uncontrolled transaction, may indicate significant differences in the services or functions performed by the controlled and uncontrolled taxpayers with respect to their respective relevant transactions. Thus, it ordinarily would be expected that the services or functions performed in the controlled and uncontrolled transactions would be with respect to relevant transactions involving the transfer of property within the same product categories or the provision of services of the same general type (for example, information-technology systems design). Furthermore, significant differences in the intangibles (if any) used by the controlled taxpayer in the controlled services transaction as distinct from the uncontrolled comparables may also affect the reliability of the comparison. Finally, the reliability of profit measures based on gross services profit may be adversely affected by factors that have less effect on prices. For example, gross services profit may be affected by a variety of other factors, including cost structures or efficiency (for example, differences in the level of experience of the employees performing the service in the controlled and uncontrolled transactions). Accordingly, if material differences in these factors are identified based on objective evidence, the reliability of the analysis may be affected.

(C) *Adjustments for differences between controlled and uncontrolled transactions.* If there are material differences between the controlled and uncontrolled transactions that would affect the gross services profit margin, adjustments should be made to the gross services profit margin, according to the comparability provisions of § 1.482–1(d)(2). For this purpose, consideration of the total services costs associated with functions performed and risks assumed may be necessary because differences in functions performed are often reflected in these costs. If there are differences in functions performed, however, the effect on gross services

profit of such differences is not necessarily equal to the differences in the amount of related costs. Specific examples of factors that may be particularly relevant to this method include—

(*1*) Contractual terms (for example, scope and terms of warranties or guarantees regarding the services or function, volume, credit and payment terms, and allocation of risks, including any contingent-payment terms);

(*2*) Intangibles (if any) used in performing the services or function;

(*3*) Geographic market in which the services or function are performed or in which the relevant uncontrolled transaction takes place; and

(*4*) Risks borne, including, if applicable, inventory-type risk.

(D) *Buy-sell distributor.* If a controlled taxpayer that performs an agent service or intermediary function is comparable to a distributor that takes title to goods and resells them, the gross profit margin earned by such distributor on uncontrolled sales, stated as a percentage of the price for the goods, may be used as the comparable gross services profit margin.

(iii) *Data and assumptions*—(A) *In general.* The reliability of the results derived from the gross services margin method is affected by the completeness and accuracy of the data used and the reliability of the assumptions made to apply this method. See § 1.482–1(c) (best method rule).

(B) *Consistency in accounting.* The degree of consistency in accounting practices between the controlled transaction and the uncontrolled comparables that materially affect the gross services profit margin affects the reliability of the results under this method.

(4) *Examples.* The principles of this paragraph (d) are illustrated by the following examples:

Example 1. Agent services. Company A and Company B are members of a controlled group. Company A is a foreign manufacturer of industrial equipment. Company B is a U.S. company that acts as a commission agent for Company A by arranging for Company A to make direct sales of the equipment it manufactures to unrelated purchasers in the U.S. market. Company B does not take title to the equipment but instead receives from Company A commissions that are determined as a specified percentage of the sales price for the equipment that is charged by Company A to the unrelated purchaser. Company B also arranges for direct sales of similar equipment by unrelated foreign manufacturers to unrelated purchasers in the U.S. market. Company B charges these unrelated foreign manufacturers a commission fee of 5% of the sales price charged by the unrelated foreign manufacturers to the unrelated U.S. purchasers for the equipment. Information regarding the comparable agent services provided by Company B to unrelated foreign manufacturers is sufficiently complete to conclude that it is likely that all material differences between the controlled and uncontrolled transactions have been identified and adjustments for such differences have been made. If the comparable gross services profit margin is 5% of the price charged in the relevant transactions involved in the uncontrolled comparables, then the appropriate gross services profit that Company B may earn and the arm's length price that it may charge Company A for its agent services is equal to 5% of the applicable uncontrolled price charged by Company A in sales of equipment in the relevant uncontrolled transactions.

Example 2. Agent services. The facts are the same as in *Example 1*, except that Company B does not act as a commission agent for unrelated parties and it is not possible to obtain reliable information concerning commission rates charged by uncontrolled commission agents that engage in comparable transactions with respect to relevant sales of property. It is possible, however, to obtain reliable information regarding the gross profit margins earned by unrelated parties that briefly take title to and then resell similar property in uncontrolled transactions, in which they purchase the property from foreign manufacturers and resell the property to purchasers in the U.S. market. Analysis of the facts and circumstances indicates that, aside from certain minor differences for which adjustments can be made, the uncontrolled parties that resell property perform similar functions and assume similar risks as Company B performs and assumes when it acts as a commission agent for Company A's sales of property. Under these circumstances, the gross profit margin earned by the unrelated distributors on the purchase and resale of property may be used, subject to any adjustments for any material differences between the controlled and uncontrolled transactions, as a comparable gross services profit margin. The appropriate gross services profit that Company B may earn and the arm's length price that it may charge Company A for its agent services is therefore equal to this comparable gross services margin, multiplied by the applicable uncontrolled price charged by Company A in its sales of equipment in the relevant uncontrolled transactions.

Example 3. Agent services. (i) Company A and Company B are members of a controlled group. Company A is a U.S. corporation that renders computer consulting services, including systems integration and networking, to business clients.

(ii) In undertaking engagements with clients, Company A in some cases pays a commission of 3% of its total fees to unrelated parties that assist Company A in obtaining consulting engagements. Typically, such fees are paid to non-computer consulting firms that provide strategic management services for their clients. When Company A obtains a consulting engagement with a client of a non-computer consulting firm, Company A does not subcontract with the other consulting firm, nor does the other consulting firm play any role in Company A's consulting engagement.

(iii) Company B, a Country X subsidiary of Company A, assists Company A in obtaining an engagement to perform computer consulting services for a Company B banking industry client in Country X. Although Company B has an established relationship with its Country X client and was instrumental in arranging for Company A's engagement with the client, Company A's particular expertise was the primary consideration in motivating the client to engage Company A. Based on the relative contributions of Companies A and B in obtaining and undertaking the engagement, Company B's role was primarily to facilitate the consulting engagement between Company A and the Country X client. Information regarding the commissions paid by Company A to unrelated parties for providing similar services to facilitate Company A's consulting engagements is sufficiently complete to conclude that it is likely that all material differences between these uncontrolled transactions and the controlled transaction between Company B and Company A have been identified and that appropriate adjustments have been made for any such differences. If the comparable gross services margin earned by unrelated parties in providing such agent services is 3% of total fees charged in the relevant transactions involved in the uncontrolled comparables, then the appropriate gross services profit that Company B may earn and the arm's length price that it may charge Company A for its agent services is equal to this comparable gross services margin (3%), multiplied by the applicable uncontrolled price charged by Company A in its relevant uncontrolled consulting engagement with Company B's client.

Example 4. Intermediary function. (i) The facts are the same as in *Example 3*, except that Company B contracts directly with its Country X client to provide computer consulting services and Company A performs the consulting services on behalf of Company B. Company A does not enter into a consulting engagement with Company B's Country X client. Instead, Company B charges its Country X client an uncontrolled price for the consulting services, and Company B pays a portion of the uncontrolled price to Company A for performing the consulting services on behalf of Company B.

(ii) Analysis of the relative contributions of Companies A and B in obtaining and undertaking the consulting contract indicates that Company B functioned primarily as an intermediary contracting party, and the gross services margin method is the most reliable method for determining the amount that Company B may retain as compensation for its intermediary function with respect to Company A's consulting services. In this case, therefore, because Company B entered into the relevant uncontrolled transaction to provide services, Company B receives the applicable uncontrolled price that is paid by the Country X client for the consulting services. Company A technically performs

services for Company B when it performs, on behalf of Company B, the consulting services Company B contracted to provide to the Country X client. The arm's length amount that Company A may charge Company B for performing the consulting services on Company B's behalf is equal to the applicable uncontrolled price received by Company B in the relevant uncontrolled transaction, less Company B's appropriate gross services profit, which is the amount that Company B may retain as compensation for performing the intermediary function.

(iii) Reliable data concerning the commissions that Company A paid to uncontrolled parties for assisting it in obtaining engagements to provide consulting services similar to those it has provided on behalf of Company B provide useful information in applying the gross services margin method. However, consideration should be given to whether the third party commission data may need to be adjusted to account for any additional risk that Company B may have assumed as a result of its function as an intermediary contracting party, compared with the risk it would have assumed if it had provided agent services to assist Company A in entering into an engagement to provide its consulting service directly. In this case, the information regarding the commissions paid by Company A to unrelated parties for providing agent services to facilitate its performance of consulting services for unrelated parties is sufficiently complete to conclude that all material differences between these uncontrolled transactions and the controlled performance of an intermediary function, including possible differences in the amount of risk assumed in connection with performing that function, have been identified and that appropriate adjustments have been made. If the comparable gross services margin earned by unrelated parties in providing such agent services is 3% of total fees charged in Company B's relevant uncontrolled transactions, then the appropriate gross services profit that Company B may retain as compensation for performing an intermediary function (and the amount, therefore, that is deducted from the applicable uncontrolled price to arrive at the arm's length price that Company A may charge Company B for performing consulting services on Company B's behalf) is equal to this comparable gross services margin (3%), multiplied by the applicable uncontrolled price charged by Company B in its contract to provide services to the uncontrolled party.

Example 5. External comparable. (i) The facts are the same as in *Example 4*, except that neither Company A nor Company B engages in transactions with third parties that facilitate similar consulting engagements.

(ii) Analysis of the relative contributions of Companies A and B in obtaining and undertaking the contract indicates that Company B's role was primarily to facilitate the consulting arrangement between Company A and the Country X client. Although no reliable internal data are available regarding comparable transactions with uncontrolled entities, reliable data exist regarding commission rates for similar facilitating services between uncontrolled parties. These data indicate that a 3% commission (3% of total engagement fee) is charged in such transactions. Information regarding the uncontrolled comparables is sufficiently complete to conclude that it is likely that all material differences between the controlled and uncontrolled transactions have been identified and adjusted for. If the appropriate gross services profit margin is 3% of total fees, then an arm's length result of the controlled services transaction is for Company B to retain an amount equal to 3% of total fees paid to it.

(e) *Cost of services plus method*—(1) *In general.* The cost of services plus method evaluates whether the amount charged in a controlled services transaction is arm's length by reference to the gross services profit markup realized in comparable uncontrolled transactions. The cost of services plus method is ordinarily used in cases where the controlled service renderer provides the same or similar services to both controlled and uncontrolled parties. This method is ordinarily not used in cases where the controlled services transaction involves a contingent-payment arrangement, as described in paragraph (i)(2) of this section.

(2) *Determination of arm's length price*—(i) *In general.* The cost of services plus method measures an arm's length price by adding the appropriate gross services profit to the controlled taxpayer's comparable transactional costs.

(ii) *Appropriate gross services profit.* The appropriate gross services profit is computed by multiplying the controlled taxpayer's comparable transactional costs by the gross services profit markup, expressed as a percentage of the comparable transactional costs earned in comparable uncontrolled transactions.

(iii) *Comparable transactional costs.* Comparable transactional costs consist of the costs of providing the services under review that are taken into account as the basis for determining the gross services profit markup in comparable uncontrolled transactions. Depending on the facts and circumstances, such costs typically include all compensation attributable to employees directly involved in the performance of such services, materials and supplies consumed or made available in rendering such services, and may include as well other costs of rendering the services. Comparable transactional costs must be determined on a basis that will facilitate comparison with the comparable uncontrolled transactions. For that reason, comparable transactional costs may not necessarily equal total services costs, as defined in paragraph (j) of this section, and in appropriate cases may be a subset of total services costs. Generally accepted accounting principles or Federal income tax accounting rules (where Federal income tax data for comparable transactions or business activities are available) may provide useful guidance but will not conclusively establish the appropriate comparable transactional costs for purposes of this method.

(iv) *Arm's length range.* See § 1.482–1(e)(2) for determination of an arm's length range.

(3) *Comparability and reliability considerations*—(i) *In general.* Whether results derived from the application of this method are the most reliable measure of the arm's length result must be determined using the factors described under the best method rule in § 1.482–1(c).

(ii) *Comparability*—(A) *Functional comparability.* The degree of comparability between controlled and uncontrolled transactions is determined by applying the comparability provisions of § 1.482–1(d). A service renderer's gross services profit provides compensation for performing services related to the controlled services transaction under review, including an operating profit for the service renderer's investment of capital and assumptions of risks. Therefore, although all of the factors described in § 1.482–1(d)(3) must be considered, comparability under this method is particularly dependent on similarity of services or functions performed, risks borne, intangibles (if any) used in providing the services or functions, and contractual terms, or adjustments to account for the effects of any such differences. If possible, the appropriate gross services profit markup should be derived from comparable uncontrolled transactions of the same taxpayer participating in the controlled services transaction because similar characteristics are more likely to be found among services provided by the same service provider than among services provided by other service providers. In the absence of such services transactions, an appropriate gross services profit markup may be derived from comparable uncontrolled services transactions of other service providers. If the appropriate gross services profit markup is derived from comparable uncontrolled services transactions of other service providers, in evaluating comparability the controlled taxpayer must consider the results under this method expressed as a markup on total services costs of the controlled taxpayer, because differences in functions performed may be reflected in differences in service costs other than

those included in comparable transactional costs.

(B) *Other comparability factors.* Comparability under this method is less dependent on close similarity between the services provided than under the comparable uncontrolled services price method. Substantial differences in the services may, however, indicate significant functional differences between the controlled and uncontrolled taxpayers. Thus, it ordinarily would be expected that the controlled and uncontrolled transactions would involve services of the same general type (for example, information-technology systems design). Furthermore, if a significant amount of the controlled taxpayer's comparable transactional costs consists of service costs incurred in a tax accounting period other than the tax accounting period under review, the reliability of the analysis would be reduced. In addition, significant differences in the value of the services rendered, due for example to the use of valuable intangibles, may also affect the reliability of the comparison. Finally, the reliability of profit measures based on gross services profit may be adversely affected by factors that have less effect on prices. For example, gross services profit may be affected by a variety of other factors, including cost structures or efficiency-related factors (for example, differences in the level of experience of the employees performing the service in the controlled and uncontrolled transactions). Accordingly, if material differences in these factors are identified based on objective evidence, the reliability of the analysis may be affected.

(C) *Adjustments for differences between the controlled and uncontrolled transactions.* If there are material differences between the controlled and uncontrolled transactions that would affect the gross services profit markup, adjustments should be made to the gross services profit markup earned in the comparable uncontrolled transaction according to the provisions of § 1.482–1(d)(2). For this purpose, consideration of the comparable transactional costs associated with the functions performed and risks assumed may be necessary, because differences in the functions performed are often reflected in these costs. If there are differences in functions performed, however, the effect on gross services profit of such differences is not necessarily equal to the differences in the amount of related comparable transactional costs. Specific examples of the factors that may be particularly relevant to this method include—

(*1*) The complexity of the services;

(*2*) The duration or quantitative measure of services;

(*3*) Contractual terms (for example, scope and terms of warranties or guarantees provided, volume, credit and payment terms, allocation of risks, including any contingent-payment terms);

(*4*) Economic circumstances; and

(*5*) Risks borne.

(iii) *Data and assumptions*—(A) *In general.* The reliability of the results derived from the cost of services plus method is affected by the completeness and accuracy of the data used and the reliability of the assumptions made to apply this method. See § 1.482–1(c) (Best method rule).

(B) *Consistency in accounting.* The degree of consistency in accounting practices between the controlled transaction and the uncontrolled comparables that materially affect the gross services profit markup affects the reliability of the results under this method. Thus, for example, if differences in cost accounting practices would materially affect the gross services profit markup, the ability to make reliable adjustments for such differences would affect the reliability of the results obtained under this method. Further, reliability under this method depends on the extent to which the controlled and uncontrolled transactions reflect consistent reporting of comparable transactional costs. For purposes of this paragraph (e)(3)(iii)(B), the term comparable transactional costs includes the cost of acquiring tangible property that is transferred (or used) with the services, to the extent that the arm's length price of the tangible property is not separately evaluated as a controlled transaction under another provision.

(4) *Examples.* The principles of this paragraph (e) are illustrated by the following examples:

Example 1. Internal comparable. (i) Company A designs and assembles information-technology networks and systems. When Company A renders services for uncontrolled parties, it receives compensation based on time and materials as well as certain other related costs necessary to complete the project. This fee includes the cost of hardware and software purchased from uncontrolled vendors and incorporated in the final network or system, plus a reasonable allocation of certain specified overhead costs incurred by Company A in providing these services. Reliable accounting records maintained by Company A indicate that Company A earned a gross services profit markup of 10% on its time, materials and specified overhead in providing design services during the year under examination on information technology projects for uncontrolled entities.

(ii) Company A designed an information-technology network for its Country X subsidiary, Company B. The services rendered to Company B are similar in scope and complexity to services that Company A rendered to uncontrolled parties during the year under examination. Using Company A's accounting records (which are determined to be reliable under paragraph (e)(3) of this section), it is possible to identify the comparable transactional costs involved in the controlled services transaction with reference to the costs incurred by Company A in rendering similar design services to uncontrolled parties. Company A's records indicate that it does not incur any additional types of costs in rendering similar services to uncontrolled customers. The data available are sufficiently complete to conclude that it is likely that all material differences between the controlled and uncontrolled transactions have been identified and adjusted for. Based on the gross services profit markup data derived from Company A's uncontrolled transactions involving similar design services, an arm's length result for the controlled services transaction is equal to the price that will allow Company A to earn a 10% gross services profit markup on its comparable transactional costs.

Example 2. Inability to adjust for differences in comparable transactional costs. The facts are the same as in *Example 1*, except that Company A's staff that rendered the services to Company B consisted primarily of engineers in training status or on temporary rotation from other Company A subsidiaries. In addition, the Company B network incorporated innovative features, including specially designed software suited to Company B's requirements. The use of less-experienced personnel and staff on temporary rotation, together with the special features of the Company B network, significantly increased the time and costs associated with the project as compared to time and costs associated with similar projects completed for uncontrolled customers. These factors constitute material differences between the controlled and the uncontrolled transactions that affect the determination of Company A's comparable transactional costs associated with the controlled services transaction, as well as the gross services profit markup. Moreover, it is not possible to perform reliable adjustments for these differences on the basis of the available accounting data. Under these circumstances, the reliability of the cost of services plus method as a measure of an arm's length price is substantially reduced.

Example 3. Operating loss by reference to total services costs. The facts and analysis are the same as in *Example 1*, except that an unrelated Company C, instead of Company A, renders similar services to uncontrolled parties and publicly available information indicates that Company C earned a gross services profit markup of 10% on its time, materials and certain specified overhead in providing those services. As in *Example 1*, Company A still provides services for its Country X subsidiary, Company B. In accordance with the requirements in paragraph (e)(3)(ii) of this section, the

taxpayer performs additional analysis and restates the results of Company A's controlled services transaction with its Country X subsidiary, Company B, in the form of a markup on Company A's total services costs. This analysis by reference to total services costs shows that Company A generated an operating loss on the controlled services transaction, which indicates that functional differences likely exist between the controlled services transaction performed by Company A and uncoutrolled services transactions performed by Company C, and that these differences may not be reflected in the comparable transactional costs. Upon further scrutiny, the presence of such functional differences between the controlled and uncontrolled transactions may indicate that the cost of services plus method does not provide the most reliable measure of an arm's length result under the facts and circumstances.

Example 4. Internal comparable. (i) Company A, a U.S. corporation, and its subsidiaries perform computer consulting services relating to systems integration and networking for business clients in various countries. Company A and its subsidiaries render only consulting services and do not manufacture or distribute computer hardware or software to clients. The controlled group is organized according to industry specialization, with key industry specialists working for Company A. These personnel typically form the core consulting group that teams with consultants from the local-country subsidiaries to serve clients in the subsidiaries' respective countries.

(ii) On some occasions, Company A and its subsidiaries undertake engagements directly for clients. On other occasions, they work as subcontractors for uncontrolled parties on more extensive consulting engagements for clients. In undertaking the latter engagements with third-party consultants, Company A typically prices its services at four times the compensation costs of its consultants, defined as the consultants' base salary plus estimated fringe benefits, as defined in this table:

Category	Rates
Project managers	$100 per hour.
Technical staff	$75 per hour.

(iii) In uncontrolled transactions, Company A also charges the customer, at no markup, for out-of-pocket expenses such as travel, lodging, and data acquisition charges. Thus, for example, a project involving 100 hours of time from project managers, and 400 hours of technical staff time would result in total compensation costs to Company A of (100 hrs. × $100/hr.) + (400 hrs. × $75/hr.) = $10,000 + $30,000 = $40,000. Applying the markup of 300%, the total fee charged would thus be (4 × $40,000), or $160,000, plus out-of-pocket expenses.

(iv) Company B, a Country X subsidiary of Company A, contracts to render consulting services to a Country X client in the banking industry. In undertaking this engagement, Company B uses its own consultants and also uses the services of Company A project managers and technical staff that specialize in the banking industry for 75 hours and 380 hours, respectively. The data available are sufficiently complete to conclude that it is likely that all material differences between the controlled and uncontrolled transactions have been identified and adjusted for. Based on reliable data concerning the compensation costs to Company A, an arm's length result for the controlled services transaction is equal to $144,000. This is calculated as follows: [4 × (75 hrs. × $100/hr.)] + [4 × (380 hrs. × $75/hr.)] = $30,000 + $114,000 = $144,000, reflecting a 4× markup on the total compensation costs for Company A project managers and technical staff. In addition, consistent with Company A's pricing of uncontrolled transactions, Company B must reimburse Company A for appropriate out-of-pocket expenses incurred in performing the services.

(f) *Comparable profits method*—(1) *In general.* The comparable profits method evaluates whether the amount charged in a controlled transaction is arm's length, based on objective measures of profitability (profit level indicators) derived from uncontrolled taxpayers that engage in similar business activities under similar circumstances. The rules in § 1.482–5 relating to the comparable profits method apply to controlled services transactions, except as modified in this paragraph (f).

(2) *Determination of arm's length result*—(i) *Tested party.* This paragraph (f) applies where the relevant business activity of the tested party as determined under § 1.482–5(b)(2) is the rendering of services in a controlled services transaction. Where the tested party determined under § 1.482–5(b)(2) is instead the recipient of the controlled services, the rules under this paragraph (f) are not applicable to determine the arm's length result.

(ii) *Profit level indicators.* In addition to the profit level indicators provided in § 1.482–5(b)(4), a profit level indicator that may provide a reliable basis for comparing operating profits of the tested party involved in a controlled services transaction and uncontrolled comparables is the ratio of operating profit to total services costs (as defined in paragraph (j) of this section).

(iii) *Comparability and reliability considerations—Data and assumptions—Consistency in accounting.* Consistency in accounting practices between the relevant business activity of the tested party and the uncontrolled service providers is particularly important in determining the reliability of the results under this method, but less than in applying the cost of services plus method. Adjustments may be appropriate if materially different treatment is applied to particular cost items related to the relevant business activity of the tested party and the uncontrolled service providers. For example, adjustments may be appropriate where the tested party and the uncontrolled comparables use inconsistent approaches to classify similar expenses as "cost of goods sold" and "selling, general, and administrative expenses." Although distinguishing between these two categories may be difficult, the distinction is less important to the extent that the ratio of operating profit to total services costs is used as the appropriate profit level indicator. Determining whether adjustments are necessary under these or similar circumstances requires thorough analysis of the functions performed and consideration of the cost accounting practices of the tested party and the uncontrolled comparables. Other adjustments as provided in § 1.482–5(c)(2)(iv) may also be necessary to increase the reliability of the results under this method.

(3) *Examples.* The principles of this paragraph (f) are illustrated by the following examples:

Example 1. Ratio of operating profit to total services costs as the appropriate profit level indicator. (i) A Country T parent firm, Company A, and its Country Y subsidiary, Company B, both engage in manufacturing as their principal business activity. Company A also performs certain advertising services for itself and its affiliates. In year 1, Company A renders advertising services to Company B.

(ii) Based on the facts and circumstances, it is determined that the comparable profits method will provide the most reliable measure of an arm's length result. Company A is selected as the tested party. No data are available for comparable independent manufacturing firms that render advertising services to third parties. Financial data are available, however, for ten independent firms that render similar advertising services as their principal business activity in Country X. The ten firms are determined to be comparable under § 1.482–5(c). Neither Company A nor the comparable companies use valuable intangibles in rendering the services.

(iii) Based on the available financial data of the comparable companies, it cannot be determined whether these comparable companies report costs for financial accounting purposes in the same manner as the tested party. The publicly available financial data of the comparable companies segregate total services costs into cost of goods sold and sales, general and administrative costs, with no further segmentation of costs provided. Due to the limited information available regarding the cost accounting practices used by the comparable companies, the ratio of operating profits to total services costs is determined to be the most appropriate profit level indicator. This ratio includes total services costs to minimize the effect of any inconsistency in accounting practices between Company A and the comparable companies.

Example 2. Application of the operating profit to total services costs profit level indicator. (i) Company A is a foreign subsidiary of Company B, a U.S. corporation. Company B is under examination for its year 1 taxable year. Company B renders management consulting services to Company A. Company B's consulting function includes analyzing Company A's operations, benchmarking Company A's financial performance against companies in the same industry, and to the extent necessary, developing a strategy to improve Company A's operational performance. The accounting records of Company B allow reliable identification of the total services costs of the consulting staff associated with the management consulting services rendered to Company A. Company A reimburses Company B for its costs associated with rendering the consulting services, with no markup.

(ii) Based on all the facts and circumstances, it is determined that the comparable profits method will provide the most reliable measure of an arm's length result. Company B is selected as the tested party, and its rendering of management consulting services is identified as the relevant business activity. Data are available from ten domestic companies that operate in the industry segment involving management consulting and that perform activities comparable to the relevant business activity of Company B. These comparables include entities that primarily perform management consulting services for uncontrolled parties. The comparables incur similar risks as Company B incurs in performing the consulting services and do not make use of valuable intangibles or special processes.

(iii) Based on the available financial data of the comparables, it cannot be determined whether the comparables report their costs for financial accounting purposes in the same manner as Company B reports its costs in the relevant business activity. The available financial data for the comparables report only an aggregate figure for costs of goods sold and operating expenses, and do not segment the underlying services costs. Due to this limitation, the ratio of operating profits to total services costs is determined to be the most appropriate profit level indicator.

(iv) For the taxable years 1 through 3, Company B shows the following results for the services performed for Company A:

	Year 1	Year 2	Year 3	Average
Revenues	1,200,000	1,100,000	1,300,000	1,200,000
Cost of Goods Sold	100,000	100,000	(*)	66,667
Operating Expenses	1,100,000	1,000,000	1,300,000	1,133,333
Operating Profit	0	0	0	0

*N/A.

(v) After adjustments have been made to account for identified material differences between the relevant business activity of Company B and the comparables, the average ratio for the taxable years 1 through 3 of operating profit to total services costs is calculated for each of the uncontrolled service providers. Applying each ratio to Company B's average total services costs from the relevant business activity for the taxable years 1 through 3 would lead to the following comparable operating profit (COP) for the services rendered by Company B:

Uncontrolled service provider	OP/total service costs (%)	Company B COP
Company 1	15.75	$189,000
Company 2	15.00	180,000
Company 3	14.00	168,000
Company 4	13.30	159,600
Company 5	12.00	144,000
Company 6	11.30	135,600
Company 7	11.25	135,000
Company 8	11.18	134,160
Company 9	11.11	133,320
Company 10	10.75	129,000

(vi) The available data are not sufficiently complete to conclude that it is likely that all material differences between the relevant business activity of Company B and the comparables have been identified. Therefore, an arm's length range can be established only pursuant to § 1.482–1(e)(2)(iii)(B). The arm's length range is established by reference to the interquartile range of the results as calculated under § 1.482–1(e)(2)(iii)(C), which consists of the results ranging from $168,000 to $134,160. Company B's reported average operating profit of zero ($0) falls outside this range. Therefore, an allocation may be appropriate.

(vii) Because Company B reported income of zero, to determine the amount, if any, of the allocation, Company B's reported operating profit for year 3 is compared to the comparable operating profits derived from the comparables' results for year 3. The ratio of operating profit to total services costs in year 3 is calculated for each of the comparables and applied to Company B's year 3 total services costs to derive the following results:

Uncontrolled service provider	OP/total service costs (for year 3) (%)	Company B COP
Company 1	15.00	$195,000
Company 2	14.75	191,750
Company 3	14.00	182,000
Company 4	13.50	175,500
Company 5	12.30	159,900
Company 6	11.05	143,650
Company 7	11.03	143,390
Company 8	11.00	143,000
Company 9	10.50	136,500

Uncontrolled service provider	OP/total service costs (for year 3) (%)	Company B COP
Company 10	10.25	133,250

(viii) Based on these results, the median of the comparable operating profits for year 3 is $151,775. Therefore, Company B's income for year 3 is increased by $151,775, the difference between Company B's reported operating profit for year 3 of zero and the median of the comparable operating profits for year 3.

Example 3. Material difference in accounting for stock-based compensation. (i) Taxpayer, a U.S. corporation the stock of which is publicly traded, performs controlled services for its wholly-owned subsidiaries. The arm's length price of these controlled services is evaluated under the comparable profits method for services in this paragraph, by reference to the net cost plus profit level indicator (PLI). Taxpayer is the tested party under paragraph (f)(2)(i) of this section. The Commissioner identifies the most narrowly identifiable business activity of the tested party for which data are available that incorporate the controlled transaction (the relevant business activity). The Commissioner also identifies four uncontrolled domestic service providers, Companies A, B, C, and D, each of which performs exclusively activities similar to the relevant business activity of Taxpayer that is subject to analysis under this paragraph (f). The stock of Companies A, B, C, and D is publicly traded on a U.S. stock exchange. Assume that Taxpayer makes an election to apply these regulations to earlier taxable years.

(ii) Stock options are granted to the employees of Taxpayer that engage in the relevant business activity. Assume that, as determined under a method in accordance with U.S. generally accepted accounting principles, the fair value of such stock options attributable to the employees' performance of the relevant business activity is 500 for the taxable year in question. In evaluating the controlled services, Taxpayer includes salaries, fringe benefits, and related compensation of these employees in "total services costs," as defined in paragraph (j) of this section. Taxpayer does not include any amount attributable to stock options in total services costs, nor does it deduct that amount in determining "reported operating profit" within the meaning of § 1.482–5(d)(5), for the year under examination.

(iii) Stock options are granted to the employees of Companies A, B, C, and D. Under a fair value method in accordance with U.S. generally accepted accounting principles, the comparables include in total compensation the value of the stock options attributable to the employees' performance of the relevant business activity for the annual financial reporting period, and treat this amount as an expense in determining operating profit for financial accounting purposes. The treatment of employee stock options is summarized in the following table.

	Salaries and other non-option compensation	Stock options fair value	Stock options expensed
Taxpayer	1,000	500	0
Company A	7,000	2,000	2,000
Company B	4,300	250	250
Company C	10,000	4,500	4,500
Company D	15,000	2,000	2,000

(iv) A material difference exists in accounting for stock-based compensation, as defined in § 1.482–7(d)(2)(i). Analysis indicates that this difference would materially affect the measure of an arm's length result under this paragraph (f). In making an adjustment to improve comparability under §§ 1.482–1(d)(2) and 1.482–5(c)(2)(iv), the Commissioner includes in total services costs of the tested party the total compensation costs of 1,500 (including stock option fair value). In addition, the Commissioner calculates the net cost plus PLI by reference to the financial-accounting data of Companies A, B, C, and D, which take into account compensatory stock options.

Example 4. Material difference in utilization of stock-based compensation.

(i) The facts are the same as in paragraph (i) of Example 3.

(ii) No stock options are granted to the employees of Taxpayer that engage in the relevant business activity. Thus, no deduction for stock options is made in determining "reported operating profit" within the meaning of § 1.482–5(d)(5), for the taxable year under examination.

(iii) Stock options are granted to the employees of Companies A, B, C, and D, but none of these companies expense stock options for financial accounting purposes. Under a method in accordance with U.S. generally accepted accounting principles, however, Companies A, B, C, and D disclose the fair value of the stock options for financial accounting purposes. The utilization and treatment of employee stock options is summarized in the following table.

	Salaries and other non-option compensation	Stock options fair value	Stock options expensed
Taxpayer	1,000	0	(*)
Company A	7,000	2,000	0
Company B	4,300	250	0
Company C	12,000	4,500	0
Company D	15,000	2,000	0

*N/A.

(iv) A material difference in the utilization of stock-based compensation exists within the meaning of § 1.482–7(d)(2)(i). Analysis indicates that these differences would materially affect the measure of an arm's length result under this paragraph (f). In evaluating the comparable operating profits of the tested party, the Commissioner uses Taxpayer's total services costs, which include total compensation costs of 1,000. In considering whether an adjustment is necessary to improve comparability under

§§ 1.482–1(d)(2) and 1.482–5(c)(2)(iv), the Commissioner recognizes that the total compensation provided to employees of Taxpayer is comparable to the total compensation provided to employees of Companies A, B, C, and D. Because Companies A, B, C, and D do not expense stock-based compensation for financial accounting purposes, their reported operating profits must be adjusted in order to improve comparability with the tested party. The Commissioner increases each comparable's total services costs, and also reduces its reported operating profit, by the fair value of the stock-based compensation incurred by the comparable company.

(v) The adjustments to the data of Companies A, B, C, and D described in paragraph (iv) of this *Example 4* are summarized in the following table:

	Salaries and other non-option compensation	Stock options	Total services costs (A)	Operating profit (B)	Net cost plus PLI (B/A) (%)
Per financial statements:					
Company A	7,000	2,000	25,000	6,000	24.00
Company B	4,300	250	12,500	2,500	20.00
Company C	12,000	4,500	36,000	11,000	30.56
Company D	15,000	2,000	27,000	7,000	25.93
As adjusted:					
Company A	7,000	2,000	27,000	4,000	14.80
Company B	4,300	250	12,750	2,250	17.65
Company C	12,000	4,500	40,500	6,500	16.05
Company D	15,000	2,000	29,000	5,000	17.24

Example 5. Non-material difference in utilization of stock-based compensation.

(i) The facts are the same as in paragraph (i) of *Example 3*.

(ii) Stock options are granted to the employees of Taxpayer that engage in the relevant business activity. Assume that, as determined under a method in accordance with U.S. generally accepted accounting principles, the fair value of such stock options attributable to the employees' performance of the relevant business activity is 50 for the taxable year. Taxpayer includes salaries, fringe benefits, and all other compensation of these employees (including the stock option fair value) in "total services costs," as defined in paragraph (j) of this section, and deducts these amounts in determining "reported operating profit" within the meaning of § 1.482–5(d)(5), for the taxable year under examination.

(iii) Stock options are granted to the employees of Companies A, B, C, and D, but none of these companies expense stock options for financial accounting purposes. Under a method in accordance with U.S. generally accepted accounting principles, however, Companies A, B, C, and D disclose the fair value of the stock options for financial accounting purposes. The utilization and treatment of employee stock options is summarized in the following table.

	Salaries and other non-option compensation	Stock options fair value	Stock options expensed
Taxpayer	1,000	50	50
Company A	7,000	100	0
Company B	4,300	40	0
Company C	10,000	130	0
Company D	15,000	75	0

(iv) Analysis of the data reported by Companies A, B, C, and D indicates that an adjustment for differences in utilization of stock-based compensation would not have a material effect on the determination of an arm's length result.

	Salaries and other non-option compensation	Stock options fair value	Total services costs (A)	Operating profit (B)	Net cost plus PLI (B/A) (%)
Per financial statements:					
Company A	7,000	100	25,000	6,000	24.00
Company B	4,300	40	12,500	2,500	20.00
Company C	12,000	130	36,000	11,000	30.56
Company D	15,000	75	27,000	7,000	25.93
As adjusted:					
Company A	7,000	100	25,100	5,900	23.51
Company B	4,300	40	12,540	2,460	19.62
Company C	12,000	130	36,130	10,870	30.09
Company D	15,000	75	27,075	6,925	25.58

(v) Under the circumstances, the difference in utilization of stock-based compensation would not materially affect the determination of the arm's length result under this paragraph (f). Accordingly, in calculating the net cost plus PLI, no comparability adjustment is made to the data of Companies A, B, C, or D pursuant to §§ 1.482–1(d)(2) and 1.482–5(c)(2)(iv).

Example 6. Material difference in comparables' accounting for stock-based compensation. (i) The facts are the same as in paragraph (i) of *Example 3*.

(ii) Stock options are granted to the employees of Taxpayer that engage in the relevant business activity. Assume that, as determined under a method in accordance

with U.S. generally accepted accounting principles, the fair value of such stock options attributable to employees' performance of the relevant business activity is 500 for the taxable year. Taxpayer includes salaries, fringe benefits, and all other compensation of these employees (including the stock option fair value) in "total services costs," as defined in paragraph (j) of this section and deducts these amounts in determining "reported operating profit" within the meaning of § 1.482–5(d)(5), for the taxable year under examination.

(iii) Stock options are granted to the employees of Companies A, B, C, and D. Companies A and B expense the stock options for financial accounting purposes in accordance with U.S. generally accepted accounting principles. Companies C and D do *not* expense the stock options for financial accounting purposes. Under a method in accordance with U.S. generally accepted accounting principles, however, Companies C and D disclose the fair value of these options in their financial statements. The utilization and accounting treatment of options are depicted in the following table.

	Salary and other non-option compensation	Stock options fair value	Stock options expensed
Taxpayer	1,000	500	500
Company A	7,000	2,000	2,000
Company B	4,300	250	250
Company C	12,000	4,500	0
Company D	15,000	2,000	0

(iv) A material difference in accounting for stock-based compensation exists, within the meaning of § 1.482–7(d)(2)(i). Analysis indicates that this difference would materially affect the measure of the arm's length result under paragraph (f) of this section. In evaluating the comparable operating profits of the tested party, the Commissioner includes in total services costs Taxpayer's total compensation costs of 1,500 (including stock option fair value of 500). In considering whether an adjustment is necessary to improve comparability under §§ 1.482–1(d)(2) and 1.482–5(c)(2)(iv), the Commissioner recognizes that the total employee compensation (including stock options provided by Taxpayer and Companies A, B, C, and D) provides a reliable basis for comparison. Because Companies A and B expense stock-based compensation for financial accounting purposes, whereas Companies C and D do not, an adjustment to the comparables' operating profit is necessary. In computing the net cost plus PLI, the Commissioner uses the financial-accounting data of Companies A and B, as reported. The Commissioner increases the total services costs of Companies C and D by amounts equal to the fair value of their respective stock options, and reduces the operating profits of Companies C and D accordingly.

(v) The adjustments described in paragraph (iv) of this Example 6 are depicted in the following table. For purposes of illustration, the unadjusted data of Companies A and B are also included.

	Salaries and other non-option compensation	Stock options fair value	Total services costs (A)	Operating profit (B)	Net cost plus PLI (B/A) (%)
Per financial Statements:					
Company A	7,000	2,000	27,000	4,000	14.80
Company B	4,300	250	12,750	2,250	17.65
As adjusted:					
Company C	12,000	4,500	40,500	6,500	16.05
Company D	15,000	2,000	29,000	5,000	17.24

(g) *Profit split method*—(1) *In general.* The profit split method evaluates whether the allocation of the combined operating profit or loss attributable to one or more controlled transactions is arm's length by reference to the relative value of each controlled taxpayer's contribution to that combined operating profit or loss. The relative value of each controlled taxpayer's contribution is determined in a manner that reflects the functions performed, risks assumed and resources employed by such controlled taxpayer in the relevant business activity. For application of the profit split method (both the comparable profit split and the residual profit split), see § 1.482–6. The residual profit split method is ordinarily used in controlled services transactions involving a combination of nonroutine contributions by multiple controlled taxpayers.

(2) *Examples.* The principles of this paragraph (g) are illustrated by the following examples:

Example 1. Residual profit split. (i) Company A, a corporation resident in Country X, auctions spare parts by means of an interactive database. Company A maintains a database that lists all spare parts available for auction. Company A developed the software used to run the database. Company A's database is managed by Company A employees in a data center located in Country X, where storage and manipulation of data also take place. Company A has a wholly-owned subsidiary, Company B, located in Country Y. Company B performs marketing and advertising activities to promote Company A's interactive database. Company B solicits unrelated companies to auction spare parts on Company A's database, and solicits customers interested in purchasing spare parts online. Company B owns and maintains a computer server in Country Y, where it receives information on spare parts available for auction. Company B has also designed a specialized communications network that connects its data center to Company A's data center in Country X. The communications network allows Company B to enter data from uncontrolled companies on Company A's database located in Country X. Company B's communications network also allows uncontrolled companies to access Company A's interactive database and purchase spare parts. Company B bore the risks and cost of developing this specialized communications network. Company B enters into contracts with uncontrolled companies and provides the companies access to Company A's database through the Company B network.

(ii) Analysis of the facts and circumstances indicates that both Company A and Company B possess valuable intangibles that they use to conduct the spare parts auction business. Company A bore the economic risks of developing and maintaining software and the interactive database. Company B bore the economic risks of developing the necessary technology to transmit information from its server to Company A's data center, and to allow uncontrolled companies to access Company A's database. Company B helped to

enhance the value of Company A's trademark and to establish a network of customers in Country Y. In addition, there are no market comparables for the transactions between Company A and Company B to reliably evaluate them separately. Given the facts and circumstances, the Commissioner determines that a residual profit split method will provide the most reliable measure of an arm's length result.

(iii) Under the residual profit split method, profits are first allocated based on the routine contributions of each taxpayer. Routine contributions include general sales, marketing or administrative functions performed by Company B for Company A for which it is possible to identify market returns. Any residual profits will be allocated based on the nonroutine contributions of each taxpayer. Since both Company A and Company B provided nonroutine contributions, the residual profits are allocated based on these contributions.

Example 2. Residual profit split. (i) Company A, a Country 1 corporation, provides specialized services pertaining to the processing and storage of Level 1 hazardous waste (for purposes of this example, the most dangerous type of waste). Under long-term contracts with private companies and governmental entities in Country 1, Company A performs multiple services, including transportation of Level 1 waste, development of handling and storage protocols, recordkeeping, and supervision of waste-storage facilities owned and maintained by the contracting parties. Company A's research and development unit has also developed new and unique processes for transport and storage of Level 1 waste that minimize environmental and occupational effects. In addition to this novel technology, Company A has substantial know-how and a long-term record of safe operations in Country 1.

(ii) Company A's subsidiary, Company B, has been in operation continuously for a number of years in Country 2. Company B has successfully completed several projects in Country 2 involving Level 2 and Level 3 waste, including projects with government-owned entities. Company B has a license in Country 2 to handle Level 2 waste (Level 3 does not require a license). Company B has established a reputation for completing these projects in a responsible manner. Company B has cultivated contacts with procurement officers, regulatory and licensing officials, and other government personnel in Country 2.

(iii) Country 2 government publishes invitations to bid on a project to handle the country's burgeoning volume of Level 1 waste, all of which is generated in government-owned facilities. Bidding is limited to companies that are domiciled in Country 2 and that possess a license from the government to handle Level 1 or Level 2 waste. In an effort to submit a winning bid to secure the contract, Company B points to its Level 2 license and its record of successful completion of projects, and also demonstrates to these officials that it has access to substantial technical expertise pertaining to processing of Level 1 waste.

(iv) Company A enters into a long-term technical services agreement with Company B. Under this agreement, Company A agrees to supply to Company B project managers and other technical staff who have detailed knowledge of Company A's proprietary Level 1 remediation techniques. Company A commits to perform under any long-term contracts entered into by Company B. Company B agrees to compensate Company A based on a markup on Company A's marginal costs (pro rata compensation and current expenses of Company A personnel). In the bid on the Country 2 for Level 1 waste, Company B proposes to use a multi-disciplinary team of specialists from Company A and Company B. Project managers from Company A will direct the team, which will also include employees of Company B and will make use of physical assets and facilities owned by Company B. Only Company A and Company B personnel will perform services under the contract. Country 2 grants Company B a license to handle Level 1 waste.

(v) Country 2 grants Company B a five-year, exclusive contract to provide processing services for all Level 1 hazardous waste generated in County 2. Under the contract, Company B is to be paid a fixed price per ton of Level 1 waste that it processes each year. Company B undertakes that all services provided will meet international standards applicable to processing of Level 1 waste. Company B begins performance under the contract.

(vi) Analysis of the facts and circumstances indicates that both Company A and Company B make nonroutine contributions to the Level 1 waste processing activity in Country 2. In addition, it is determined that reliable comparables are not available for the services that Company A provides under the long-term contract, in part because those services incorporate specialized knowledge and process intangibles developed by Company A. It is also determined that reliable comparables are not available for the Level 2 license in Country 2, the successful track record, the government contacts with Country 2 officials, and other intangibles that Company B provided. In view of these facts, the Commissioner determines that the residual profit split method for services in paragraph (g) of this section provides the most reliable means of evaluating the arm's length results for the transaction. In evaluating the appropriate returns to Company A and Company B for their respective contributions, the Commissioner takes into account that the controlled parties incur different risks, because the contract between the controlled parties provides that Company A will be compensated on the basis of marginal costs incurred, plus a markup, whereas the contract between Company B and the government of Country 2 provides that Company B will be compensated on a fixed-price basis per ton of Level 1 waste processed.

(vii) In the first stage of the residual profit split, an arm's length return is determined for routine activities performed by Company B in Country 2, such as transportation, recordkeeping, and administration. In addition, an arm's length return is determined for routine activities performed by Company A (administrative, human resources, etc.) in connection with providing personnel to Company B. After the arm's length return for these functions is determined, residual profits may be present. In the second stage of the residual profit split, any residual profit is allocated by reference to the relative value of the nonroutine contributions made by each taxpayer. Company A's nonroutine contributions include its commitment to perform under the contract and the specialized technical knowledge made available through the project managers under the services agreement with Company B. Company B's nonroutine contributions include its licenses to handle Level 1 and Level 2 waste in Country 2, its knowledge of and contacts with procurement, regulatory and licensing officials in the government of Country 2, and its record in Country 2 of successfully handling non-Level 1 waste.

(h) *Unspecified methods.* Methods not specified in paragraphs (b) through (g) of this section may be used to evaluate whether the amount charged in a controlled services transaction is arm's length. Any method used under this paragraph (h) must be applied in accordance with the provisions of § 1.482–1. Consistent with the specified methods, an unspecified method should take into account the general principle that uncontrolled taxpayers evaluate the terms of a transaction by considering the realistic alternatives to that transaction, including economically similar transactions structured as other than services transactions, and only enter into a particular transaction if none of the alternatives is preferable to it. For example, the comparable uncontrolled services price method compares a controlled services transaction to similar uncontrolled transactions to provide a direct estimate of the price to which the parties would have agreed had they resorted directly to a market alternative to the controlled services transaction. Therefore, in establishing whether a controlled services transaction achieved an arm's length result, an unspecified method should provide information on the prices or profits that the controlled taxpayer could have realized by choosing a realistic alternative to the controlled services transaction (for example, outsourcing a particular service function, rather than performing the function itself). As with any method, an unspecified method will not be applied unless it provides the most reliable measure of an arm's length result under the principles of the best method rule. See § 1.482–1(c). Therefore, in accordance with § 1.482–1(d) (comparability), to the extent that an unspecified method relies on internal data rather than uncontrolled comparables, its reliability will be

reduced. Similarly, the reliability of a method will be affected by the reliability of the data and assumptions used to apply the method, including any projections used.

Example. (i) Company T, a U.S. corporation, develops computer software programs including a real estate investment program that performs financial analysis of commercial real properties. The primary business activity of Companies U, V and W is commercial real estate development. For business reasons, Company T does not sell the computer program to its customers (on a compact disk or via download from Company T's server through the Internet). Instead, Company T maintains the software program on its own server and allows customers to access the program through the Internet by using a password. The transactions between Company T and Companies U, V and W are structured as controlled services transactions whereby Companies U, V and W obtain access via the Internet to Company T's software program for financial analysis. Each year, Company T provides a revised version of the computer program including the most recent data on the commercial real estate market, rendering the old version obsolete.

(ii) In evaluating whether the consideration paid by Companies U, V and W to Company T was arm's length, the Commissioner may consider, subject to the best method rule of § 1.482–1(c), Company T's alternative of selling the computer program to Companies U, V and W on a compact disk or via download through the Internet. The Commissioner determines that the controlled services transactions between Company T and Companies U, V and W are comparable to the transfer of a similar software program on a compact disk or via download through the Internet between uncontrolled parties. Subject to adjustments being made for material differences between the controlled services transactions and the comparable uncontrolled transactions, the uncontrolled transfers of tangible property may be used to evaluate the arm's length results for the controlled services transactions between Company T and Companies U, V and W.

(i) *Contingent-payment contractual terms for services*—(1) *Contingent-payment contractual terms recognized in general.* In the case of a contingent-payment arrangement, the arm's length result for the controlled services transaction generally would not require payment by the recipient to the renderer in the tax accounting period in which the service is rendered if the specified contingency does not occur in that period. If the specified contingency occurs in a tax accounting period subsequent to the period in which the service is rendered, the arm's length result for the controlled services transaction generally would require payment by the recipient to the renderer on a basis that reflects the recipient's benefit from the services rendered and the risks borne by the renderer in performing the activities in the absence of a provision that unconditionally obligates the recipient to pay for the activities performed in the tax accounting period in which the service is rendered.

(2) *Contingent-payment arrangement.* For purposes of this paragraph (i), an arrangement will be treated as a contingent-payment arrangement if it meets all of the requirements in paragraph (i)(2)(i) of this section and is consistent with the economic substance and conduct in paragraph (i)(2)(ii) of this section.

(i) *General requirements*—(A) *Written contract.* The arrangement is set forth in a written contract entered into prior to, or contemporaneous with the start of the activity or group of activities constituting the controlled services transaction.

(B) *Specified contingency.* The contract states that payment is contingent (in whole or in part) upon the happening of a future benefit (within the meaning of paragraph (l)(3) of this section) for the recipient directly related to the controlled services transaction.

(C) *Basis for payment.* The contract provides for payment on a basis that reflects the recipient's benefit from the services rendered and the risks borne by the renderer. Whether the specified contingency bears a direct relationship to the controlled services transaction, and whether the basis for payment reflects the recipient's benefit and the renderer's risk, is evaluated based on all the facts and circumstances.

(ii) *Economic substance and conduct.* The arrangement, including the contingency and the basis for payment, is consistent with the economic substance of the controlled transaction and the conduct of the controlled parties. See § 1.482–1(d)(3)(ii)(B).

(3) *Commissioner's authority to impute contingent-payment terms.* Consistent with the authority in § 1.482–1(d)(3)(ii)(B), the Commissioner may impute contingent-payment contractual terms in a controlled services transaction if the economic substance of the transaction is consistent with the existence of such terms.

(4) *Evaluation of arm's length charge.* Whether the amount charged in a contingent-payment arrangement is arm's length will be evaluated in accordance with this section and other applicable regulations under section 482. In evaluating whether the amount charged in a contingent-payment arrangement for the manufacture, construction, or development of tangible or intangible property owned by the recipient is arm's length, the charge determined under the rules of §§ 1.482–3 and 1.482–4 for the transfer of similar property may be considered. See § 1.482–1(f)(2)(ii).

(5) *Examples.* The principles of this paragraph (i) are illustrated by the following examples:

Example 1. (i) Company X is a member of a controlled group that has operated in the pharmaceutical sector for many years. In year 1, Company X enters into a written services agreement with Company Y, another member of the controlled group, whereby Company X will perform certain research and development activities for Company Y. The parties enter into the agreement before Company X undertakes any of the research and development activities covered by the agreement. At the time the agreement is entered into, the possibility that any new products will be developed is highly uncertain and the possible market or markets for any products that may be developed are not known and cannot be estimated with any reliability. Under the agreement, Company Y will own any patent or other rights that result from the activities of Company X under the agreement and Company Y will make payments to Company X only if such activities result in commercial sales of one or more derivative products. In that event, Company Y will pay Company X, for a specified period, x% of Company Y's gross sales of each of such products. Payments are required with respect to each jurisdiction in which Company Y has sales of such a derivative product, beginning with the first year in which the sale of a product occurs in the jurisdiction and continuing for six additional years with respect to sales of that product in that jurisdiction.

(ii) As a result of research and development activities performed by Company X for Company Y in years 1 through 4, a compound is developed that may be more effective than existing medications in the treatment of certain conditions. Company Y registers the patent rights with respect to the compound in several jurisdictions in year 4. In year 6, Company Y begins commercial sales of the product in Jurisdiction A and, in that year, Company Y makes the payment to Company X that is required under the agreement. Sales of the product continue in Jurisdiction A in years 7 through 9 and Company Y makes the payments to Company X in years 7 through 9 that are required under the agreement.

(iii) The years under examination are years 6 though 9. In evaluating whether the contingent-payment terms will be recognized, the Commissioner considers whether the conditions of paragraph (i)(2) of this section are met and whether the arrangement, including the specified contingency and basis of payment, is consistent with the economic substance of the controlled services transaction and with the conduct of the controlled parties. The Commissioner determines that the contingent-payment arrangement is reflected in the written agreement between Company X and Company Y; that commercial sales of products developed under the arrangement

represent future benefits for Company Y directly related to the controlled services transaction; and that the basis for the payment provided for in the event such sales occur reflects the recipient's benefit and the renderer's risk. Consistent with § 1.482–1(d)(3)(ii)(B) and (iii)(B), the Commissioner determines that the parties' conduct over the term of the agreement has been consistent with their contractual allocation of risk; that Company X has the financial capacity to bear the risk that its research and development services may be unsuccessful and that it may not receive compensation for such services; and that Company X exercises managerial and operational control over the research and development, such that it is reasonable for Company X to assume the risk of those activities. Based on all these facts, the Commissioner determines that the contingent-payment arrangement is consistent with economic substance.

(iv) In determining whether the amount charged under the contingent-payment arrangement in each of years 6 through 9 is arm's length, the Commissioner evaluates under this section and other applicable rules under section 482 the compensation paid in each year for the research and development services. This analysis takes into account that under the contingent-payment terms Company X bears the risk that it might not receive payment for its services in the event that those services do not result in marketable products and the risk that the magnitude of its payment depends on the magnitude of product sales, if any. The Commissioner also considers the alternatives reasonably available to the parties in connection with the controlled services transaction. One such alternative, in view of Company X's willingness and ability to bear the risk and expenses of research and development activities, would be for Company X to undertake such activities on its own behalf and to license the rights to products successfully developed as a result of such activities. Accordingly, in evaluating whether the compensation of x% of gross sales that is paid to Company X during the first four years of commercial sales of derivative products is arm's length, the Commissioner may consider the royalties (or other consideration) charged for intangibles that are comparable to those incorporated in the derivative products and that resulted from Company X's research and development activities under the contingent-payment arrangement.

Example 2. (i) The facts are the same as in *Example 1*, except that no commercial sales ever materialize with regard to the patented compound so that, consistent with the agreement, Company Y makes no payments to Company X in years 6 through 9.

(ii) Based on all the facts and circumstances, the Commissioner determines that the contingent-payment arrangement is consistent with economic substance, and the result (no payments in years 6 through 9) is consistent with an arm's length result.

Example 3. (i) The facts are the same as in *Example 1*, except that, in the event that Company X's activities result in commercial sales of one or more derivative products by Company Y, Company Y will pay Company X a fee equal to the research and development costs borne by Company X plus an amount equal to x% of such costs, with the payment to be made in the first year in which any such sales occur. The x% markup on costs is within the range, ascertainable in year 1, of markups on costs of independent contract researchers that are compensated under terms that unconditionally obligate the recipient to pay for the activities performed in the tax accounting period in which the service is rendered. In year 6, Company Y makes the single payment to Company X that is required under the arrangement.

(ii) The years under examination are years 6 though 9. In evaluating whether the contingent-payment terms will be recognized, the Commissioner considers whether the requirements of paragraph (i)(2) of this section were met at the time the written agreement was entered into and whether the arrangement, including the specified contingency and basis for payment, is consistent with the economic substance of the controlled services transaction and with the conduct of the controlled parties. The Commissioner determines that the contingent-payment terms are reflected in the written agreement between Company X and Company Y and that commercial sales of products developed under the arrangement represent future benefits for Company Y directly related to the controlled services transaction. However, in this case, the Commissioner determines that the basis for payment provided for in the event such sales occur (costs of the services plus x%, representing the markup for contract research in the absence of any nonpayment risk) does not reflect the recipient's benefit and the renderer's risks in the controlled services transaction. Based on all the facts and circumstances, the Commissioner determines that the contingent-payment arrangement is not consistent with economic substance.

(iii) Accordingly, the Commissioner determines to exercise its authority to impute contingent-payment contractual terms that accord with economic substance, pursuant to paragraph (i)(3) of this section and § 1.482–1(d)(3)(ii)(B). In this regard, the Commissioner takes into account that at the time the arrangement was entered into, the possibility that any new products would be developed was highly uncertain and the possible market or markets for any products that may be developed were not known and could not be estimated with any reliability. In such circumstances, it is reasonable to conclude that one possible basis of payment, in order to reflect the recipient's benefit and the renderer's risks, would be a charge equal to a percentage of commercial sales of one or more derivative products that result from the research and development activities. The Commissioner in this case may impute terms that require Company Y to pay Company X a percentage of sales of the products developed under the agreement in each of years 6 through 9.

(iv) In determining an appropriate arm's length charge under such imputed contractual terms, the Commissioner conducts an analysis under this section and other applicable rules under section 482, and considers the alternatives reasonably available to the parties in connection with the controlled services transaction. One such alternative, in view of Company X's willingness and ability to bear the risks and expenses of research and development activities, would be for Company X to undertake such activities on its own behalf and to license the rights to products successfully developed as a result of such activities. Accordingly, for purposes of its determination, the Commissioner may consider the royalties (or other consideration) charged for intangibles that are comparable to those incorporated in the derivative products that resulted from Company X's research and development activities under the contingent-payment arrangement.

(j) *Total services costs.* For purposes of this section, total services costs means all costs of rendering those services for which total services costs are being determined. Total services costs include all costs in cash or in kind (including stock-based compensation) that, based on analysis of the facts and circumstances, are directly identified with, or reasonably allocated in accordance with the principles of paragraph (k)(2) of this section to, the services. In general, costs for this purpose should comprise provision for all resources expended, used, or made available to achieve the specific objective for which the service is rendered. Reference to generally accepted accounting principles or Federal income tax accounting rules may provide a useful starting point but will not necessarily be conclusive regarding inclusion of costs in total services costs. Total services costs do not include interest expense, foreign income taxes (as defined in § 1.901–2(a)), or domestic income taxes.

(k) *Allocation of costs*—(1) *In general.* In any case where the renderer's activity that results in a benefit (within the meaning of paragraph (l)(3) of this section) for one recipient in a controlled services transaction also generates a benefit for one or more other members of a controlled group (including the benefit, if any, to the renderer), and the amount charged under this section in the controlled services transaction is determined under a method that makes reference to costs, costs must be allocated among the portions of the activity performed for the benefit of the first mentioned recipient and such other members of the controlled group under this paragraph (k). The principles of this paragraph (k) must also be used whenever it is appropriate to allocate and apportion any class of costs (for example, overhead costs) in order to determine the total services costs of rendering the services. In no event will an allocation of costs based on a

generalized or non-specific benefit be appropriate.

(2) *Appropriate method of allocation and apportionment*—(i) *Reasonable method standard.* Any reasonable method may be used to allocate and apportion costs under this section. In establishing the appropriate method of allocation and apportionment, consideration should be given to all bases and factors, including, for example, total services costs, total costs for a relevant activity, assets, sales, compensation, space utilized, and time spent. The costs incurred by supporting departments may be apportioned to other departments on the basis of reasonable overall estimates, or such costs may be reflected in the other departments' costs by applying reasonable departmental overhead rates. Allocations and apportionments of costs must be made on the basis of the full cost, as opposed to the incremental cost.

(ii) *Use of general practices.* The practices used by the taxpayer to apportion costs in connection with preparation of statements and analyses for the use of management, creditors, minority shareholders, joint venturers, clients, customers, potential investors, or other parties or agencies in interest will be considered as potential indicators of reliable allocation methods, but need not be accorded conclusive weight by the Commissioner. In determining the extent to which allocations are to be made to or from foreign members of a controlled group, practices employed by the domestic members in apportioning costs among themselves will also be considered if the relationships with the foreign members are comparable to the relationships among the domestic members of the controlled group. For example, if for purposes of reporting to public stockholders or to a governmental agency, a corporation apportions the costs attributable to its executive officers among the domestic members of a controlled group on a reasonable and consistent basis, and such officers exercise comparable control over foreign members of the controlled group, such domestic apportionment practice will be considered in determining the allocations to be made to the foreign members.

(3) *Examples.* The principles of this paragraph (k) are illustrated by the following examples:

Example 1. Company A pays an annual license fee of 500x to an uncontrolled taxpayer for unlimited use of a database within the corporate group. Under the terms of the license with the uncontrolled taxpayer, Company A is permitted to use the database for its own use and in rendering research services to its subsidiary, Company B. Company B obtains benefits from the database that are similar to those that it would obtain if it had independently licensed the database from the uncontrolled taxpayer. Evaluation of the arm's length charge (under a method in which costs are relevant) to Company B for the controlled services that incorporate use of the database must take into account the full amount of the license fee of 500x paid by Company A, as reasonably allocated and apportioned to the relevant benefits, although the incremental use of the database for the benefit of Company B did not result in an increase in the license fee paid by Company A.

Example 2. (i) Company A is a consumer products company located in the United States. Companies B and C are wholly-owned subsidiaries of Company A and are located in Countries B and C, respectively. Company A and its subsidiaries manufacture products for sale in their respective markets. Company A hires a consultant who has expertise regarding a manufacturing process used by Company A and its subsidiary, Company B. Company C, the Country C subsidiary, uses a different manufacturing process, and accordingly will not receive any benefit from the outside consultant hired by Company A. In allocating and apportioning the cost of hiring the outside consultant (100), Company A determines that sales constitute the most appropriate allocation key.

(ii) Company A and its subsidiaries have the following sales:

Company	A	B	C	Total
Sales	400	100	200	700

(iii) Because Company C does not obtain any benefit from the consultant, none of the costs are allocated to it. Rather, the costs of 100 are allocated and apportioned ratably to Company A and Company B as the entities that obtain a benefit from the campaign, based on the total sales of those entities (500). An appropriate allocation of the costs of the consultant is as follows:

Company	A	B	Total
Allocation	400/500	100/500	
Amount	80	20	100

(l) *Controlled services transaction*—(1) *In general.* A controlled services transaction includes any activity (as defined in paragraph (l)(2) of this section) by one member of a group of controlled taxpayers (the renderer) that results in a benefit (as defined in paragraph (l)(3) of this section) to one or more other members of the controlled group (the recipient(s)).

(2) *Activity.* An activity includes the performance of functions, assumptions of risks, or use by a renderer of tangible or intangible property or other resources, capabilities, or knowledge, such as knowledge of and ability to take advantage of particularly advantageous situations or circumstances. An activity also includes making available to the recipient any property or other resources of the renderer.

(3) *Benefit*—(i) *In general.* An activity is considered to provide a benefit to the recipient if the activity directly results in a reasonably identifiable increment of economic or commercial value that enhances the recipient's commercial position, or that may reasonably be anticipated to do so. An activity is generally considered to confer a benefit if, taking into account the facts and circumstances, an uncontrolled taxpayer in circumstances comparable to those of the recipient would be willing to pay an uncontrolled party to perform the same or similar activity on either a fixed or contingent-payment basis, or if the recipient otherwise would have performed for itself the same activity or a similar activity. A benefit may result to the owner of an intangible if the renderer engages in an activity that is reasonably anticipated to result in an increase in the value of that intangible. Paragraphs (l)(3)(ii) through (v) of this section provide guidelines that indicate the presence or absence of a benefit for the activities in the controlled services transaction.

(ii) *Indirect or remote benefit.* An activity is not considered to provide a benefit to the recipient if, at the time the activity is performed, the present or reasonably anticipated benefit from that activity is so indirect or remote that the recipient would not be willing to pay, on either a fixed or contingent-payment

basis, an uncontrolled party to perform a similar activity, and would not be willing to perform such activity for itself for this purpose. The determination whether the benefit from an activity is indirect or remote is based on the nature of the activity and the situation of the recipient, taking into consideration all facts and circumstances.

(iii) *Duplicative activities.* If an activity performed by a controlled taxpayer duplicates an activity that is performed, or that reasonably may be anticipated to be performed, by another controlled taxpayer on or for its own account, the activity is generally not considered to provide a benefit to the recipient, unless the duplicative activity itself provides an additional benefit to the recipient.

(iv) *Shareholder activities.* An activity is not considered to provide a benefit if the sole effect of that activity is either to protect the renderer's capital investment in the recipient or in other members of the controlled group, or to facilitate compliance by the renderer with reporting, legal, or regulatory requirements applicable specifically to the renderer, or both. Activities in the nature of day-to-day management generally do not relate to protection of the renderer's capital investment. Based on analysis of the facts and circumstances, activities in connection with a corporate reorganization may be considered to provide a benefit to one or more controlled taxpayers.

(v) *Passive association.* A controlled taxpayer generally will not be considered to obtain a benefit where that benefit results from the controlled taxpayer's status as a member of a controlled group. A controlled taxpayer's status as a member of a controlled group may, however, be taken into account for purposes of evaluating comparability between controlled and uncontrolled transactions.

(4) *Disaggregation of transactions.* A controlled services transaction may be analyzed as two separate transactions for purposes of determining the arm's length consideration, if that analysis is the most reliable means of determining the arm's length consideration for the controlled services transaction. See the best method rule under § 1.482–1(c).

(5) *Examples.* The principles of this paragraph (l) are illustrated by the following examples. In each example, assume that Company X is a U.S. corporation and Company Y is a wholly-owned subsidiary of Company X in Country B.

Example 1. In general. In developing a worldwide advertising and promotional campaign for a consumer product, Company X pays for and obtains designation as an official sponsor of the Olympics. This designation allows Company X and all its subsidiaries, including Company Y, to identify themselves as sponsors and to use the Olympic logo in advertising and promotional campaigns. The Olympic sponsorship campaign generates benefits to Company X, Company Y, and other subsidiaries of Company X.

Example 2. Indirect or remote benefit. Based on recommendations contained in a study performed by its internal staff, Company X implements certain changes in its management structure and the compensation of managers of divisions located in the United States. No changes were recommended or considered for Company Y in Country B. The internal study and the resultant changes in its management may increase the competitiveness and overall efficiency of Company X. Any benefits to Company Y as a result of the study are, however, indirect or remote. Consequently, Company Y is not considered to obtain a benefit from the study.

Example 3. Indirect or remote benefit. Based on recommendations contained in a study performed by its internal staff, Company X decides to make changes to the management structure and management compensation of its subsidiaries, in order to increase their profitability. As a result of the recommendations in the study, Company X implements substantial changes in the management structure and management compensation scheme of Company Y. The study and the changes implemented as a result of the recommendations are anticipated to increase the profitability of Company X and its subsidiaries. The increased management efficiency of Company Y that results from these changes is considered to be a specific and identifiable benefit, rather than remote or speculative.

Example 4. Duplicative activities. At its corporate headquarters in the United States, Company X performs certain treasury functions for Company X and for its subsidiaries, including Company Y. These treasury functions include raising capital, arranging medium and long-term financing for general corporate needs, including cash management. Under these circumstances, the treasury functions performed by Company X do not duplicate the functions performed by Company Y's staff. Accordingly, Company Y is considered to obtain a benefit from the functions performed by Company X.

Example 5. Duplicative activities. The facts are the same as in *Example 4*, except that Company Y's functions include ensuring that the financing requirements of its own operations are met. Analysis of the facts and circumstances indicates that Company Y independently administers all financing and cash-management functions necessary to support its operations, and does not utilize financing obtained by Company X. Under the circumstances, the treasury functions performed by Company X are duplicative of similar functions performed by Company Y's staff, and the duplicative functions do not enhance Company Y's position. Accordingly, Company Y is not considered to obtain a benefit from the duplicative activities performed by Company X.

Example 6. Duplicative activities. Company X's in-house legal staff has specialized expertise in several areas, including intellectual property law. Company Y is involved in negotiations with an unrelated party to enter into a complex joint venture that includes multiple licenses and cross-licenses of patents and copyrights. Company Y retains outside counsel that specializes in intellectual property law to review the transaction documents. Outside counsel advises that the terms for the proposed transaction are advantageous to Company Y and that the contracts are valid and fully enforceable. Before Company Y executes the contracts, the legal staff of Company X also reviews the transaction documents and concurs in the opinion provided by outside counsel. The activities performed by Company X substantially duplicate the legal services obtained by Company Y, but they also reduce the commercial risk associated with the transaction in a way that confers an additional benefit on Company Y.

Example 7. Shareholder activities. Company X is a publicly held corporation. U.S. laws and regulations applicable to publicly held corporations such as Company X require the preparation and filing of periodic reports that show, among other things, profit and loss statements, balance sheets, and other material financial information concerning the company's operations. Company X, Company Y and each of the other subsidiaries maintain their own separate accounting departments that record individual transactions and prepare financial statements in accordance with their local accounting practices. Company Y, and the other subsidiaries, forward the results of their financial performance to Company X, which analyzes and compiles these data into periodic reports in accordance with U.S. laws and regulations. Because Company X's preparation and filing of the reports relate solely to its role as an investor of capital or shareholder in Company Y or to its compliance with reporting, legal, or regulatory requirements, or both, these activities constitute shareholder activities and therefore Company Y is not considered to obtain a benefit from the preparation and filing of the reports.

Example 8. Shareholder activities. The facts are the same as in *Example 7*, except that Company Y's accounting department maintains a general ledger recording individual transactions, but does not prepare any financial statements (such as profit and loss statements and balance sheets). Instead, Company Y forwards the general ledger data to Company X, and Company X analyzes and compiles financial statements for Company Y, as well as for Company X's overall operations, for purposes of complying with U.S. reporting requirements. Company Y is subject to reporting requirements in Country B similar to those applicable to Company X in the United States. Much of the data that Company X analyzes and compiles regarding Company Y's operations for purposes of complying with the U.S. reporting requirements are made available to Company

Y for its use in preparing reports that must be filed in Country B. Company Y incorporates these data, after minor adjustments for differences in local accounting practices, into the reports that it files in Country B. Under these circumstances, because Company X's analysis and compilation of Company Y's financial data does not relate solely to its role as an investor of capital or shareholder in Company Y, or to its compliance with reporting, legal, or regulatory requirements, or both, these activities do not constitute shareholder activities.

Example 9. Shareholder activities. Members of Company X's internal audit staff visit Company Y on a semiannual basis in order to review the subsidiary's adherence to internal operating procedures issued by Company X and its compliance with U.S. anti-bribery laws, which apply to Company Y on account of its ownership by a U.S. corporation. Because the sole effect of the reviews by Company X's audit staff is to protect Company X's investment in Company Y, or to facilitate Company X's compliance with U.S. anti-bribery laws, or both, the visits are shareholder activities and therefore Company Y is not considered to obtain a benefit from the visits.

Example 10. Shareholder activities. Country B recently enacted legislation that changed the foreign currency exchange controls applicable to foreign shareholders of Country B corporations. Company X concludes that it may benefit from changing the capital structure of Company Y, thus taking advantage of the new foreign currency exchange control laws in Country B. Company X engages an investment banking firm and a law firm to review the Country B legislation and to propose possible changes to the capital structure of Company Y. Because Company X's retention of the firms facilitates Company Y's ability to pay dividends and other amounts and has the sole effect of protecting Company X's investment in Company Y, these activities constitute shareholder activities and Company Y is not considered to obtain a benefit from the activities.

Example 11. Shareholder activities. The facts are the same as in *Example 10*, except that Company Y bears the full cost of retaining the firms to evaluate the new foreign currency control laws in Country B and to make appropriate changes to its stock ownership by Company X. Company X is considered to obtain a benefit from the rendering by Company Y of these activities, which would be shareholder activities if conducted by Company X (see *Example 10*).

Example 12. Shareholder activities. The facts are the same as in *Example 10*, except that the new laws relate solely to corporate governance in Country B, and Company X retains the law firm and investment banking firm in order to evaluate whether restructuring would increase Company Y's profitability, reduce the number of legal entities in Country B, and increase Company Y's ability to introduce new products more quickly in Country B. Because Company X retained the law firm and the investment banking firm primarily to enhance Company Y's profitability and the efficiency of its operations, and not solely to protect Company X's investment in Company Y or to facilitate Company X's compliance with Country B's corporate laws, or to both, these activities do not constitute shareholder activities.

Example 13. Shareholder activities. Company X establishes detailed personnel policies for its subsidiaries, including Company Y. Company X also reviews and approves the performance appraisals of Company Y's executives, monitors levels of compensation paid to all Company Y personnel, and is involved in hiring and firing decisions regarding the senior executives of Company Y. Because this personnel-related activity by Company X involves day-to-day management of Company Y, this activity does not relate solely to Company X's role as an investor of capital or a shareholder of Company Y, and therefore does not constitute a shareholder activity.

Example 14. Shareholder activities. Each year, Company X conducts a two-day retreat for its senior executives. The purpose of the retreat is to refine the long-term business strategy of Company X and its subsidiaries, including Company Y, and to produce a confidential strategy statement. The strategy statement identifies several potential growth initiatives for Company X and its subsidiaries and lists general means of increasing the profitability of the company as a whole. The strategy statement is made available without charge to Company Y and the other subsidiaries of Company X. Company Y independently evaluates whether to implement some, all, or none of the initiatives contained in the strategy statement. Because the preparation of the strategy statement does not relate solely to Company X's role as an investor of capital or a shareholder of Company Y, the expense of preparing the document is not a shareholder expense.

Example 15. Passive association/benefit. Company X is the parent corporation of a large controlled group that has been in operation in the information-technology sector for ten years. Company Y is a small corporation that was recently acquired by the Company X controlled group from local Country B owners. Several months after the acquisition of Company Y, Company Y obtained a contract to redesign and assemble the information-technology networks and systems of a large financial institution in Country B. The project was significantly larger and more complex than any other project undertaken to date by Company Y. Company Y did not use Company X's marketing intangibles to solicit the contract, and Company X had no involvement in the solicitation, negotiation, or anticipated execution of the contract. For purposes of this section, Company Y is not considered to obtain a benefit from Company X or any other member of the controlled group because the ability of Company Y to obtain the contract, or to obtain the contract on more favorable terms than would have been possible prior to its acquisition by the Company X controlled group, was due to Company Y's status as a member of the Company X controlled group and not to any specific activity by Company X or any other member of the controlled group.

Example 16. Passive association/benefit. The facts are the same as in *Example 15*, except that Company X executes a performance guarantee with respect to the contract, agreeing to assist in the project if Company Y fails to meet certain mileposts. This performance guarantee allowed Company Y to obtain the contract on materially more favorable terms than otherwise would have been possible. Company Y is considered to obtain a benefit from Company X's execution of the performance guarantee.

Example 17. Passive association/benefit. The facts are the same as in Example 15, except that Company X began the process of negotiating the contract with the financial institution in Country B before acquiring Company Y. Once Company Y was acquired by Company X, the contract with the financial institution was entered into by Company Y. Company Y is considered to obtain a benefit from Company X's negotiation of the contract.

Example 18. Passive association/benefit. The facts are the same as in Example 15, except that Company X sent a letter to the financial institution in Country B, which represented that Company X had a certain percentage ownership in Company Y and that Company X would maintain that same percentage ownership interest in Company Y until the contract was completed. This letter allowed Company Y to obtain the contract on more favorable terms than otherwise would have been possible. Since this letter from Company X to the financial institution simply affirmed Company Y's status as a member of the controlled group and represented that this status would be maintained until the contract was completed, Company Y is not considered to obtain a benefit from Company X's furnishing of the letter.

Example 19. Passive association/benefit. (i) S is a company that supplies plastic containers to companies in various industries. S establishes the prices for its containers through a price list that offers customers discounts based solely on the volume of containers purchased.

(ii) Company X is the parent corporation of a large controlled group in the information technology sector. Company Y is a wholly-owned subsidiary of Company X located in Country B. Company X and Company Y both purchase plastic containers from unrelated supplier S. In year 1, Company X purchases 1 million units and Company Y purchases 100,000 units. S, basing its prices on purchases by the entire group, completes the order for 1.1 million units at a price of $0.95 per unit, and separately bills and ships the orders to each company. Companies X and Y undertake no bargaining with supplier S with respect to the price charged, and purchase no other products from supplier S.

(iii) R1 and its wholly-owned subsidiary R2 are a controlled group of taxpayers (unrelated to Company X or Company Y) each of which carries out functions comparable to those of Companies X and Y and undertakes purchases of plastic containers from supplier S, identical to those purchased from S by Company X and Company Y, respectively. S, basing its prices

on purchases by the entire group, charges R1 and R2 $0.95 per unit for the 1.1 million units ordered. R1 and R2 undertake no bargaining with supplier S with respect to the price charged, and purchase no other products from supplier S.

(iv) U is an uncontrolled taxpayer that carries out comparable functions and undertakes purchases of plastic containers from supplier S identical to Company Y. U is not a member of a controlled group, undertakes no bargaining with supplier S with respect to the price charged, and purchases no other products from supplier S. U purchases 100,000 plastic containers from S at the price of $1.00 per unit.

(v) Company X charges Company Y a fee of $5,000, or $0.05 per unit of plastic containers purchased by Company Y, reflecting the fact that Company Y receives the volume discount from supplier S.

(vi) In evaluating the fee charged by Company X to Company Y, the Commissioner considers whether the transactions between R1, R2, and S or the transactions between U and S provide a more reliable measure of the transactions between Company X, Company Y and S. The Commissioner determines that Company Y's status as a member of a controlled group should be taken into account for purposes of evaluating comparability of the transactions, and concludes that the transactions between R1, R2, and S are more reliably comparable to the transactions between Company X, Company Y, and S. The comparable charge for the purchase was $0.95 per unit. Therefore, obtaining the plastic containers at a favorable rate (and the resulting $5,000 savings) is entirely due to Company Y's status as a member of the Company X controlled group and not to any specific activity by Company X or any other member of the controlled group. Consequently, Company Y is not considered to obtain a benefit from Company X or any other member of the controlled group.

Example 20. Disaggregation of transactions. (i) X, a domestic corporation, is a pharmaceutical company that develops and manufactures ethical pharmaceutical products. Y, a Country B corporation, is a distribution and marketing company that also performs clinical trials for USP in Country X. Because Y does not possess the capability to conduct the trials, it contracts with a third party to undertake the trials at a cost of $100. Y also incurs $25 in expenses related to the third-party contract (for example, in hiring and working with the third party).

(ii) Based on a detailed functional analysis, the Commissioner determines that Y performed functions beyond merely facilitating the clinical trials for X, such as audit controls of the third party performing those trials. In determining the arm's length price, the Commissioner may consider a number of alternatives. For example, for purposes of determining the arm's length price, the Commissioner may determine that the intercompany service is most reliably analyzed on a disaggregated basis as two separate transactions: in this case, the contract between Y and the third party could constitute an internal CUSP with a price of $100. Y would be further entitled to an arm's length remuneration for its facilitating services. If the most reliable method is one that provides a markup on Y's costs, then "total services cost" in this context would be $25. Alternatively, the Commissioner may determine that the intercompany service is most reliably analyzed as a single transaction, based on comparable uncontrolled transactions involving the facilitation of similar clinical trial services performed by third parties. If the most reliable method is one that provides a markup on all of Y's costs, and the base of the markup determined by the comparable companies includes the third-party clinical trial costs, then such a markup would be applied to Y's total services cost of $125.

Examples 21. Disaggregation of transactions. (i) X performs a number of administrative functions for its subsidiaries, including Y, a distributor of widgets in Country B. These services include those relating to working capital (inventory and accounts receivable/payable) management. To facilitate provision of these services, X purchases an ERP system specifically dedicated to optimizing working capital management. The system, which entails significant third-party costs and which includes substantial intellectual property relating to its software, costs $1000.

(ii) Based on a detailed functional analysis, the Commissioner determines that in providing administrative services for Y, X performed functions beyond merely operating the ERP system itself, since X was effectively using the ERP as an input to the administrative services it was providing to Y. In determining arm's length price for the services, the Commissioner may consider a number of alternatives. For example, if the most reliable uncontrolled data is derived from companies that use similar ERP systems purchased from third parties to perform similar administrative functions for uncontrolled parties, the Commissioner may determine that a CPM is the best method for measuring the functions performed by X, and, in addition, that a markup on total services costs, based on the markup from the comparable companies, is the most reliable PLI. In this case, total services cost, and the basis for the markup, would include appropriate reflection of the ERP costs of $1000. Alternatively, X's functions may be most reliably measured based on comparable uncontrolled companies that perform similar administrative functions using their customers' own ERP systems. Under these circumstances, the total services cost would equal X's costs of providing the administrative services excluding the ERP cost of $1000.

(m) *Coordination with transfer pricing rules for other transactions*—(1) *Services transactions that include other types of transactions.* A transaction structured as a controlled services transaction may include other elements for which a separate category or categories of methods are provided, such as a loan or advance, a rental, or a transfer of tangible or intangible property. See §§ 1.482–1(b)(2) and 1.482–2(a), (c), and (d). Whether such an integrated transaction is evaluated as a controlled services transaction under this section or whether one or more elements should be evaluated separately under other sections of the section 482 regulations depends on which approach will provide the most reliable measure of an arm's length result. Ordinarily, an integrated transaction of this type may be evaluated under this section and its separate elements need not be evaluated separately, provided that each component of the transaction may be adequately accounted for in evaluating the comparability of the controlled transaction to the uncontrolled comparables and, accordingly, in determining the arm's length result in the controlled transaction. See § 1.482–1(d)(3).

(2) *Services transactions that effect a transfer of intangible property.* A transaction structured as a controlled services transaction may in certain cases include an element that constitutes the transfer of intangible property or may result in a transfer, in whole or in part, of intangible property. Notwithstanding paragraph (m)(1) of this section, if such element relating to intangible property is material to the evaluation, the arm's length result for the element of the transaction that involves intangible property must be corroborated or determined by an analysis under § 1.482–4.

(3) *Services subject to a qualified cost sharing arrangement.* Services provided by a controlled participant under a qualified cost sharing arrangement are subject to § 1.482–7.

(4) *Other types of transactions that include controlled services transactions.* A transaction structured other than as a controlled services transaction may include one or more elements for which separate pricing methods are provided in this section. Whether such an integrated transaction is evaluated under another section of the section 482 regulations or whether one or more elements should be evaluated separately under this section depends on which approach will provide the most reliable measure of an arm's length result. Ordinarily, a single method may be applied to such an integrated transaction, and the separate services component of the transaction need not be separately analyzed under this section, provided that the controlled services may be adequately accounted for in evaluating the comparability of the controlled transaction to the uncontrolled comparables and, accordingly, in determining the arm's length results in the controlled transaction. See § 1.482–1(d)(3).

(5) *Examples.* The following examples illustrate paragraphs (m)(1) through (4) of this section:

Example 1. (i) U.S. parent corporation Company X enters into an agreement to maintain equipment of Company Y, a foreign subsidiary. The maintenance of the equipment requires the use of spare parts. The cost of the spare parts necessary to maintain the equipment amounts to approximately 25 percent of the total costs of maintaining the equipment. Company Y pays a fee that includes a charge for labor and parts.

(ii) Whether this integrated transaction is evaluated as a controlled services transaction or is evaluated as a controlled services transaction and the transfer of tangible property depends on which approach will provide the most reliable measure of an arm's length result. If it is not possible to find comparable uncontrolled services transactions that involve similar services and tangible property transfers as the controlled transaction between Company X and Company Y, it will be necessary to determine the arm's length charge for the controlled services, and then to evaluate separately the arm's length charge for the tangible property transfers under § 1.482–1 and §§ 1.482–3 through 1.482–6. Alternatively, it may be possible to apply the comparable profits method of § 1.482–5, to evaluate the arm's length profit of Company X or Company Y from the integrated controlled transaction. The comparable profits method may provide the most reliable measure of measure of an arm's length result if uncontrolled parties are identified that perform similar, combined functions of maintaining and providing spare parts for similar equipment.

Example 2. (i) U.S. parent corporation Company X sells industrial equipment to its foreign subsidiary, Company Y. In connection with this sale, Company X renders to Company Y services that consist of demonstrating the use of the equipment and assisting in the effective start-up of the equipment. Company X structures the integrated transaction as a sale of tangible property and determines the transfer price under the comparable uncontrolled price method of § 1.482–3(b).

(ii) Whether this integrated transaction is evaluated as a transfer of tangible property or is evaluated as a controlled services transaction and a transfer of tangible property depends on which approach will provide the most reliable measure of an arm's length result. In this case, the controlled services may be similar to services rendered in the transactions used to determine the comparable uncontrolled price, or they may appropriately be considered a difference between the controlled transaction and comparable transactions with a definite and reasonably ascertainable effect on price for which appropriate adjustments can be made. See § 1.482–1(d)(3)(ii)(A)(*6*). In either case, application of the comparable uncontrolled price method to evaluate the integrated transaction may provide a reliable measure of an arm's length result, and application of a separate transfer pricing method for the controlled services element of the transaction is not necessary.

Example 3. (i) The facts are the same as in Example 2 except that, after assisting Company Y in start-up, Company X also renders ongoing services, including instruction and supervision regarding Company Y's ongoing use of the equipment. Company X structures the entire transaction, including the incremental ongoing services, as a sale of tangible property, and determines the transfer price under the comparable uncontrolled price method of § 1.482–3(b).

(ii) Whether this integrated transaction is evaluated as a transfer of tangible property or is evaluated as a controlled services transaction and a transfer of tangible property depends on which approach will provide the most reliable measure of an arm's length result. It may not be possible to identify comparable uncontrolled transactions in which a seller of merchandise renders services similar to the ongoing services rendered by Company X to Company Y. In such a case, the incremental services in connection with ongoing use of the equipment could not be taken into account as a comparability factor because they are not similar to the services rendered in connection with sales of similar tangible property. Accordingly, it may be necessary to evaluate separately the transfer price for such services under this section in order to produce the most reliable measure of an arm's length result. Alternatively, it may be possible to apply the comparable profits method of § 1.482–5 to evaluate the arm's length profit of Company X or Company Y from the integrated controlled transaction. The comparable profits method may provide the most reliable measure of an arm's length result if uncontrolled parties are identified that perform the combined functions of selling equipment and rendering ongoing after-sale services associated with such equipment. In that case, it would not be necessary to separately evaluate the transfer price for the controlled services under this section.

Example 4. (i) Company X, a U.S. corporation, and Company Y, a foreign corporation, are members of a controlled group. Both companies perform research and development activities relating to integrated circuits. In addition, Company Y manufactures integrated circuits. In years 1 through 3, Company X engages in substantial research and development activities, gains significant know-how regarding the development of a particular high-temperature resistant integrated circuit, and memorializes that research in a written report. In years 1 through 3, Company X generates overall net operating losses as a result of the expenditures associated with this research and development effort. At the beginning of year 4, Company X enters into a technical assistance agreement with Company Y. As part of this agreement, the researchers from Company X responsible for this project meet with the researchers from Company Y and provide them with a copy of the written report. Three months later, the researchers from Company Y apply for a patent for a high-temperature resistant integrated circuit based in large part upon the know-how obtained from the researchers from Company X.

(ii) The controlled services transaction between Company X and Company Y includes an element that constitutes the transfer of intangible property (such as, know-how). Because the element relating to the intangible property is material to the arm's length evaluation, the arm's length result for that element must be corroborated or determined by an analysis under § 1.482–4.

(n) *Effective date*—(1) *In general.* This section is generally applicable for taxable years beginning after December 31, 2006. In addition, a person may elect to apply the provisions of this section, § 1.482–9T, to earlier taxable years. See paragraph (n)(2) of this section.

(2) *Election to apply regulations to earlier taxable years*—(i) *Scope of election.* A taxpayer may elect to apply §§ 1.482–1T, 1.482–2T, 1.482–4T, 1.482–6T, 1.482–8T, and 9T, 1.861–8T, § 1.6038A–3T, § 1.6662–6T and § 31.3121(s)-1T of this chapter to any taxable year beginning after September 10, 2003. Such election requires that all of the provisions of this section, §§ 1.482–1T, 1.482–2T, 1.482–4T, 1.482–6T, 1.482–8T, and 1.482–9T, as well as the related provisions, §§ 1.861–8T, 1.6038A–3T, 1.6662–6T and 31.3121(s)–1T of this chapter be applied to such taxable year and all subsequent taxable years (earlier taxable years) of the taxpayer making the election.

(ii) *Effect of election.* An election to apply the regulations to earlier taxable years has no effect on the limitations on assessment and collection or on the limitations on credit or refund (see Chapter 66 of the Internal Revenue Code).

(iii) *Time and manner of making election.* An election to apply the regulations to earlier taxable years must be made by attaching a statement to the taxpayer's timely filed U.S. tax return (including extensions) for its first taxable year after December 31, 2006.

(iv) *Revocation of election.* An election to apply the regulations to earlier taxable years may not be revoked without the consent of the Commissioner.

(3) *In general.* The applicability of § 1.482–9T expires on or before July 31, 2009.

■ Par. 15. Section 1.861–8 is amended as follows:

■ 1. Paragraph (a)(5)(ii) is redesignated as paragraph (a)(5)(iii).

■ 2. A new paragraph (a)(5)(ii) is added.

■ 3. Paragraph (e)(4) is revised.

■ 4. Paragraph (f)(4)(i) is revised.

■ 5. Paragraph (g), *Example 17*, *Example 18*, and *Example 30* are revised.

The addition and revisions read as follows:

§ 1.861–8 Computation of taxable income from sources within the United States and from other sources and activities.

(a) * * *

(5) * * *

(ii) [Reserved]. For further guidance, see § 1.861–8T(a)(5) (ii).

* * * * *

(e) * * *

(4) [Reserved]. For further guidance, see § 1.861–8T(e)(4).

(f) * * *

(4) * * * (i)[Reserved]. For further guidance, see § 1.861–8T(f)(4)(i).

* * * * *

(g) * * *

Example 17. [Reserved]. For further guidance, see § 1.861–8T(g), *Example 17.*

Example 18. [Reserved]. For further guidance, see § 1.861–8T(g), *Example 18.*

* * * * *

Example 30. [Reserved]. For further guidance, see § 1.861–8T(g), *Example 30.*

* * * * *

■ **Par. 16.** Section 1.861–8T is amended as follows:

■ 1. Paragraphs (a)(3) and (a)(4) are removed and reserved and paragraph (a)(5)(ii) is revised.

■ 2. Paragraphs (b)(3) are revised.

■ 3. Paragraph (e)(4) is added.

■ 4. Paragraph (f)(4)(i) is revised.

■ 5. Paragraph (g), *Example 17*, *Example 18*, and *Example 30* are added.

■ 6. Paragraph (h) is revised.

The addition and revisions read as follows:

§ 1.861–8T Computation of taxable income from sources within the United States and from other sources and activities (temporary).

(a) * * *

(5) * * *

(ii) Paragraph (e)(4), the last sentence of paragraph (f)(4)(i), and paragraph (g), *Example 17*, *Example 18*, and *Example 30* of this section are generally applicable for taxable years beginning after December 31, 2006. In addition, a person may elect to apply the provisions of paragraph (e)(4) of this section to earlier years. Such election shall be made in accordance with the rules set forth in § 1.482–9T(n)(2).

(b) * * *

(3) *Supportive functions.* Deductions which are supportive in nature (such as overhead, general and administrative, and supervisory expenses) may relate to other deductions which can more readily be allocated to gross income. In such instance, such supportive deductions may be allocated and apportioned along with the deductions to which they relate. On the other hand, it would be equally acceptable to attribute supportive deductions on some reasonable basis directly to activities or property ordinarily be accomplished by allocating the supportive expenses to all gross income or to another broad class of gross income and apportioning the expenses in accordance with paragraph (c)(1) of this section. For this purpose, reasonable departmental overhead rates may be utilized. For examples of the application of the principles of this paragraph (b)(3) to expenses other than expenses attributable to stewardship activities, see *Examples 19* through *21* of paragraph (g) of this section. See paragraph (e)(4)(ii) of this section for the allocation and apportionment of deductions attributable to stewardship expenses. However, supportive deductions that are described in 1.861–14T(e)(3) shall be allocated and apportioned by reference only to the gross income of a single member of an affiliated group of corporations as defined in 1.861–14T.

* * * * *

(e) * * *

(4) *Stewardship and controlled services*—(i) *Expenses attributable to controlled services.* If a corporation performs a controlled services transaction (as defined in § 1.482–9T(l)(3)), which includes any activity by one member of a group of controlled taxpayers that results in a benefit to a related corporation, and the rendering corporation charges the related corporation for such services, section 482 and these regulations provide for an allocation where the charge is not consistent with an arm's length result as determined. The deductions for expenses of the corporation attributable to the controlled services transaction are considered definitely related to the amounts so charged and are to be allocated to such amounts.

(ii) *Stewardship expenses attributable to dividends received.* Stewardship expenses, which result from "overseeing" functions undertaken for a corporation's own benefit as an investor in a related corporation, shall be considered definitely related and allocable to dividends received, or to be received, from the related corporation. For purposes of this section, stewardship expenses of a corporation are those expenses resulting from "duplicative activities" (as defined in § 1.482–9T(l)(3)(iii)) or "shareholder activities" (as defined in § 1.482–9T(l)(3)(iv)) of the corporation with respect to the related corporation. Thus, for example, stewardship expenses include expenses of an activity the sole effect of which is either to protect the corporation's capital investment in the related corporation or to facilitate compliance by the corporation with reporting, legal, or regulatory requirements applicable specifically to the corporation, or both. If a corporation has a foreign or international department which exercises overseeing functions with respect to related foreign corporations and, in addition, the department performs other functions that generate other foreign-source income (such as fees for services rendered outside of the United States for the benefit of foreign related corporations, foreign-source royalties, and gross income of foreign branches), some part of the deductions with respect to that department are considered definitely related to the other foreign-source income. In some instances, the operations of a foreign or international department will also generate United States source income (such as fees for services performed in the United States). Permissible methods of apportionment with respect to stewardship expenses include comparisons of time spent by employees weighted to take into account differences in compensation, or comparisons of each related corporation's gross receipts, gross income, or unit sales volume, assuming that stewardship activities are not substantially disproportionate to such factors. See paragraph (f)(5) of this section for the type of verification that may be required in this respect. See § 1.482–9T(l)(5) for examples that illustrate the principles of § 1.482–9T(l)(3). See *Example 17* and *Example 18* of paragraph (g) of this section for the allocation and apportionment of stewardship expenses. See paragraph (b)(3) of this section for the allocation and apportionment of deductions attributable to supportive functions other than stewardship expenses, such as expenses in the nature of day-to-day management, and paragraph (e)(5) of this section generally for the allocation and apportionment of deductions attributable to legal and accounting fees and expenses.

(f) * * *

(4) *Adjustments made under other provisions of the Code*—(i) *In general.* If an adjustment which affects the taxpayer is made under section 482 or any other provision of the Code, it may be necessary to recompute the allocations and apportionments required by this section in order to reflect changes resulting from the adjustment. The recomputation made by the Commissioner shall be made using the same method of allocation and

apportionment as was originally used by the taxpayer, provided such method as originally used conformed with paragraph (a)(5) of this section and, in light of the adjustment, such method does not result in a material distortion. In addition to adjustments which would be made aside from this section, adjustments to the taxpayer's income and deductions which would not otherwise be made may be required before applying this section in order to prevent a distortion in determining taxable income from a particular source of activity. For example, if an item included as a part of the cost of goods sold has been improperly attributed to specific sales, and, as a result, gross income under one of the operative sections referred to in paragraph (f)(1) of this section is improperly determined, it may be necessary for the Commissioner to make an adjustment to the cost of goods sold, consistent with the principles of this section, before applying this section. Similarly, if a domestic corporation transfers the stock in its foreign subsidiaries to a domestic subsidiary and the parent corporation continues to incur expenses in connection with protecting its capital investment in the foreign subsidiaries (see paragraph (e)(4) of this section), it may be necessary for the Commissioner to make an allocation under section 482 with respect to such expenses before making allocations and apportionments required by this section, even though the section 482 allocation might not otherwise be made.

(g) * * *

Example 17. Stewardship Expenses (Consolidation). (i) (A) *Facts.* X, a domestic corporation, wholly owns M, N, and O, also domestic corporations. X, M, N, and O file a consolidated income tax return. All the income of X and O is from sources within the United States, all of M's income is general limitation income from sources within South America, and all of N's income is general limitation income from sources within Africa. X receives no dividends from M, N, or O. During the taxable year, the consolidated group of corporations earned consolidated gross income of $550,000 and incurred total deductions of $370,000 as follows:

	Gross income	Deductions
Corporations:		
X	$100,000	$50,000
M	250,000	100,000
N	150,000	200,000
O	50,000	20,000
Total	550,000	370,000

(B) Of the $50,000 of deductions incurred by X, $15,000 relates to X's ownership of M; $10,000 relates to X's ownership of N; $5,000 relates to X's ownership of O; and the sole effect of the entire $30,000 of deductions is to protect X's capital investment in M, N, and O. X properly categorizes the $30,000 of deductions as stewardship expenses. The remainder of X's deductions ($20,000) relates to production of United States source income from its plant in the United States.

(ii) (A) *Allocation.* X's deductions of $50,000 are definitely related and thus allocable to the types of gross income to which they give rise, namely $25,000 wholly to general limitation income from sources outside the United States ($15,000 for stewardship of M and $10,000 for stewardship of N) and the remainder ($25,000) wholly to gross income from sources within the United States. Expenses incurred by M and N are entirely related and thus wholly allocable to general limitation income earned from sources without the United States, and expenses incurred by O are entirely related and thus wholly allocable to income earned within the United States. Hence, no apportionment of expenses of X, M, N, or O is necessary. For purposes of applying the foreign tax credit limitation; the statutory grouping is general limitation gross income from sources without the United States and the residual grouping is gross income from sources within the United States. As a result of the allocation of deductions, the X consolidated group has taxable income from sources without the United States in the amount of $75,000, computed as follows:

Foreign source general limitation gross income:	
($250,000 from M + $150,000 from N)	$400,000
Less: Deductions allocable to foreign source general limitation gross income:	
($25,000 from X, $100,000 from M, and $200,000 from N)	325,000
Total foreign-source taxable income	75,000

(B) Thus, in the combined computation of the general limitation, the numerator of the limiting fraction (taxable income from sources outside the United States) is $75,000.

Example 18. Stewardship and Supportive Expenses. (i) (A) *Facts.* X, a domestic corporation, manufactures and sells pharmaceuticals in the United States. X's domestic subsidiary S, and X's foreign subsidiaries T, U, and V perform similar functions in the United States and foreign countries T, U, and V, respectively. Each corporation derives substantial net income during the taxable year that is general limitation income described in section 904(d)(1). X's gross income for the taxable year consists of:

Domestic sales income	$32,000,000
Dividends from S (before dividends received deduction)	3,000,000
Dividends from T	2,000,000
Dividends from U	1,000,000
Dividends from V	0
Royalties from T and U	1,000,000
Fees from U for services performed by X	1,000,000
Total gross income	40,000,000

(B) In addition, X incurs expenses of its supervision department of $1,500,000.

(C) X's supervision department (the Department) is responsible for the supervision of its four subsidiaries and for rendering certain services to the subsidiaries,

and this Department provides all the supportive functions necessary for X's foreign activities. The Department performs three principal types of activities. The first type consists of services for the direct benefit of U for which a fee is paid by U to X. The cost of the services for U is $900,000 (which results in a total charge to U of $1,000,000). The second type consists of activities described in § 1.482–9(l)(3)(iii) that are in the nature of shareholder oversight that duplicate functions performed by the subsidiaries' own employees and that do not provide an additional benefit to the subsidiaries. For example, a team of auditors from X's accounting department periodically audits the subsidiaries' books and prepares internal reports for use by X's management. Similarly, X's treasurer periodically reviews for the board of directors of X the subsidiaries' financial policies. These activities do not provide an additional benefit to the related corporations. The cost of the duplicative services and related supportive expenses is $540,000. The third type of activity consists of providing services which are ancillary to the license agreements which X maintains with subsidiaries T and U. The cost of the ancillary services is $60,000.

(ii) *Allocation.* The Department's outlay of $900,000 for services rendered for the benefit of U is allocated to the $1,000,000 in fees paid by U. The remaining $600,000 in the Department's deductions are definitely related to the types of gross income to which they give rise, namely dividends from subsidiaries S, T, U, and V and royalties from T and U. However, $60,000 of the $600,000 in deductions are found to be attributable to the ancillary services and are definitely related (and therefore allocable) solely to royalties received from T and U, while the remaining $540,000 in deductions are definitely related (and therefore allocable) to dividends received from all the subsidiaries.

(iii) (A) *Apportionment.* For purposes of applying the foreign tax credit limitation, the statutory grouping is general limitation gross income from sources outside the United States and the residual grouping is gross income from sources within the United States. X's deduction of $540,000 for the Department's expenses and related supportive expenses which are allocable to dividends received from the subsidiaries must be apportioned between the statutory and residual groupings before the foreign tax credit limitation may be applied. In determining an appropriate method for apportioning the $540,000, a basis other than X's gross income must be used since the dividend payment policies of the subsidiaries bear no relationship either to the activities of the Department or to the amount of income earned by each subsidiary. This is evidenced by the fact that V paid no dividends during the year, whereas S, T, and U paid dividends of $1 million or more each. In the absence of facts that would indicate a material distortion resulting from the use of such method, the stewardship expenses ($540,000) may be apportioned on the basis of the gross receipts of each subsidiary.

(B) The gross receipts of the subsidiaries were as follows:

S	$4,000,000
T	3,000,000
U	500,000
V	1,500,000
Total	9,000,000

(C) Thus, the expenses of the Department are apportioned for purposes of the foreign tax credit limitation as follows:

Apportionment of stewardship expenses to the statutory grouping of gross income: $540,000 × [($3,000,000 + $500,000 + $1,500,000)/$9,000,000]	$300,000
Apportionment of supervisory expenses to the residual grouping of gross income: $540,000 × [$4,000,000/9,000,000]	240,000
Total: Apportioned stewardship expense	540,000

* * * * *

Example 30. Income Taxes. (i) (A) *Facts.* As in *Example 17* of this paragraph, X is a domestic corporation that wholly owns M, N, and O, also domestic corporations. X, M, N, and O file a consolidated income tax return. All the income of X and O is from sources within the United States, all of M's income is general limitation income from sources within South America, and all of N's income is general limitation income from sources within Africa. X receives no dividends from M, N, or O. During the taxable year, the consolidated group of corporations earned consolidated gross income of $550,000 and incurred total deductions of $370,000. X has gross income of $100,000 and deductions of $50,000, without regard to its deduction for state income tax. Of the $50,000 of deductions incurred by X, $15,000 relates to X's ownership of M; $10,000 relates to X's ownership of N; $5,000 relates to X's ownership of O; and the entire $30,000 constitutes stewardship expenses. The remainder of X's $20,000 of deductions (which is assumed not to include state income tax) relates to production of U.S. source income from its plant in the United States. M has gross income of $250,000 and deductions of $100,000, which yield foreign-source general limitation taxable income of $150,000. N has gross income of $150,000 and deductions of $200,000, which yield a foreign-source general limitation loss of $50,000. O has gross income of $50,000 and deductions of $20,000, which yield U.S. source taxable income of $30,000.

(B) Unlike *Example 17* of this paragraph (g), however, X also has a deduction of $1,800 for state A income taxes. X's state A taxable income is computed by first making adjustments to the Federal taxable income of X to derive apportionable taxable income for state A tax purposes. An analysis of state A law indicates that state A law also includes in its definition of the taxable business income of X which is apportionable to X's state A activities, the taxable income of M, N, and O, which is related to X's business. As in *Example 25*, the amount of apportionable taxable income attributable to business activities conducted in state A is determined by multiplying apportionable taxable income by a fraction (the "state apportionment fraction") that compares the relative amounts of payroll, property, and sales within state A with worldwide payroll, property, and sales. Assuming that X's apportionable taxable income equals $180,000, $100,000 of which is from sources without the United States, and $80,000 is from sources within the United States, and that the state apportionment fraction is equal to 10 percent, X has state A taxable income of $18,000. The state A income tax of $1,800 is then derived by applying the state A income tax rate of 10 percent to the $18,000 of state A taxable income.

(C)

(i) *Allocation and apportionment.* Assume that under *Example 29*, it is determined that X's deduction for state A income tax is definitely related to a class of gross income consisting of income from sources both within and without the United States, and that the state A tax is apportioned $1,000 to sources without the United States, and $800 to sources within the United States. Under *Example 17*, without regard to the deduction for X's state A income tax, X has a separate loss of ($25,000) from sources without the United States. After taking into account the deduction for state A income tax, X's separate loss from sources without the United States is increased by the $1,000 state A tax apportioned to sources without the United States, and equals a loss of ($26,000), for purposes of computing the numerator of the consolidated general limitation foreign tax credit limitation.

(h) *Effective dates*—(1) *In general.* In general, the rules of this section, as well as the rules of §§ 1.861–9T, 1.861–10T, 1.861–11T, 1.861–12T, and 1.861–14T apply for taxable years beginning after December 31, 1986, except for paragraphs (a)(5)(ii), (b)(3), (e)(4), (f)(4)(i), paragraph (g) *Example 17*, *Example 18*, and *Example 30*, and paragraph (h) of this section, which are generally applicable for taxable years beginning after December 31, 2006. However, see 1.861–8(e)(12)(iv) and 1.861–14(e)(6) for rules concerning the allocation and apportionment of deductions for charitable contributions. In the case of corporate taxpayers, transition rules set forth in 1.861–13T provide for the gradual phase-in of certain provisions of this and the foregoing sections. However, the following rules are effective for taxable years commencing after December 31, 1988:

(i) Section 1.861–9T(b)(2) (concerning the treatment of certain foreign currency).

(ii) Section 1.861–9T(d)(2) (concerning the treatment of interest incurred by nonresident aliens).

(iii) Section 1.861–10T(b)(3)(ii) (providing an operating costs test for purposes of the nonrecourse indebtedness exception).

(iv) Section 1.861–10T(b)(6) (concerning excess collaterilzation of nonrecourse borrowings).

(2) In addition, 1.861–10T(e) (concerning the treatment of related controlled foreign corporation indebtedness) is applicable for taxable years commencing after December 31, 1987. For rules for taxable years beginning before January 1, 1987, and for later years to the extent permitted by 1.861–13T, see 1.861–8 (revised as of April 1, 1986).

(3) *Expiration date.* The applicability of the paragraphs (a)(5)(ii), (b)(3), (e)(4), (f)(4)(i), paragraph (g) *Example 17*, *Example 18*, and *Example 30*, and paragraph (h) of this section, expires on or before July 31, 2009.

■ **Par. 17.** Section 1.6038A–3(a)(3) is amended by revising paragraph (a)(3), *Example 4* to read:

§ 1.6038A–3 Record maintenance.

(a) * * *

(3) * * *

Example 4. [Reserved]. For further guidance, see § 1.6038A–3T, Example 4.

* * * * *

■ **Par. 18.** Section 1.6038A–3T is added to read as follows:

§ 1.6038A–3T Record maintenance (temporary).

(a)(1) through (3) *Examples 1* through *3* [Reserved]. For further guidance, see § 1.6038A–3(a)(1) through (3) *Examples 1* through *3*.

Example 4. S, a U.S. reporting corporation, provides computer consulting services for its foreign parent, X. Based on the application of section 482 and the regulations, it is determined that the cost of services plus method, as described in § 1.482–9T(e), will provide the most reliable measure of an arm's length result, based on the facts and circumstances of the controlled transaction between S and X. S is required to maintain records to permit verification upon audit of the comparable transactional costs (as described in § 1.482–9T(e)(2)(iii)) used to calculate the arm's length price. Based on the facts and circumstances, if it is determined that X's records are relevant to determine the correct U.S. tax treatment of the controlled transaction between S and X, the record maintenance requirements under section 6038A(a) and this section will be applicable to the records of X.

(b)(1) through (h) [Reserved]. For further guidance, see § 1.6038A–3T(b)(1) through (h).

(i) Effective date—(1) *In general.* This provision is generally applicable for taxable years beginning after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(3) *Expiration date.* The applicability of this section expires on or before July 31, 2009.

■ **Par. 19.** Section 1.6662–6 is amended as follows:

■ 1. Paragraphs (d)(2)(ii)(A) through (d)(2)(ii)(G) are redesignated as paragraphs (d)(2)(ii)(A)(*1*) through (d)(2)(ii)(A)(*7*) and paragraph (d)(2)(ii) introductory text as paragraph (d)(2)(ii)(A), respectively.

■ 2. A new paragraph (d)(2)(ii)(B) is added.

■ 3. Paragraphs (d)(2)(iii)(B)(*4*) and (d)(2)(iii)(B)(*6*) are revised

■ 4. Paragraph (g) is revised.

The additions and revisions read as follows:

§ 1.6662–6 Transactions between persons described in section 482 and net section 482 transfer price adjustments.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(B) [Reserved]. For further guidance, see § 1.6662–6T(d)(2)(ii)(B).

* * * * *

(iii) * * *

(B) * * *

(*4*) [Reserved]. For further guidance, see § 1.6662–6T(d)(2)(iii)(B)(*4*).

* * * * *

(*6*) [Reserved]. For further guidance, see § 1.6662–6T(d)(2)(iii)(B)(*6*).

* * * * *

(g) [Reserved]. For further guidance, see § 1.6662–6T(g).

■ **Par. 20.** Section 1.6662–6T is added to read as follows:

§ 1.6662–6T Transactions between parties described in section 482 and net section 482 transfer price adjustments (temporary).

(a) through (d)(2)(ii)(A) [Reserved]. For further guidance, see § 1.6662–6(a) through (d)(2)(ii)(A).

(d)(2)(ii)(B) *Services cost method.* A taxpayer's selection of the services cost method for certain services, described in § 1.482–9T(b), and its application of that method to a controlled services transaction will be considered reasonable for purposes of the specified method requirement only if the taxpayer reasonably allocated and apportioned costs in accordance with § 1.482–9T(k), reasonably concluded that the controlled services transaction meets the conditions of § 1.482–9T(b)(3), and reasonably concluded that the controlled services transaction is not described in paragraph § 1.482–9T(b)(2). Whether the taxpayer's conclusion was reasonable must be determined from all the facts and circumstances. The factors relevant to this determination include those described in paragraph (d)(2)(ii)(A) of this section, to the extent applicable.

(d)(2)(iii)(A) through (d)(2)(iii)(B)(*3*) [Reserved]. For further guidance, see § 1.6662–6(d)(2)(iii)(A) through (d)(2)(iii)(B)(*3*).

(d)(2)(iii)(B)(*4*) A description of the method selected and an explanation of why that method was selected, including an evaluation of whether the regulatory conditions and requirements for application of that method, if any, were met;

(d)(2)(iii)(B)(*5*) [Reserved]. For further guidance, see § 1.6662–6(d)(2)(iii)(B)(*5*).

(d)(2)(iii)(B)(*6*) A description of the controlled transactions (including the terms of sale) and any internal data used to analyze those transactions. For example, if a profit split method is applied, the documentation must include a schedule providing the total income, costs, and assets (with adjustments for different accounting practices and currencies) for each controlled taxpayer participating in the relevant business activity and detailing the allocations of such items to that activity. Similarly, if a cost-based method (such as the cost plus method, the services cost method for certain services, or a comparable profits method with a cost-based profit level indicator) is applied, the documentation must include a description of the manner in which relevant costs are determined and are allocated and apportioned to the relevant controlled transaction.

(d)(2)(iii)(B)(*7*) through (f) [Reserved]. For further guidance, see § 1.6662–6(d)(2)(iii)(B)(*7*) through (f).

(g) *Effective date*—(1) This section is generally effective February 9, 1996. However, taxpayers may elect to apply this section to all open taxable years beginning after December 31, 1993.

(2)(i) The provisions of paragraphs (d)(2)(ii)(B), (d)(2)(iii)(B)(*4*) and (d)(2)(iii)(B)(*6*) of this section are applicable for taxable years beginning after December 31, 2006.

(ii) *Election to apply regulation to earlier taxable years.* A person may elect to apply the provisions of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2) of this chapter.

(iii) *Expiration date.* The applicability of § 1.6662–6T expires on or before July 31, 2009.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

■ **Par. 21.** The authority citation for part 31 continues to read as follows:

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

■ **Par. 22.** Section 31.3121(s)–1 is amended by revising paragraphs (c)(2)(iii) and (d) to read as follows:

§ 31.3121(s)–1 Concurrent employment by related corporations with common paymaster.

* * * * *

(c) * * *

(2) * * *

(iii) [Reserved]. For further guidance, see § 31.3121(s)–1T(c)(2)(iii).

* * * * *

(d) [Reserved]. For further guidance, see § 31.3121(s)–1T(d).

■ **Par. 23.** Section 31.3121(s)–1T is added to read as follows:

§ 31.3121(s)–1T Concurrent employment by related corporations with common paymaster (temporary).

(a) through (c)(2)(ii) [Reserved]. For further guidance, see § 31.3121(s)–1(a) through (c)(2)(ii).

(c)(2)(iii) *Group-wide allocation rules.* Under the group-wide method of allocation, the district director may allocate the taxes imposed by sections 3102 and 3111 in an appropriate manner to a related corporation that remunerates an employee through a common paymaster if the common paymaster fails to remit the taxes to the Internal Revenue Service. Allocation in an appropriate manner varies according to the circumstances. It may be based on sales, property, corporate payroll, or any other basis that reflects the distribution of the services performed by the employee, or a combination of the foregoing bases. To the extent practicable, the Commissioner may use the principles of § 1.482–2(b) of this chapter in making the allocations with respect to wages paid after December 31, 1978, and on or before December 31, 2006. To the extent practicable, the Commissioner may use the principles of § 1.482–9T of this chapter in making the allocations with respect to wages paid after December 31, 2006.

(d) *Effective date*—(1) *In general.* This section is applicable with respect to wages paid after December 31, 1978. [§ 31.3121(s)–1]. The fourth sentence of paragraph (c)(2)(iii) of this section is applicable with respect to wages paid after December 31, 1978, and on or before December 31, 2006. The fifth sentence of paragraph (c)(2)(iii) of this section is applicable with respect to wages paid after December 31, 2006.

(2) *Election to apply regulation to earlier taxable years.* A person may elect to apply the fifth sentence of paragraph (c)(2)(iii) of this section to earlier taxable years in accordance with the rules set forth in § 1.482–9T(n)(2).

(3) The applicability of § 31.3121(s)–1T expires on or before July 31, 2009.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: July 11, 2006.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 06–6497 Filed 7–31–06; 4:40 pm]

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Federal Register

Friday,
August 4, 2006

Part VI

Environmental Protection Agency

40 CFR Part 59

Consumer and Commercial Products: Control Techniques Guidelines in Lieu of Regulations for Lithographic Printing Materials, Letterpress Printing Materials, Flexible Packaging Printing Materials, Flat Wood Paneling Coatings, and Industrial Cleaning Solvents; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 59

[EPA–HQ–OAR–2006–0672; FRL–8204–9]

Consumer and Commercial Products: Control Techniques Guidelines in Lieu of Regulations for Lithographic Printing Materials, Letterpress Printing Materials, Flexible Packaging Printing Materials, Flat Wood Paneling Coatings, and Industrial Cleaning Solvents

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed determination and availability of draft control techniques guidelines.

SUMMARY: Pursuant to section 183(e)(3)(C) of the Clean Air Act (CAA or the Act), EPA proposes to determine that control techniques guidelines documents (CTGs) will be substantially as effective as national regulations in reducing emissions of volatile organic compounds (VOC) in ozone national ambient air quality standard (NAAQS) nonattainment areas from the following five product categories: Lithographic printing materials, letterpress printing materials, flexible packaging printing materials, flat wood paneling coatings, and industrial cleaning solvents. Based on this determination, EPA may issue CTGs in lieu of national regulations for these product categories. EPA has prepared draft CTGs for the control of VOC emissions from each of the product categories covered by this proposed determination. Once finalized, these CTGs will provide guidance to the States concerning EPA's recommendations for reasonably available control technology (RACT)-level controls for these product categories. EPA further proposes to take final action to list the five Group II consumer and commercial product categories addressed in this notice pursuant to CAA section 183(e).

DATES: *Comments:* Written comments on the proposed determination must be received by September 5, 2006, unless a public hearing is requested by August 11, 2006. If a hearing is requested on the proposed determination, written comments must be received by September 13, 2006. We are also soliciting written comments on the draft CTGs and those comments must be submitted within the comment period for the proposed determination.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing concerning the proposed determination by August 11, 2006, we will hold a public hearing on August 14, 2006. The substance of any such hearing will be limited solely to EPA's proposed determination under CAA section 183(e)(3)(C) that the CTGs for the five Group II product categories will be substantially as effective as regulations in reducing VOC emissions in ozone nonattainment areas. Accordingly, if a commenter has no objection to EPA's proposed determination under CAA section 183(e)(3)(C), but has comments on the substance of a draft CTG, the commenter should submit those comments in writing.

ADDRESSES: Submit your comments, identified by applicable docket ID number, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov*.
- *Fax:* (202) 566–1741.
- *Mail:* Comments concerning the Proposed Determination should be sent to: Consumer and Commercial Products, Group II—Determination to Issue Control Techniques Guidelines in Lieu of Regulations, Docket No. EPA–HQ–OAR–2006–0672.

Comments concerning any draft CTG should be sent to the applicable docket, as noted below: Consumer and Commercial Products—Lithographic Printing Materials and Letterpress Printing Materials, Docket No. EPA–HQ–OAR–2006–0536; Consumer and Commercial Products—Flexible Packaging Printing Materials, Docket No. EPA–HQ–OAR–2006–0537; Consumer and Commercial Products—Industrial Cleaning Solvents, Docket No. EPA–HQ–OAR–2006–0535; or Consumer and Commercial Products—Flat Wood Paneling Coatings, Docket No. EPA–HQ–OAR–2006–0538, Environmental Protection Agency, EPA Docket Center, Mailcode 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies.

- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to the applicable docket. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Public Hearing. If a public hearing is held, it will be held at 10 a.m. at Building C on the EPA campus in Research Triangle Park, NC, or at an alternate site nearby. Persons interested in presenting oral testimony must contact Ms. Dorothy Apple, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), Research Triangle Park, North Carolina 27711, telephone number: (919) 541–4487, fax number (919) 541–3470, e-mail address: *apple.dorothy@epa.gov*, no later than August 11, 2006. Persons interested in attending the public hearing must also call Ms. Apple to verify the time, date, and location of the hearing. If no one contacts Ms. Apple by August 11, 2006 with a request to present oral testimony at the hearing, we will cancel the hearing.

Docket: All documents in the docket are listed in the *http://www.regulations.gov index*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at

the EPA Docket Center, Public Reading Room, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to make hand deliveries or visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket operations, locations and telephone numbers. The Docket Center's mailing address for U.S. mail and the procedure for submitting comments to *http://www.regulations.gov* are not affected by the flooding and will remain the same.

FOR FURTHER INFORMATION CONTACT: For information concerning the CAA section 183(e) consumer and commercial products program, contact Mr. Bruce Moore, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5460, fax number (919) 541–3470, e-mail address: *moore.bruce@epa.gov*. For further information on technical issues concerning the proposed determinations and draft CTG for lithographic printing materials and letterpress printing materials, contact: Mr. Dave Salman, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01), Research Triangle Park, North Carolina 27711, telephone number: (919) 541–0859, e-mail address: *salman.dave@epa.gov*. For further information on technical issues concerning the proposed determination and draft CTG for flexible packaging printing materials, contact: Ms. Paula Hirtz, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Coatings and Chemicals Group (E143–01, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–2618, e-mail address: *hirtz.paula@epa.gov*. For further information on technical issues concerning the proposed determination and draft CTG for flat wood paneling coatings, contact: Mr. Lynn Dail, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), Research Triangle Park, North Carolina 27711, telephone number: (919) 541–2363, e-mail address: *dail.lynn@epa.gov*. For further information on technical issues concerning the proposed determination and draft CTG for industrial cleaning solvents, contact: Dr. Mohamed Serageldin, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), Research Triangle Park, North Carolina 27711, telephone number: (919) 541–2379, e-mail address: *serageldin.mohamed@epa.gov*.

SUPPLEMENTARY INFORMATION: *Entities Potentially Affected by this Action.* The entities potentially affected by this action include industrial facilities that use the respective consumer and commercial products covered in this action as follows:

Category	NAICS code [1]	Examples of affected entities
Flexible packaging printing materials.	322221, 326112, 322223, 3265111, 322224, 322225, 332999.	Facilities that use rotogravure or flexographic processes to print materials such as bags, pouches, labels, liners, and wraps using paper, plastic film, aluminum foil, metalized or coated paper or film, or any combination of these materials.
Lithographic printing materials	323110	Facilities engaged in lithographic printing on individual sheets or continuous rolls of substrate material.
Letterpress printing materials	323119	Facilities engaged in letterpress printing on individual sheets or continuous rolls of substrate material.
Industrial cleaning solvents	various [2]	Facilities engaged in cleaning activities associated with manufacturing, repair, and service operations across a wide variety of industry sectors.
Flat wood paneling coatings	321211, 321212, 321219, 321999	Facilities that apply protective, decorative, or functional material to any interior, exterior, or hardboard panel product.
Federal Government		Not affected.
State/local/tribal government		Not affected.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be affected by this action, you should examine the applicable industry description in sections II.A, III.A, IV.A, and V.A of this notice. If you have any questions regarding the applicability of this action to a particular entity, consult the appropriate EPA contact listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Preparation of Comments. Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Attention: Docket ID EPA–HQ–OAR–2006–0672, 0535, 0536, 0537, or 0538 (as applicable). Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

World Wide Web (WWW). In addition to being available in the docket, an electronic copy of this proposed action will also be available on the Worldwide

[1] North American Industry Classification System.

[2] Industrial cleaning solvents are used in various manufacturing, repair, and service operations that span many industry sectors. A detailed list of affected industries and their respective NAICS codes are presented in the draft CTG for industrial cleaning solvents.

Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of the proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

Organization of This Document. The information presented in this notice is organized as follows:

I. Background Information and Proposed Determination

A. The Ozone Problem

Ground-level ozone, a major component of smog, is formed in the atmosphere by reactions of VOC and oxides of nitrogen in the presence of sunlight. The formation of ground-level ozone is a complex process that is affected by many variables.

Exposure to ground-level ozone is associated with a wide variety of human health effects, agricultural crop loss, and damage to forests and ecosystems. Acute health effects are induced by short-term exposures (observed at concentrations as low as 0.12 parts per million (ppm)), generally while individuals are engaged in moderate or heavy exertion, and by prolonged exposures to ozone (observed at concentrations as low as 0.08 ppm), typically while individuals are engaged in moderate exertion. Moderate exertion levels are more frequently experienced by individuals than heavy exertion levels. The acute health effects include respiratory symptoms, effects on exercise performance, increased airway responsiveness, increased susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and pulmonary inflammation. Groups at increased risk of experiencing such effects include active children, outdoor workers, and others who regularly engage in outdoor activities, as well as those with preexisting respiratory disease. Currently available information also suggests that long-term exposures to ozone may cause chronic health effects (e.g., structural damage to lung tissue and accelerated decline in baseline lung function).

B. Statutory and Regulatory Background

Under section 183(e) of the CAA, EPA conducted a study of VOC emissions from the use of consumer and commercial products to assess their potential to contribute to levels of ozone that violate the national ambient air quality standards (NAAQS) for ozone, and to establish criteria for regulating VOC emissions from these products. Section 183(e) of the CAA directs EPA to list for regulation those categories of products that account for at least 80 percent of the VOC emissions, on a reactivity-adjusted basis, from consumer and commercial products in areas that violate the NAAQS for ozone (*i.e.*, ozone nonattainment areas), and to divide the list of categories to be regulated into four groups. EPA published the initial list in the **Federal Register** on March 23, 1995 (60 FR 15264). In that notice, EPA stated that it may amend the list of products for regulation, and the groups of product categories, in order to achieve an effective regulatory program in accordance with the Agency's discretion under CAA section 183(e).

EPA has revised the list several times. See 70 FR 69759 (Nov. 17, 2005); 64 FR 13422 (Mar. 18, 1999). Most recently, in May 2006, EPA revised the list to add one product category, portable fuel containers, and to remove one product category, petroleum dry cleaning solvents. See 71 FR 28320 (May 16, 2006). As a result of these revisions, Group II of the list now comprises the five product categories that are the subject of this action.[3]

Any regulations issued under section CAA 183(e) must be based on "best available controls" (BAC). CAA section 183(e)(1)(A) defines BAC as "the degree of emissions reduction that the Administrator determines, on the basis of technological and economic feasibility, health, environmental, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal." CAA section 183(e) also provides EPA with authority to use any system or systems of regulation that EPA determines is the most appropriate for the product category. Under these provisions, EPA has previously issued "national" regulations for architectural and industrial maintenance coatings, autobody refinishing coatings and consumer products.[4]

CAA section 183(e)(3)(C) further provides that EPA may issue a CTG in lieu of a national regulation for a product category where the EPA determines that the CTG will be "substantially as effective as regulations" in reducing emissions of VOC in ozone nonattainment areas. The statute does not specify how EPA is to make this determination, but does provide a fundamental distinction between national regulations and CTGs. Specifically, for national regulations,

[3] Pursuant to the court's order in *Sierra Club* v. *EPA*, 1:01–cv–01597–PLF (D.C. Cir., March 31, 2006), EPA must take final action on the product categories in Group II by September 30, 2006.

[4] See 63 FR 48792 (September 11, 1998).

CAA section 183(e) defines regulated entities as:

(i) * * * manufacturers, processors, wholesale distributors, or importers of consumer or commercial products for sale or distribution in interstate commerce in the United States; or (ii) manufacturers, processors, wholesale distributors, or importers that supply the entities listed under clause (i) with such products for sale or distribution in interstate commerce in the United States.

Thus, under CAA section 183(e), a regulation for consumer or commercial products is limited to the measures applicable to manufacturers, processors, distributors, or importers of the solvents, materials, or products supplied to the consumer or industry. CAA section 183(e) does not authorize EPA to issue regulations that would directly regulate end-users of these products. By contrast, CTG are guidance documents that recommend RACT measures that States can adopt and apply to the end users of products. This dichotomy (i.e., that EPA cannot directly regulate end-users under CAA section 183(e), but can address end-users through a CTG) created by Congress is relevant to EPA's evaluation of the relative merits of a national regulation versus a CTG.

C. Significance of CTG

CAA section 172(c)(1) provides that state implementation plans (SIPs) for nonattainment areas must include "reasonably available control measures" (RACM), including "reasonably available control technology" (RACT), for sources of emissions. Section 182(b)(2) provides that States must revise their ozone SIPs to include RACT for VOC sources covered by any CTG document issued after November 15, 1990, and prior to the date of attainment. Those ozone nonattainment areas that are subject to CAA section 172(c)(1) and submit an attainment demonstration seeking more than five years from the date of designation to attain must also meet the requirements of CAA section 182(b)(2) and revise their ozone SIPs in response to any CTG issued after November 15, 1990, and prior to the date of attainment. Other ozone nonattainment areas subject to CAA section 172(c)(1) may take action in response to this guidance, as necessary to attain.

EPA defines RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility, 44 FR 53761 (Sept. 17, 1979)." In subsequent **Federal Register** notices, EPA has addressed how states can meet the RACT requirements of the Act. Significantly, RACT for a particular industry is determined on a case-by-case basis, considering issues of technological and economic feasibility.

EPA provides states with guidance concerning what types of controls could constitute RACT for a given source category through issuance of a CTG. The recommendations in the CTG are based on available data and information and may not apply to a particular situation based upon the circumstances. States can follow the CTG and adopt State regulations to implement the recommendations contained therein, or they can adopt alternative approaches. In either event, States must submit their RACT rules to EPA for review and approval as part of the SIP process. EPA will evaluate the rules and determine, through notice and comment rulemaking in the SIP process, whether they meet the RACT requirements of the Act and EPA's regulations. To the extent a State adopts any of the recommendations in a CTG into its State RACT rules, interested parties can raise questions and objections about the substance of the guidance and the appropriateness of the application of the guidance to a particular situation during the development of the State rules and EPA's SIP approval process.

We encourage States in developing their RACT rules to consider carefully the facts and circumstances of the particular sources in their States because, as noted above, RACT is determined on a case-by-case basis, considering issues of technological and economic feasibility. For example, a state may decide not to require 90 percent control efficiency at facilities that are already well controlled, if the additional emission reductions would not be cost-effective. States may also want to consider reactivity-based approaches, as appropriate, in developing their RACT regulations.[5] Finally, if States consider requiring more stringent VOC content limits than those recommended in the draft CTGs, states may also wish to consider averaging, as appropriate. In general, the RACT requirement is applied on a short-term basis up to 24 hours.[6] However, EPA guidance permits averaging times longer than 24 hours under certain conditions.[7] The EPA's Economic Incentive Policy"[8] provides guidance on use of long-term averages with regard to RACT and generally provides for averaging times of no greater than 30 days. Thus, if the appropriate conditions are present, States may consider the use of averaging in conjunction with more stringent limits. Because of the nature of averaging, however, we would expect that any State RACT Rules that allow for averaging also include appropriate recordkeeping and reporting requirements.

By this action, we are making available four draft CTGs that cover the five product categories in Group II of the CAA section 183(e) list. We are consolidating lithographic printing materials and letterpress printing materials into one CTG document. These CTGs are guidance to the States and provide recommendations only. A State can develop its own strategy for what constitutes RACT for the Group II product categories, and EPA will review that strategy in the context of the SIP process and determine whether it meets the RACT requirements of the Act and its implementing regulations.

Finally, CAA section 182(b)(2) provides that a CTG issued after 1990 specify the date by which a State must submit a SIP revision in response to the CTG. In the draft CTGs at issue here, EPA provides that States should submit their SIP revisions within one year of the date that the CTGs are finalized.

D. General Considerations in Determining Whether a CTG Will Be Substantially as Effective as a Regulation

CAA Section 183(e)(3)(C) authorizes EPA to issue a CTG in lieu of a regulation for a category of consumer and commercial products if a CTG "will be substantially as effective as regulations in reducing [VOC] emissions" in ozone nonattainment areas. The statute does not specify how EPA is to make this determination.

On July 13, 1999 (64 FR 37773), EPA issued a final determination pursuant to CAA section 183(e)(3)(C), concluding that CTGs for wood furniture coatings, aerospace coatings, and shipbuilding and repair coatings were substantially as

[5] "Interim Guidance on Control of Volatile Organic Compounds in Ozone State Implementation Plans," 70 FR 54046 (September 13, 2005).

[6] See, e.g., 52 FR at 45108, col. 2, "Compliance Periods" (November 24, 1987). "VOC rules should describe explicitly the compliance timeframe associated with each emission limit (e.g., instantaneous or daily). However, where the rules are silent on compliance time, EPA will interpret it as instantaneous."

[7] Memorandum from John O'Connor, Acting Director of the Office of Air Quality Planning and Standards, January 20, 1984, "Averaging Times for Compliance with VOC Emission Limits-SIP Revision Policy."

[8] "Improving Air Quality with Economic Incentive Programs, January 2001," available at *http://www.epa.gov/region07/programs/artd/air/policy/search.htm.*

effective as national regulations in reducing emissions of VOC from these products in areas that violate the NAAQS for ozone. Recognizing that the statute does not specify any criteria for making a determination under CAA section 183(e)(3)(C), EPA, in 1999 considered several relevant factors, including: (1) The product's distribution and place of use; (2) the most effective entity to target to control emissions—in other words, whether it is more effective to achieve VOC reductions at the point of manufacture of the product or at the point of use of the product; (3) consistency with other VOC control strategies; and (4) estimates of likely VOC emission reductions in ozone nonattainment areas which would result from the regulation or CTG. EPA believes that these factors are useful for evaluating whether the rule or CTG approach would be best from the perspective of implementation and enforcement of an effective strategy to achieve the intended VOC emission reductions. As we consider other product categories in the current and future phases of regulation under CAA section 183(e), there may be other factors that are relevant to the CAA section 183(e)(3)(C) determination for given product categories. EPA believes that in making these determinations, no single factor is dispositive. On the contrary, for each product category, we must weigh the factors and make our determination based on the unique set of facts and circumstances associated with each product category. For purposes of making the determination, EPA analyzed the components of the draft CTGs for the product categories at issue and compared the CTGs to the types of controls and emission strategies possible through a regulation. As we explained in 1999, it would be unreasonable for EPA, in effect, to have to complete both the full rulemaking and full CTG development processes before being able to make a determination under CAA section 183(e)(3)(C) validly. EPA believes that for most product categories, it is possible for the Agency to make a determination between what a rule might reasonably be expected to achieve versus what a CTG might reasonably be expected to achieve, without having to complete the entire rulemaking and CTG processes. To conclude otherwise would result in unnecessary wasting of limited time and resources by the Agency and the stakeholders participating in the processes. Moreover, such an approach would be directly contrary to CAA section 183(e)(3)(C), which authorizes EPA to issue a CTG in lieu of a regulation if it determines that the CTG "will be substantially as effective as" a regulation in reducing VOC emissions in ozone nonattainment areas.

With regard to the five product categories at issue here, EPA notes that it does not have reliable quantitative data that would enable it to conduct a ton-by-ton comparison of the likely emission reductions associated with a national regulation versus a CTG. Although we conducted such a comparative analysis in 1999 for the product categories of wood furniture coatings, aerospace coatings and shipbuilding and repair coatings, (64 FR 37773, July 13, 1999), such analysis is not necessary for evaluating likely VOC emission reductions, particularly, where, as here, a CTG can achieve significant emission reductions from end-users, which cannot be achieved through regulation under CAA section 183(e).

E. Proposed Determination

Based on the factors identified above and the facts and circumstances associated with each of the Group II product categories, EPA proposes to determine that CTGs for lithographic printing materials, letterpress printing materials, flexible packaging printing materials, flat wood paneling coatings and industrial cleaning solvents will be substantially as effective as national regulations in reducing VOC emissions from facilities located in ozone nonattainment areas.

The following four sections address the five product categories that comprise Group II of the CAA section 183(e) list. We address lithographic printing materials and letterpress printing materials in one section below. Although these are two distinct product categories in the CAA section 183(e) list, offset lithographic printing and letterpress printing have many similarities in terms of the types of inks and cleaning materials used, the sources of VOC emissions and the controls available to address those emissions. Based on these similarities, EPA has concluded that it is appropriate to address the categories together and to issue a single CTG that covers both product categories.

In each of the product-category sections below, we provide a general description of the industry, identify the sources of VOC emissions associated with the industry, summarize the recommended control techniques in the draft CTG and describe the impacts of those techniques, and discuss the considerations supporting our proposed determination under CAA section 183(e)(3)(C) that a CTG will be substantially as effective as a regulation in reducing VOC emissions in ozone nonattainment areas from the product category at issue.

The specific subsections below that address our proposed determination for each product category are organized into two parts, each of which addresses two of the factors relevant to the CAA section 183(e)(1)(C) determination. The first part addresses whether it is more effective to target the point of manufacture of the product or the point of use for purposes of reducing VOC emissions and discusses whether our proposed approach is consistent with state and local VOC reduction strategies. The second part addresses the product's distribution and place of use and discusses the likely VOC emission reductions associated with a CTG, as compared to a regulation.

Finally, we propose to find that these five product categories are appropriate for inclusion on the CAA section 183(e) list in accordance with the factors and criteria that EPA used to develop the original list. See Consumer and Commercial Products: Schedule for Regulation, 60 FR 15264 (Mar. 23, 1995).

F. Availability of Documents

EPA has prepared four draft CTG documents covering the five consumer and commercial products source categories addressed in this action. Lithographic printing materials and letterpress printing materials are included in one draft CTG document. Each of the draft CTGs addresses, among other things, RACT recommendations, cost impacts, and State and local regulations. These draft CTGs are available for public comment and are contained in the respective dockets listed in the **ADDRESSES** section of this notice.

II. Lithographic Printing Materials and Letterpress Printing Materials

A. Industry Characterization

Lithographic printing materials and letterpress printing materials are two of the product categories in Group II of the section 183(e) list. Not only are these distinct product categories, they are distinct printing processes. Nevertheless, offset lithographic printing and letterpress printing have many similarities in terms of the types of inks and cleaning materials used, the sources of VOC emissions and the controls available to address these emissions. Accordingly, for purposes of simplifying the discussion in this notice, we have combined the

discussion of offset lithographic printing and letterpress printing.

1. Source Category Description

These categories of consumer and commercial products include the inks and other associated materials used by offset lithographic printers and letterpress printers.

Offset lithography is a planographic method of printing. The term "planographic" denotes that the printing and non-printing areas are in the same plane on the surface of a thin metal lithographic plate. To maintain the distinction between the areas on the lithographic plate, the image area is rendered oil receptive, and the non-image area is rendered water receptive.

Offset lithography is an indirect printing method; that is, ink is not transferred directly to a substrate. Rather, ink is transferred from the lithographic plate to a rubber-covered, intermediate "blanket" cylinder and then transferred from the blanket cylinder to the substrate. The offset lithographic process is used for a broad range of printing applications, including books, magazines, periodicals, labels and wrappers, catalogs and directories, financial and legal documents, business forms, advertising brochures, newspapers, newspaper inserts, charts and maps, calendars, tickets and coupons, greeting cards, and stamps.

Letterpress printing is a printing process in which the image area is raised relative to the nonimage area and the paste ink is transferred to the substrate directly from the image surface. Letterpress printing is no longer an economically significant segment of the printing market. Some newspapers, corrugated boxes and kraft paper are still printed by letterpress.

2. Processes, Sources of VOC Emissions, and Controls

a. Offset Lithographic Printing

There are two types of offset lithography characterized by the method in which the substrate is fed to the press. In sheet-fed printing, individual sheets of paper or other substrate are fed to the press. In web printing, continuous rolls of substrate material are fed to the press and rewound or cut to size after printing. VOC emissions from offset lithographic printing result from evaporation of components of the inks, fountain solutions, and cleaning materials.

The inks used in offset lithographic printing are a source of VOC emissions. The amount of VOC emitted varies depending on the type of offset lithographic printing process.

Heatset web offset lithographic inks require heat to set the ink. Heatset web inks may contain up to 45 weight percent VOC (ink oils). In heatset web offset lithographic printing, 20 percent of the petroleum ink oils and essentially all of the vegetable ink oils are retained in the substrate and dry ink film. The remaining 80 percent of the petroleum ink oil is volatilized in and then exhausted from the dryer. Consequently, volatilized ink oils can be a significant source of VOC emissions from heatset web offset lithographic printing operations. Most heatset web offset lithographic printing dryers, however, are equipped with control devices such as a thermal oxidizer, catalytic oxidizer, or chiller condenser. These control devices significantly reduce VOC emissions from heatset web offset lithographic printing.

Coldset web and sheet-fed offset lithographic inks dry by absorption into the substrate or by oxidation. The petroleum ink oils in sheet-fed and coldset web inks have higher boiling points than the petroleum ink oils in heatset inks. Coldset web inks usually contain below 35 percent weight VOC (ink oils). Most sheet-fed inks contain below 25 weight percent VOC (ink oils). In sheet-fed and coldset web offset lithographic printing, 95 percent of the petroleum ink oils and essentially all of the vegetable oils are retained in the substrate and dry ink film. As a result, VOC emissions from sheet-fed and coldset web offset lithographic inks are very low.

Some radiation (ultra-violet and electron beam) cured offset lithographic materials are also used. These materials do not contain ink oils. Their VOC content and emissions are usually extremely low.

The second source of VOC emissions from offset lithographic printing is the fountain solution used in conjunction with the inks. Fountain solution is unique to lithography and is not used in other printing processes.

Fountain solution is applied to the lithographic plate to render the non-image areas unreceptive to ink. The on-press fountain solution is typically a mixture of water and fountain solution concentrate. The concentrate contains additives such as gum arabic or synthetic resins, acids, and buffer salts to maintain the pH of the solution, and a wetting agent or "dampening aid" to enhance the spreadability of the fountain solution across the plate. The dampening aid reduces the surface tension of the water as well as increases viscosity.

Fountain solutions can be the source of a significant portion of the VOC emitted by offset lithographic printing operations. Historically, alcohols such as isopropyl alcohol, n-propyl alcohol and ethanol were used as the dampening aid. Over the past 20 years, many printers have reduced their emissions from fountain solution by reducing the alcohol content of the fountain solution or refrigerating the fountain solution. In addition, many printers have further reduced VOC emissions by switching to alcohol substitutes, most commonly certain glycol ethers.

The third source of VOC emissions from offset lithographic printing is cleaning materials. Cleaning materials are used to wash the blankets, rollers, and outside of presses, and to remove residues of excess ink between color changes. These materials are typically mixtures of organic (often petroleum-based) solvents. Cleaning materials can be the source of a significant portion of the VOC emitted by lithographic printing operations. The keys to reducing VOC emissions from offset lithographic printing cleaning materials are reducing the composite vapor pressure of the material used and work practices. Low-VOC content waterborne cleaning materials have been tested but have not proven to be a satisfactory alternative.

b. Letterpress Printing

The VOC emissions from letterpress printing result from the evaporation of components of the inks and cleaning materials. Fountain solution is not used in letterpress printing. Letterpress inks are similar to offset lithographic inks. They are paste inks containing petroleum oils or vegetable oils. Both sheet-fed and web presses are used for letterpress printing.

Sheet-fed letterpress presses use coldset inks. Most web letterpress equipment use coldset inks. These letterpress inks are similar in composition and behavior to sheet-fed and coldset web lithographic inks. In sheet-fed and coldset web letterpress printing, 95 percent of the petroleum ink oils and essentially all of the vegetable oils are retained in the substrate and dry ink film. As a result, VOC emissions from sheet-fed and coldset web letterpress inks are very low.

There are also some heatset web letterpress printers. Heatset letterpress ink is similar to heatset lithographic ink with 20 percent of the petroleum ink oils and essentially all of the vegetable ink oils retained in the substrate and dry ink film. The remaining ink oil is volatilized in and then exhausted from the dryer. Heatset web letterpress

printing dryers may be equipped with control devices such as a thermal oxidizer, catalytic oxidizer, or chiller condenser. These control devices would significantly reduce VOC emissions from heatset letterpress printing.

The most significant source of VOC emissions in the letterpress process is cleaning materials. Cleaning materials are used to wash the rollers, plates and outside of presses. The cleaning materials used for letterpress printing are similar to those used in lithographic printing. These materials are typically mixtures of organic (often petroleum-based) solvents. The keys to reducing VOC emissions from letterpress printing cleaning materials are reducing the composite vapor pressure of the material used and work practices.

3. State and Local Regulations

Seventeen States or local areas have VOC emission regulations for offset lithographic printing operations. Five states or local areas have regulations for letterpress printing operations. These rules generally limit the alcohol or alcohol substitute content of fountain solutions and the composite vapor pressure of cleaning materials, and require control of heatset dryer exhaust. More detail on these rules is provided in the draft CTG.

B. Recommended Control Techniques

The draft CTG recommends certain control techniques for heatset dryers, fountain solution and cleaning. The recommendations in the draft CTG apply to offset lithographic printing operations or letterpress printing operations that emit at least 6.8 kg/day (15 lb/day) of VOC before consideration of control. The 15 lb/day level of emissions has been the applicability threshold for many CTGs in the past.[9] For purposes of determining whether this applicability threshold is met, emissions from all offset lithographic printing, letterpress printing, and cleaning activities associated with offset lithographic printing or letterpress printing at a given facility are included. The only exception to this threshold relates to the add-on control recommendations provided below for heatset web offset lithographic printing operations and heatset web letterpress printing operations, and that exception is described below.

1. Offset Lithographic Printing

In the draft CTG, the recommended level of control for VOC emissions from exhaust from heatset web offset lithographic dryers is a 90 percent reduction in VOC for control equipment installed before March 14, 1995. The draft CTG further recommends that control equipment installed on or after March 14, 1995, achieve 95 percent efficiency. These levels of control can be achieved by thermal oxidizers, catalytic oxidizers and chiller condensers. In light of technological improvements, add-on controls installed on or after March 14, 1995 can achieve 95 percent VOC reduction. To accommodate situations where the inlet VOC concentration is so low that a 90 or 95 percent reduction may not be achievable, an outlet concentration alternative is also recommended.

The above recommended levels of control apply only to heatset web offset lithographic printing operations with potential to emit from the dryers of at least 25 tpy of VOC combined from heatset inks and carryover of alcohol substitutes (fountain solution) and low vapor pressure automatic blanket wash materials, before consideration of controls. We are recommending the 25 tpy threshold for add-on controls for heatset ink printers because the limited information currently available to us suggests that controls for small printers may be more costly for a given amount of emission reduction. In the 1993 draft CTG, EPA examined the cost of controlling heatset dryer emissions from four different size model plants. Annual ink oil emissions, before control, from the dryers at these facilities were approximately 25, 50, 100 and 200 tons per year (tpy). The cost-effectiveness of controlling these ink oil emissions was estimated to range from $1,300 per ton at the largest model facility to $2,300 per ton at the smallest model facility (1990 dollars). In 2005 dollars, this equates to $1,800 per ton at the largest model facility and $3,100 per ton at the smallest model facility. More recently, EPA learned of a heatset web offset lithographic book printing facility with potential to emit 26 tpy of VOC from ink and alcohol substitute (fountain solution) carryover, before control, from the dryers on five heatset web offset lithographic presses. Book printing tends to have much lighter coverage and lower dryer exhaust VOC concentration than other types of heatset printing (*e.g.*, magazine printing). In this case the VOC concentration of the dryer exhaust was very low. A 2004 state BACT analysis for this facility did not require the installation of control equipment. The cost per ton of controlling heatset dryer emissions was estimated by the facility to be $15,500 per ton which is significantly higher than that estimated for the smallest model facility in the 1993 draft CTG.

We recognize that we have limited information on small heatset web facilities and the costs of controlling VOCs emitted from the dryers at these smaller sources. To allow us to assess the cost of controlling dryer emissions at small heatset web facilities and the appropriateness of the 25 tpy threshold for controlling dryer exhaust from heatset web printers, we request information on the mass of ink oil emissions and mass of alcohol substitute and automatic blanket wash carryover before control, dryer exhaust rates, and other relevant operating parameters for facilities with potential to emit from heatset dryers up to 100 tpy. We would also welcome information on the experience of smaller facilities in controlling their dryer emissions, including any alternative control approaches, and the cost of such controls.

No limits or controls are recommended for VOC emissions from sheet-fed and coldset web offset lithographic inks. In sheet-fed and coldset web offset lithographic printing, 95 percent of the petroleum ink oils and essentially all of the vegetable oils are retained in the substrate and dry ink film. As a result, VOC emissions from sheet-fed and coldset web offset lithographic inks are already very low.

The recommended level of control for VOC emissions from fountain solution for heatset web printing is 1.6 percent alcohol (by weight) in the fountain or equivalent. The draft CTG recommends three different approaches for achieving this recommended level of control. The first approach involves reducing the alcohol content to 1.6 percent alcohol or less (by weight). The second approach involves using 3 percent alcohol or less (by weight) in the fountain solution provided the fountain solution is refrigerated to below 60 °F (15.5 °C). The third approach involves using 5 percent alcohol substitute or less (by weight) and no alcohol in the fountain solution.

The recommended level of control for VOC emissions from fountain solution for sheet-fed printing is equivalent to 5 percent alcohol (by weight) in the fountain or equivalent The draft CTG recommends three different approaches for achieving this recommended level of control. The first approach involves reducing the alcohol content to 5.0

[9] See. e.g., Model Volatile Organic Compound Rules for Reasonably Available Control Technology: Planning for Ozone Nonattainment Pursuant to Title I of the Clean Air Act, dated June 1992 (establishing the 15 lb of VOC per day applicability threshold for coating applications for eleven industries, including automobile and light duty truck coating operations and coating of cans, coil, paper, fabric, vinyl, metal furniture, large appliances, magnet wire, miscellaneous metal parts, and flatwood paneling).

percent alcohol or less (by weight). The second approach involves using 8.5 percent alcohol or less (by weight) in the fountain solution provided the fountain solution is refrigerated to below 60°F (15.5° C). The third approach involves using 5 percent alcohol substitute or less (by weight) and no alcohol in the fountain solution.

The recommended level of control for VOC emissions from fountain solution for coldset web is 5 percent alcohol substitute or less (by weight) and no alcohol in the fountain solution.

For all types of offset lithographic printing, the draft CTG recommends the use of cleaning materials with a VOC composite partial pressure less than 10 mm Hg at 20 °C, and that cleaning materials and used shop towels be kept in closed containers. The draft CTG also recommends an allowance for limited, 209 or 418 liters (55 or 110 gallons) per year, use of higher vapor pressure cleaning materials. We request comments on the appropriate size for this allowance and additional information on the specific cleaning activities which require the use of higher vapor pressure cleaning materials.

2. Letterpress Printing

The recommended level of control for VOC emissions from exhaust from heatset letterpress dryers is a 90 percent reduction in VOC for control equipment installed before March 14, 1995. The draft CTG further recommends that new control equipment installed on or after March 14, 1995, be required to achieve 95 percent efficiency. These levels of control can be achieved by thermal oxidizers, catalytic oxidizers, and chiller condensers. In light of technological improvements, add-on controls installed after March 14, 1995 can achieve 95 percent VOC reduction. To accommodate situations where the inlet VOC concentration is low, an outlet concentration alternative is also recommended.

The above recommended levels of control apply only to heatset web letterpress printing operations with potential to emit from the dryers of at least 25 tpy of VOC combined from heatset inks and carryover of automatically applied low vapor pressure cleaning materials, before consideration of controls. For the reasons explained above, we are recommending the 25 tpy threshold for add-on controls for heatset ink letterpress printers because the limited information currently available to us suggests that controls for small heatset printers may be more costly for a given amount of emission reduction. Because we have limited information on small heatset web letterpress facilities and the costs of controlling VOCs emitted from the dryers at these smaller sources, we request additional information on these facilities. The type of information we are requesting is specified above in the discussion concerning add-on controls for heatset web offset lithographic printers.

No limits are recommended for VOC emissions from sheet-fed and coldset letterpress inks. In sheet-fed and coldset web letterpress printing, 95 percent of the petroleum ink oils and essentially all of the vegetable oils are retained in the substrate and dry ink film. As a result, VOC emissions from sheet-fed and coldset web letterpress inks are already very low.

The draft CTG recommends the use of letterpress cleaning materials with a VOC composite partial pressure less than 10 mm Hg at 20 °C, and that cleaning materials and shop used towels be kept in closed containers. The document also recommends an allowance for limited, 209 or 418 liters (55 or 110 gallons) per year, use of higher vapor pressure cleaning materials. We request comments on the appropriate size for this allowance and additional information on the specific cleaning activities which require the use of higher vapor pressure cleaning materials.

C. Impacts of Recommended Control Techniques

In the 1993 draft CTG, EPA estimated baseline emissions from the offset lithographic printing industry in ozone nonattainment areas, based on 1990 data, to be 820,000 tons per year (with 62,000 tpy coming from ink, 631,000 tpy from fountain solution and 126,000 tpy from cleaning.) Commenters on the 1993 draft CTG asserted that the alcohol content (17 percent) used to generate this estimate was too high and that the assumed ratio of fountain solution usage to ink usage was also too high. Baseline emissions from fountain solution may have been overestimated in 1993 by a factor of 2 to 3. This would reduce industry wide baseline emissions to between 400,000 to 500,000 tpy. As for letterpress printers, we have limited emissions data information for this industry. Based on available information, we estimate that VOC emissions from the letterpress printing industry as of 1990 were about 28,000 tons per year.

Based on VOC emissions data and April 2006 ozone nonattainment designations, EPA estimates that 6,700 offset lithographic printing facilities and 2,200 letterpress printing facilities would be affected by the draft CTG. We estimate the cost effectiveness of the recommended control techniques for offset lithographic printing to be $2,000/ton of VOC removed for heatset web dryers and $850/ton of VOC removed for cleaning materials. A cost savings is estimated for fountain solution. We estimate the cost effectiveness of the recommended control techniques for letterpress heatset web dryers and letterpress printing cleaning materials to be similar to the cost effectiveness for offset lithographic heatset dryers and offset lithographic printing cleaning materials.

D. Considerations in Determining Whether a CTG Will Be Substantially as Effective as a Regulation

In determining whether to issue a national rule or a CTG for the product categories of lithographic printing materials and letterpress printing materials under section 183(e)(3)(C), we analyzed the four factors identified above in Section I.D in light of the specific facts and circumstances associated with these product categories. Based on that analysis, we propose to determine that a CTG will be substantially as effective as a rule in achieving VOC emission reductions in ozone nonattainment areas from lithographic printing materials and letterpress printing materials.

As noted above, this section is divided into two parts. In the first part, we discuss our belief that the most effective means of achieving VOC emission reductions in these two categories is through controls at the point of use of the product (i.e., through controls on printers), and this can only be accomplished through a CTG. We further explain that the approaches in the draft CTG are consistent with existing effective state and local VOC strategies. In the second part, we discuss how the distribution and place of use of the products in each of these categories also support the use of a CTG. We further explain that there are control approaches for these two categories that result in significant VOC emission reductions and that such reductions could only be obtained by controlling the use of the product through a CTG. Such reductions could not be obtained through a regulation under section 183(e) because the controls affect the end-user, which cannot be a regulated entity under section 183(e)(1)(C). Accordingly, for these reasons and the reasons described more fully below, we believe that a CTG will achieve greater VOC emission reductions than a rule for these two categories.

1. The Most Effective Entity To Target for VOC Reductions and Consistency With State and Local VOC Strategies

To evaluate the most effective entity to target for VOC reductions, it is important to first identify the primary sources of VOC emissions. There are three main sources of VOC emissions from offset lithography: (1) Evaporation of VOC from the inks; (2) evaporation of VOC from the fountain solution; and (3) evaporation of VOC from the cleaning materials. VOC emissions associated with letterpress printing stem from inks and cleaning materials only; fountain solutions are not used in letterpress printing. We address each of these sources of VOC emissions, in turn, below, as we discuss the CTG versus regulation approach.

a. Inks

A national rule could contain limits for the as-sold VOC content of offset lithographic inks and letterpress inks, but given the nature of the offset lithographic printing and letterpress printing processes, this would result, in little, if any, reduction in VOC emissions.

Inks are a significant source of VOC emissions from heatset web offset lithographic printing and heatset web letterpress printing. In these processes, heat is applied in a dryer to set the inks. As a result of the heating process, about 80 percent of the petroleum ink oil (VOC) is volatilized in the dryer. The remaining 20 percent of petroleum ink oil and all of the vegetable ink oil is retained in the substrate and dry ink film. Since the vegetable ink oil does not volatilize in the dryer, the amount of vegetable ink oil that can be used in heatset inks is very limited. If there is too much vegetable oil in a heatset ink, the ink will not dry properly.

Control devices, such as thermal oxidizers, catalytic oxidizers, or chiller condensers, can achieve a 90 percent or greater reduction in VOC emissions from heatset dryers. In light of the significant reductions in VOC emissions obtained with such devices, existing State and local regulations that address offset lithography require the use of controls on heatset dryer exhaust. The same controls are equally applicable to heatset letterpress dryers.

We could not require such control devices at printers through a national rule, because, pursuant to CAA section 183(e)(1)(C) and (e)(3)(A), the regulated entities subject to a national rule would be the ink manufacturers and suppliers, not the printers. The draft CTG applies to printers, as the end users of the inks, and specifically recommends limiting emissions by requiring printers to install and operate control devices on heatset dryers.

Although both a national rule and a CTG could, in theory, achieve some reduction in VOC emissions from heatset web inks by requiring minimum vegetable oil content or limiting the ratio of petroleum oil to vegetable oil, we do not believe that such an approach is appropriate for addressing the emissions associated with these inks. As noted above, only very limited amounts of vegetable oil can be used in heatset inks. As a result, only a small emission reduction could be achieved, and we believe that this emission reduction—whether pursued through a rule or CTG—would not be cost-effective. Accordingly, the draft CTG does not contain restrictions on vegetable oil content. Given the significant reductions achievable through use of add-on control devices and the limited reductions that would be achieved by a national rule for heatset inks, the most effective entity to regulate VOC emissions associated with heatset web offset lithographic inks and heatset letterpress inks is the printer.

The VOC emissions from sheet-fed and coldset web lithographic inks and sheet-fed and coldset web letterpress inks are inherently very low. First, these inks are lower VOC-content inks than heatset web inks. Second, 95 percent of the petroleum ink oil and essentially all of the vegetable ink oil in sheet-fed and coldset web lithographic inks and sheet-fed and coldset web letterpress inks do not evaporate and are retained in the substrate and dry ink film. Because only a small percentage of the sheet-fed and coldset web lithographic and letterpress ink oils evaporate, VOC emissions associated with these inks are small.

Although both a national rule and a CTG could, in theory, achieve some reduction in VOC emissions from sheet-fed and coldset web inks by requiring a minimum vegetable oil content or limiting the ratio of petroleum oil to vegetable oil, we do not believe that such an approach is appropriate for addressing the limited emissions associated with these inks. Only a small emission reduction could be achieved, and we believe that this emission reduction—whether pursued through a rule or a CTG—would not be cost-effective. There are therefore no restrictions on vegetable oil content in the draft CTG.

In addition, there are no cost-effective control devices to address VOC emissions from sheet-fed and coldset web lithographic and letterpress printers because the emissions that occur from these processes are diffuse and spread over a large area. Such emissions stand in contrast to those associated with heatset offset web lithographic inks and heatset letterpress inks, as the petroleum oils in those inks volatilize in a dryer and can be controlled in a cost-effective manner because they are emitted in a more concentrated form from a discrete source. Thus, the draft CTG, while a viable approach for addressing VOC emissions associated with heatset web inks with add-on controls, does not contain any add-on control recommendations for sheet-fed and coldset web inks because of the absence of any cost-effective control devices.

b. Fountain Solutions [10]

Fountain solutions contain alcohol or alcohol substitutes, which are VOCs. Fountain solutions are generally purchased in the form of fountain solution concentrate from vendors serving offset lithographic printers. The printers—the end-users of the fountain solution—buy the concentrate and dilute it with water to make "press-ready" fountain solution. The more the concentrate is diluted, the lower the VOC content of the press-ready fountain solution and the fewer VOC emissions result.

A national rule requiring fountain solution concentrate manufacturers and suppliers to package the fountain solution concentrate with less VOC would not be an effective means of addressing VOC emissions in ozone nonattainment areas. In this regard, we could, in theory, require the manufacturer or supplier to sell only pre-diluted fountain solution with a specified amount of VOC content. The effect of such a rule could be easily subverted, however, because the rule would not, in any way, affect the actions of the end-user of the fountain solution, i.e., the printers. In particular, printers can purchase alcohol or alcohol substitutes from a variety of sources and add these to the pre-diluted fountain solution concentrate, which would effectively nullify the reformulation actions of the manufacturer and supplier, resulting in no net change in VOC emissions in ozone nonattainment areas. By contrast, a CTG can reach the users of the product and can therefore implement controls or practices by the user that are more likely to achieve the intended VOC emission reduction goal.

In addition, printers purchase fountain solution concentrate with the intention of diluting the solution with

[10] This section addresses offset lithographic printing only because fountain solutions are not used in letterpress printing.

water, as appropriate, for the particular printing at issue. Thus, a regulation requiring dilution of the fountain solution concentrate by the manufacturer would be redundant of the actions that will be taken by the printers. The only result of such a national regulation would be increased shipping costs for printers. Shipping costs would increase because diluting the fountain solution concentrate would increase the volume of material to be shipped to the printers.

A national rule also, in theory, could prohibit fountain solution manufacturers and suppliers from selling fountain solution concentrates which contain alcohol or alcohol substitutes. Similar to the reformulation strategy described above, the net effect of such a rule could be easily nullified by actions of the printers, because nothing precludes the printers from purchasing alcohol or alcohol substitutes from vendors that would not be subject to the section 183(e) regulation. Moreover, most offset lithographic printing requires some alcohol or alcohol substitute in the fountain solution, so prohibiting alcohol or alcohol substitutes in fountain solution concentrate would be impractical.

Although a national rule could, in theory, prohibit the sale of all alcohol and alcohol substitutes regardless of specified end use for purposes of reducing VOC emissions from the offset lithographic and letterpress printing industries, such an approach is unreasonable and impractical, as it would preclude the use of alcohol in all contexts just to obtain VOC reductions in ozone nonattainment areas from two limited product categories. A more effective approach is to target reductions through controls on the end-user, the printers, through a CTG. Specifically, the draft CTG recommends limiting the on-press VOC (alcohol or alcohol substitute) content of fountain solutions, or refrigerating the fountain solution to reduce evaporation of VOC. These approaches are consistent with approaches already taken by State and local authorities, and they have proven effective in reducing VOC emissions.

c. Cleaning Materials

There are two primary means to control VOC emissions associated with the cleaning materials used in the offset lithographic printing process and the letterpress printing process: (1) Limiting the composite vapor pressure of the cleaning materials, and (2) implementing work practices governing the use of the product. A national rule affecting lithographic cleaning material and letterpress cleaning material manufacturers that limits the composite vapor pressure of VOC in the cleaning materials sold suffers from the same deficiencies noted above with regard to fountain solutions. Specifically, although lithographic printers and letterpress printers generally purchase cleaning materials from vendors serving their respective industry, nothing in a national rule governing manufacturers would preclude them from purchasing bulk solvents or other multipurpose cleaning materials from other vendors. The general availability of bulk solvents or multipurpose cleaning materials from vendors that would not be subject to the regulation would directly undermine the effectiveness of the regulation.

A national rule also could, in theory, limit the composite vapor pressure of all cleaning materials and all solvents sold regardless of specified end use, which would ensure that only low composite vapor pressure materials are available for lithographic printing and letterpress printing. Such an approach is unreasonable and impractical. Cleaning materials and solvents are sold for multiple different commercial and industrial purposes. Reducing the vapor pressure of all materials merely to achieve VOC emission reduction from two limited product categories, could preclude the use of such materials in many important, legitimate contexts.

The more effective approach for obtaining VOC reductions from cleaning materials used by offset lithographic printers and letterpress printers is to control the use of such materials by the printers through a CTG. The draft CTG recommends limiting the composite vapor pressure of offset lithographic and letterpress cleaning materials. With the CTG, the composite vapor pressure restrictions would apply to the printer regardless of the source of the cleaning materials and solvents.

Significantly, we could not impose work practices through a section 183(e) rule. Work practices, by their nature, are directed at the end-user of the product. The draft CTG recommends work practices such as keeping shop towels in closed containers. This measure alone results in significant reductions in VOC cleaning emissions, when used in conjunction with low composite vapor pressure cleaning materials. These reductions would not be possible through a section 183(e) regulation because, by statute, such regulations do not apply to the end-user. Finally, the approaches recommended in the CTG are consistent with approaches taken by States and localities for cleaning materials, and these approaches have proven effective in reducing VOC emissions.

Based on the nature of the offset lithographic printing and letterpress printing processes, the sources of significant VOC emissions from those processes, and the available strategies for reducing such emissions, the most effective means of achieving VOC emission reductions from these product categories is through controls at the point of use of the products, (*i.e.*, through controls on printers), and this can only be accomplished through a CTG. The approaches described in the draft CTG are also consistent with effective state and local VOC control strategies. These two factors alone demonstrate that a CTG will be substantially as effective as a national regulation.

2. The Product's Distribution and Place of Use and Likely VOC Emission Reductions Associated With a CTG Versus a Regulation

The factors described in the above section, taken by themselves, weigh heavily in favor of the CTG approach. The other two factors relevant to the section 183(e)(3)(C) determination only further confirm that a CTG will be substantially as effective as a national regulation for offset lithographic printing and letterpress printing products.

First, the products described above are used at commercial printing facilities in specific, identifiable locations. This stands in contrast to other consumer products, such as architectural coatings, that are widely distributed and used by innumerable small users (e.g., individual consumers in the general public). Because the VOC emissions are occurring at commercial printing facilities, implementation and enforcement of controls concerning the use of products are feasible and therefore the nature of the product's place of use further counsels in favor of the CTG approach.

Second, a CTG will achieve equal or greater emission reduction than a national rule for each source of VOC emissions from offset lithographic printing and letterpress printing. In total, the CTG will achieve greater emission reductions because, as explained above, there are certain control strategies, applicable to the end-user of the product, that achieve significant VOC reductions. In particular, a CTG will achieve a significant reduction of VOC emissions (90 percent or greater) from heatset inks through the use of control devices on dryers used in heatset web offset lithographic printing and heatset web

letterpress printing. A CTG also provides for work practices associated with cleaning materials. The VOC reductions associated with these measures could not be obtained through a national regulation because they require the implementation of measures by the end-user.

In addition, there are certain strategies that arguably could be implemented through rulemaking, but are far more effective if implemented directly at the point of use of the product. For the reasons described above, it is more effective to control the alcohol or alcohol-substitutes content of fountain solution concentrate and the composite vapor pressure of cleaning materials through a CTG, than a regulation.

Furthermore, the number of sources affected by a CTG, as compared to the number of sources in nonattainment areas does not change our conclusion that the CTG would, in total, achieve greater VOC emission reductions than a rule. Based on the April 2006 designations, we estimate that 6,700 offset lithographic printing facilities, and 2,200 letterpress printing facilities would be affected by the draft CTG. We further estimate that there are 30,500 offset lithographic printing facilities and 11,000 letterpress printing facilities located in ozone nonattainment areas. Although there is a large difference between the number of facilities affected by the CTG, as compared to the number of facilities in nonattainment areas, the facilities not covered by the CTG are predominantly small sheet-fed printing facilities that, as demonstrated above, are inherently low VOC emitters.

Upon considering the above factors in light of the facts and circumstances associated with these product categories, we propose to determine that a CTG for offset lithographic printing and letterpress printing will be substantially as effective as a national regulation.

III. Flexible Packaging Printing Materials

A. Industry Characterization

1. Source Category Description

Flexible packaging refers to any package or part of a package the shape of which can be readily changed. Flexible packaging includes, but is not limited to, bags, pouches, labels, liners, and wraps utilizing paper, plastic, film, aluminum foil, metalized or coated paper or film, or any combination of these materials. Printing, coating, laminating, and the use of adhesives, primers, and varnishes may all be performed on or in-line with a flexible packaging printing press, and these activities are included in the source category.

2. Processes, Sources of VOC Emissions, and Controls

The primary source of VOC emissions from the flexible packaging printing industry is evaporation of components of the printing inks, coatings, adhesives and cleaning materials.

About 80 percent of flexible packaging printing is performed using rotogravure processes. Gravure printing is a printing process in which an image (type and art) is etched or engraved below the surface of a plate or cylinder. Rotogravure package printing uses a wide variety of different ink systems, including solvent systems (using aromatic, aliphatic and oxygenated hydrocarbon solvent-borne inks), and waterborne inks. VOC are contained in the printing inks, coatings, adhesives and cleaning materials.

In flexographic printing, the image is raised above the printing plate, and the image carrier is made of rubber or other elastomeric materials. The major applications of flexographic printing are flexible and rigid packaging; tags and labels; newspapers, magazines, and directories; and paper towels, tissues, etc. Flexographic inks include both waterborne and solvent-based systems. Solvents used must be compatible with the rubber or polymeric plates; thus, aromatic solvents are not used. VOC are contained in the printing inks, coatings, adhesives and cleaning materials.

There are two approaches to reducing VOC emissions from the inks, coatings and adhesives used in the flexible packaging printing industry. The first approach includes improving existing capture and/or control systems or adding control systems where none are in use. The second approach, focusing on pollution prevention, is to substitute lower VOC content or VOC-free inks, coatings and adhesives for higher VOC content materials presently in use. The controls employed are influenced by the type of inks, coatings and adhesives used, the printing process being used, the substrate, and performance requirements for the end product.

Capture systems in use include combinations of dryer exhausts, floor sweeps, hoods, and total enclosures. Pressroom ventilation air can also be exhausted to a control device. Capture efficiencies can vary widely; the differences in efficiency contribute much more to the variation in overall efficiencies than the choice of control device. Control devices in use include carbon adsorbers, thermal oxidizers, and catalytic oxidizers.

Many facilities in the packaging rotogravure and flexographic printing industries use waterborne inks. These inks typically contain a small proportion of alcohols or glycol ethers which function to reduce surface tension and improve flow characteristics. Waterborne inks are being used successfully for printing on paper packaging and for printing on non-absorbent packaging substrates such as plastics, aluminum, and laminates.

Use of waterborne inks for rotogravure printing is increasing; however, problems still limit their use at press speeds above 1,000 feet per minute. Their use may require redesign of the system (e.g., changes in ink formulation, cylinder engraving, press operation, and dryer design) for rotogravure flexible packaging printing. While use of waterborne inks reduces or eliminates VOC emissions, their higher surface tension and slower drying rate continue to be obstacles to their expanded use.

There is widespread use of waterborne inks in flexographic printing. Most of these facilities have no control devices, and may have converted from solvent-borne to waterborne materials to avoid the need to install control devices to comply with VOC regulations. Flexographic printing is more easily adapted to the use of waterborne materials, and may not require redesign of the system.

Flexible packaging producers print on many different substrates within the same facility. Low-VOC inks are not available to meet all of the performance requirements of the products produced at these facilities or for all substrates in all of the colors required by some facilities.

3. State and Local Regulations

At least 34 States and several more local agencies have regulations that control VOC emissions from rotogravure and flexographic printing for flexible packaging. The majority of these agencies have adopted control levels consistent with the 1978 RACT levels of 65 percent overall control for rotogravure, 60 percent overall control for flexography, or use of inks, coatings and adhesives with less than or equal to 25 percent by volume VOC in their volatile fraction, more than 60 volume percent solids less water, or less than 0.5 kg of VOC per kg of solids. More recently issued regulations for flexible package printing operations are more stringent than the recommendations found in the 1978 CTG. These regulations have overall control efficiency requirements ranging from 66 percent to 85 percent.

B. Recommended Control Techniques

The draft CTG recommends certain control techniques for flexible packaging printing (inks, coatings and adhesives) and cleaning. The recommendations in the draft CTG apply to flexible packaging printing operations that emit at least 6.8 kg/day (15 lb/day) of VOC before consideration of control. This level of emissions has been the applicability threshold for many CTG in the past. For purposes of this threshold, emissions from all flexible packaging printing and cleaning activities associated with flexible packaging printing at a given facility are included. The only exception to this threshold relates to the control recommendations provided below for emissions from inks, coatings and adhesives, and that exception is described below.

1. Inks, Coatings and Adhesives

More recently installed presses are capable of achieving greater capture efficiencies than older presses. For presses first installed prior to March 14, 1995, the draft CTG recommends an overall capture and control efficiency of 70 percent for flexible packaging printers. Alternative "as-applied" ink, coating and adhesive limits of 0.5 kg of VOC/kg of solids applied (0.5 lb of VOC/lb of solids applied) or 0.10 kg of VOC/kg of materials applied (0.10 lb of VOC/lb of materials applied) are also recommended.

For presses installed on or after March 14, 1995, the draft CTG recommends an overall capture and control efficiency of 80 percent for flexible packaging printers. Alternative "as-applied" ink, coating and adhesive limits of 0.5 kg VOC/kg of solids applied (0.5 lb of VOC/lb of solids applied) or 0.10 kg VOC/kg of materials applied (0.10 lb of VOC/lb of materials applied) are also recommended.

The above recommended levels of control apply only to flexible packaging printing operations with potential to emit at least 25 tpy of VOC from inks, coatings and adhesives combined before consideration of controls. We are recommending the 25 tpy threshold because not all flexible packaging facilities can use low VOC content inks, coatings and adhesives, and because the limited information currently available to us suggests that add-on controls for small printers may be more costly for a given amount of emission reduction.

Based on available information, we estimate that for a press exhausting approximately 5,800 cubic feet per minute, operating 2000 hours per year, and achieving 70 percent capture efficiency, the VOC emission reduction achieved by add-on controls would range from 30 to 60 megagrams (Mg) (33 to 66 tons) per year and the cost effectiveness would range from $1,400/Mg to $3,100/Mg ($1,300/ton to 2,800/ton) depending on the average hourly solvent use rate. At lower solvent use rates, the cost per ton of emission controlled would likely be higher.

We recognize that we have limited information on small flexible packaging printing facilities and the cost of add-on controls to reduce VOCs emitted from inks, coatings and adhesives at these smaller sources. To allow us to assess the cost of controlling emissions from inks, coatings and adhesives at small flexible packaging printing facilities and the appropriateness of the 25 tpy threshold for recommending control of these emissions, we request information on the mass of VOC emissions from inks, coatings and adhesives before control, dryer exhaust rates, press utilization rates and other relevant operating parameters for these smaller facilities. We would also welcome information on the experience of smaller facilities in controlling these emissions, including any alternative control approaches, and the cost of such controls.

2. Work Practices for Cleaning Materials

The draft CTG recommends work practice requirements to ensure that all cleaning materials are stored in closed containers; spills are minimized; cleaning materials are conveyed from one location to another in closed containers or pipes; and emissions of VOC are minimized during cleaning of equipment. The draft CTG also recommends that used shop towels be stored in closed containers.

C. Impacts of Recommended Control Techniques

EPA estimates that there are a total of 219 facilities located in ozone nonattainment areas (based on April 2006 designations). Based on VOC emissions data, EPA estimates that there are approximately 100 facilities in ozone nonattainment areas that would be affected based on the 6.8 kg/day (15 lb/day) VOC emissions applicability threshold.

Nonattainment area VOC emissions (based on April 2006 designations) are estimated to range from 8,636 to 16,364 Mg/yr (9,500 to 18,000 tpy). Many facilities located in ozone nonattainment areas are already meeting the control levels recommended in the draft CTG. These facilities may be using capture and control systems or low VOC content inks, coatings and adhesives. The costs for facilities using higher VOC materials that are not currently controlled and will be subject to RACT for the first time will vary depending on the flow rate, hourly solvent use rate, and operating hours. Although we do not have sufficient information for the industry as a whole to estimate the costs of the recommended control approaches, we have information on certain sources from which we can estimate the likely emissions reductions and costs for a typical source subject to control for the first time.

As noted above, on a relatively small flexible packaging press exhausting approximately 5,800 cubic feet per minute, operating 2000 hours per year, and achieving 70 percent capture efficiency, we estimate the VOC emission reduction to range from 30 to 60 megagrams (Mg) (33 to 66 tons) per year and the cost effectiveness to range from $1,400/Mg to $3,100/Mg ($1,300/ton to $2,800/ton) depending on the average hourly solvent use rate. Increasing the hourly solvent use rate, annual operating hours, or capture efficiency of this size press would increase the annual VOC emission reduction and improve the cost effectiveness. Larger presses with proportionately larger hourly solvent use rates would also have larger annual VOC emission reductions and better cost effectiveness than smaller presses.

D. Considerations in Determining Whether a CTG Will Be Substantially as Effective as a Regulation

In determining whether to do a national rule or a CTG for the flexible packaging printing materials category, we evaluated the factors noted above in Section I.D of this notice in light of the specific facts and circumstances associated with this product category. Given the nature of the flexible packaging printing process, the sources of VOC emissions from this process and the available strategies for reducing VOC emissions from this process, we propose to determine that a CTG will be substantially as effective as a rule in achieving VOC emission reductions in ozone nonattainment areas from the flexible packaging printing materials product category.

1. The Most Effective Entity To Target for VOC Reductions and Consistency With State and Local VOC Strategies

To evaluate the most effective entity to target for VOC reductions, it is important to first identify the primary sources of VOC emissions. There are two main sources of VOC emissions from flexible package printing: (1) Evaporation of VOC from inks, coatings,

and adhesives; and (2) evaporation of VOC from cleaning materials. We address each of these sources of VOC emissions, in turn, below, as we discuss the CTG versus regulation approach.

a. Inks, Coatings, and Adhesives

While there is already significant use of low-VOC inks, coatings and adhesives, not all flexible packaging printing can be done with low-VOC content materials. In addition, in some cases where low-VOC content materials could be used for some or all of the products produced by a particular printer, there can be significant equipment costs associated with switching to low-VOC content materials. For example, in order to switch from solvent-borne materials to waterborne materials, a rotogravure printer would need to re-engrave all of its rotogravure cylinders. In other cases significant modifications may need to be made to dryers.

A national rule could, in theory, limit the as-sold VOC content of inks, coatings and adhesives used for specific purposes in flexible packaging printing. This would in essence be specifying which print work must be done with waterborne or other low-VOC content materials and which print work may be done with solvent-borne materials. During the development of the national emission standard for hazardous air pollutants for the printing and publishing industry, we identified many inks, coatings and adhesives with low hazardous air pollutant (HAP) content; however, we were unable to identify specific print work that could always be performed with low HAP content materials. Similarly, given the wide variety of flexible packaging products; the wide variety of combinations of substrates, inks, coatings and adhesives used to make these products; the wide variety of products that may be printed on an individual press; and the wide variation in the capabilities of individual presses, we do not believe that we would be able to identify specific print work that could always be performed with waterborne or other low-VOC content materials. As a result, we do not believe we could create an effective national rule which specified which print work must be done with waterborne or other low-VOC content materials and which print work may be done with solvent-borne materials.

Alternatively, a national rule could contain limits for the as-sold VOC content of broad categories of flexible packaging printing inks, coatings, and adhesives, but given the nature of the flexible package printing process, this would result in little, if any, reduction in VOC emissions. For example, a national rule could categorize inks by their chemistry into waterborne inks, other low-VOC content inks, and solvent-borne inks and set VOC content limits for each category. Such a rule would not restrict the type of work that could be conducted with each type of ink. Structuring a rule in this fashion would not result in significant reductions in VOC emissions because solvent-borne inks, which are the primary source of VOC emissions, would still be allowed to have high VOC content, and a national rule would not require printers to use add-on controls in conjunction with these high VOC content materials. It is more effective to address the emissions associated with solvent-borne inks at the point of use through a CTG.

Indeed, control devices, such as thermal oxidizers, catalytic oxidizers, or carbon adsorbers, can achieve significant reductions in VOC emissions from high VOC content inks, coatings and adhesives. Existing State and local regulations that address flexible packaging printing authorize the use of high VOC content materials in conjunction with control devices or the use equivalent low-VOC content materials.

We could not require control devices at printers through a national rule, because, pursuant to CAA section 183(e)(1)(C) and (e)(3)(A), the regulated entities subject to a national rule would be the ink, coating and adhesive manufacturers and suppliers, not the printers. The draft CTG applies to printers, as the end users of the inks, coatings and adhesives, and specifically recommends limiting emissions by requiring printers to install and operate control devices or to use equivalent low-VOC content materials. Given the significant reductions achievable through use of add-on control devices, the most effective entity to regulate to address VOC emissions associated with flexible packaging inks, coatings and adhesives is the printer.

b. Cleaning Materials

There are two primary means to control VOC emissions associated with the cleaning materials used in the flexible packaging printing process: (1) Limiting the composite vapor pressure of the cleaning materials and (2) implementing work practices governing the use of the product.

A national rule affecting flexible packaging printing cleaning material manufacturers that limits the composite vapor pressure of VOC in the cleaning materials sold would suffer from the same deficiencies noted above with regard lithographic printing fountain solutions and lithographic printing and letterpress printing cleaning materials. Specifically, although flexible packaging printers may purchase cleaning materials from vendors serving their respective industry, nothing in a national rule governing manufacturers would preclude them from purchasing bulk solvents or other multipurpose cleaning materials from other vendors. The general availability of bulk solvents or multipurpose cleaning materials from vendors that would not be subject to the regulation would directly undermine the effectiveness of the regulation.

A national rule also could, in theory, limit the composite vapor pressure of all cleaning materials and all solvents sold regardless of specified end use, which would ensure that only low composite vapor pressure materials are available for flexible packaging printing. Such an approach is unreasonable and impractical. Cleaning materials and solvents are sold for multiple different commercial and industrial purposes. Reducing the vapor pressure of all cleaning materials and solvents merely to achieve VOC emission reduction from flexible packaging printing, would preclude the use of such materials in many important, legitimate contexts.

The more effective approach for obtaining VOC reductions from cleaning materials used by flexible packaging printers is to control the use of such materials by the printers through a CTG. The draft CTG recommends limiting the composite vapor pressure of flexible packaging cleaning materials. With the CTG, the composite vapor pressure restrictions would apply to the printer regardless of the source of the cleaning materials and solvents.

Significantly, we could not impose work practices through a CAA section 183(e) rule. Work practices, by their nature, are directed at the end-user of the product. The draft CTG recommends work practices such as keeping shop towels in closed containers. This measure alone results in significant reductions in VOC cleaning emissions, when used in conjunction with low composite vapor pressure cleaning materials. These reductions would not be possible through a CAA section 183(e) regulation because, by statute, such regulations do not apply to the end-user. Finally, the approaches recommended in the CTG are consistent with approaches taken by States and localities for cleaning materials, and these approaches have proven effective in reducing VOC emissions.

Based on the nature of the flexible packaging printing process, the sources of significant VOC emissions from this

process, and the available strategies for reducing such emissions, the most effective means of achieving VOC emission reductions from this product category is through controls at the point of use of the products, (*i.e.*, through controls on printers), and this can only be accomplished through a CTG. The approaches described in the draft CTG are also consistent with effective state and local VOC control strategies. These two factors alone demonstrate that a CTG will be substantially as effective as a national regulation.

2. The Product's Distribution and Place of Use and Likely VOC Emission-Reductions Associated With a CTG Versus a Regulation

The factors described in the above section, taken by themselves, weigh heavily in favor of the CTG approach. The other two factors relevant to the CAA section 183(e)(3)(C) determination only further confirm that a CTG will be substantially as effective as a national regulation for flexible packaging printing products.

First, the products described above are used at commercial printing facilities in specific, identifiable locations. This stands in contrast to other consumer products, such as architectural coatings, that are widely distributed and used by innumerable small users (e.g., individual consumers in the general public). Because the VOC emissions are occurring at commercial printing facilities, implementation and enforcement of controls concerning the use of products are feasible and therefore the nature of the product's place of use further counsels in favor of the CTG approach.

Second, as described above, a CTG will achieve equal or greater emission reductions than a national rule for each source of VOC emissions from flexible packaging printing. In total, the CTG will achieve greater emission reductions because, as explained above, there are certain control strategies, applicable to the end-user of the product, that achieve significant VOC reductions. In particular, the only mechanism by which to achieve the significant VOC reductions associated with installing add-on controls, which is one of the recommended approaches for addressing VOC emissions from inks, coatings, and adhesives, is through a CTG. The VOC reductions associated with work practices similarly can only be achieved through a CTG as it affects the end-user. Although a regulation could impose low VOC content restrictions for inks, coatings, and adhesives, and vapor pressure limits for cleaning materials, we believe, for the reasons described above, that it is far more effective to control these materials at the point of use, rather than the point of manufacture.

Furthermore, the number of sources affected by a CTG, as compared to the number of sources in nonattainment areas does not change our conclusion that the CTG would, in total, achieve greater VOC emission reductions than a rule. Based on the April 2006 designations, we estimate that approximately 100 flexible packaging printing facilities in ozone nonattainment areas would meet the applicability criteria in the CTG (i.e., 6.8 kg/day (15 lb/day)) VOC emissions. We further estimate that there are 219 flexible packaging printing facilities located in ozone nonattainment areas. Although the CTG would apply only to about half of the facilities in ozone nonattainment areas, the facilities that are not covered by the CTG are, by themselves, low VOC emitters in that they emit less than 15 lb VOC per day (which is less than 2.5 tpy).

Upon considering the above factors in light of the facts and circumstances associated with this product category, we propose to determine that a CTG for flexible packaging printing will be substantially as effective as a national regulation.

IV. Flat Wood Paneling Coatings

A. Industry Characterization

1. Source Category Description

Flat wood paneling coatings include, but are not limited to, paints, stains, sealers, topcoats, basecoats, primers, enamels, inks and adhesives used in the manufacture of flat wood paneling. The coatings provide a protective or decorative layer to paneling products used in interior and exterior construction of residential, commercial and institutional buildings. These paneling products can be classified into three main product types: decorative interior panels, exterior siding, and tileboard.

2. Processes, Sources of VOC Emissions, and Controls

The primary VOC emissions from flat wood paneling surface coating operations occur during coating application and drying/curing of the coatings. The remaining emissions are primarily from mixing and/or thinning and cleaning operations. In most cases, VOC emissions from surface preparation, storage, handling, and waste/wastewater operations are relatively small.

After being coated by any of the conventional wet coating operations (such as spray coating, roll coating, or dip coating), the flat wood paneling products are cured using heated dryers. This step removes any remaining volatiles from the coating so that the surface of the flat wood paneling product meets the hardness, durability, and appearance requirements of the customer.

The industry currently uses primarily waterborne coatings, although some products (e.g., tileboard and fire-resistant paneling) still require solvent-borne coatings to provide adequate water, weather, and fire resistance. Quick drying time is another important reason why manufacturers use solvent-borne coatings, especially when fast line speeds are used. Solvent-borne coatings contain higher amounts of VOC materials so they evaporate more readily than water and the products take less time to cure in the ovens. Curing time is an important variable because the applied coating must be dry, hard, and cool prior to packaging, otherwise the products have the potential to stick together when stacked, causing defects or rejected material.

Decorative interior panels require multiple coating layers and coating steps. Production speeds of 30 to 35 boards per minute require the use of solvents that evaporate without leaving cure blisters and without leaving residual solvent in the coating film or substrate. Exterior siding products must have coatings able to withstand extreme and long-term weather conditions and resist ultra-violet radiation. These performance requirements impact the amount of VOC emitted from the coating of exterior siding. Tileboard is a premium interior wall paneling product made of hardboard that is used in high moisture areas of the home such as kitchens and bathrooms. Tileboard has more stringent product performance requirements compared to standard interior wall paneling.

Common techniques to reduce emissions include use of low-VOC coatings and operation of add-on control devices where low-VOC materials cannot be used due to performance requirements calling for solvent-borne coatings. In addition, emissions from cleaning operations can be reduced through use of work practices such as keeping cleaning solvents and shop towels in covered containers.

3. State and Local Regulations

At least 28 State and local jurisdictions have regulations that control VOC emissions from surface coating operations that include flat wood paneling. Most of these regulations are general surface coating

rules; a few are specific to flat wood paneling. In addition to the State and local requirements, there are two previous EPA actions that affect surface coating operations for flat wood paneling. In 1978, EPA issued a CTG document (EPA–450/2–78–032) that provided RACT recommendations for controlling VOC emissions from this industry. In 2003, EPA promulgated national emission standards for hazardous air pollutants (NESHAP) covering surface coating of wood building products. See 68 FR 31746 (May 28, 2003). The 1978 CTG and the 2003 NESHAP are further discussed in the current draft CTG document.

Almost all of the jurisdictions that specifically address flat wood paneling have based their rules on the old 1978 CTG. However, there are two jurisdictions in California that have requirements specific to flat wood paneling that are more current than the 1978 CTG. In the Placer County California Air Pollution Control District, VOC emissions from flat wood paneling operations in a nonattainment area are limited to 250 g VOC/l (2.1 lb VOC/gal) of coating (excluding water) or the overall control device efficiency must be at least 90 percent.

The California South Coast AQMD defines flat wood paneling as "interior wood panels and exterior wood siding, which include, by way of illustration and not limitation, redwood, cedar or plywood stocks, plywood panels, particle boards, composition hard boards, and any other panels or siding constructed of solid wood or a wood-containing product." The emissions limit established by the South Coast rule is identical to the emission limit established by Placer County, California and also covers exterior siding, which the Placer County rule does not.

B. Recommended Control Techniques

The draft CTG provides flexibility by recommending either low-VOC materials or, as an option, add-on controls as an alternative to low-VOC materials. The low-VOC materials recommendations include an emissions limit of 250 g VOC/l (2.1 lb VOC/gal) of material (minus water). An equivalent limit, expressed as units of weight of VOC per volume of solids in all coatings would be 350 grams of VOC per liter solids (2.9 lb of VOC per gal of solids). Or, alternatively, a facility could choose to use add-on control equipment to meet an overall control efficiency of 90 percent. These control options would apply to surface coatings, inks, and adhesives applied to all types of flat wood paneling.

The draft CTG also recommends work practice standards. The work practice plan must include steps to ensure that VOC emissions are minimized from mixing operations, storage tanks and other containers, and handling operations for coatings, thinners, cleaning materials, and waste materials. Examples of work practice standards include: Storing all VOC coatings, thinners, and cleaning materials in closed containers, minimizing spills of VOC containing coatings, thinners, cleaning up spills immediately, conveying any coatings, thinners, and cleaning materials in closed containers or pipes, closing mixing vessels which contain VOC coatings and other materials except when specifically in use, and minimizing emissions of VOC during cleaning of storage, mixing, and conveying equipment.

C. Impacts of Recommended Control Techniques

EPA estimates that there are a total of 24 flat wood paneling facilities located in ozone nonattainment areas (based on April 2006 designations). Based on VOC emissions data, all of the 24 facilities in ozone nonattainment areas would be affected considering the 6.8 kg/day (15 lb/day) VOC emissions applicability threshold. This level of emissions has been the applicability threshold for many CTG in the past. For purposes of this threshold, aggregate emissions from all flat wood paneling coating operations and cleaning activities associated with flat wood paneling coating at a given facility are included.

These facilities emit about 4,400 Mg (4,000 tons) of VOC per year. The cost effectiveness estimates vary according to the type of flat wood paneling. Based on studies conducted as part of development of the Placer County and South Coast regulations, the cost effectiveness is estimated at $4,400 per ton of VOC for exterior siding and $1,900 per ton of VOC for interior paneling and tileboard. Due to the higher estimated cost for a given amount of emission reductions from exterior siding, and because exterior siding is not covered by the 1978 CTG and by several current State rules based on that CTG, EPA solicits comments on whether it is appropriate to exclude exterior siding from applicability of the draft CTG. As discussed above, the draft CTG recommends three alternatives, plus work practices, for reducing VOC emissions from these operations. Two of the alternatives focus on use of low-VOC coatings that are readily available. For those facilities that choose to use high-VOC coatings, they may choose to employ the third alternative, the use of add-on controls. From information in the NEI database, there is no indication that any of the 24 facilities currently have add-on controls, but may be using low-VOC coatings for compliance with any existing State or local requirements.

D. Considerations in Determining Whether a CTG Will Be Substantially as Effective as a Regulation

In determining whether to develop a national rule or a CTG for the product category of flat wood paneling coatings under CAA section 183(e)(3)(C), we analyzed the four factors identified above in Section I.D in light of the specific facts and circumstances associated with this product category. Based on that analysis, we propose to determine that a CTG will be substantially as effective as a rule in achieving VOC emission reductions in ozone nonattainment areas from flat wood paneling coatings.

This section is divided into two parts, each of which addresses two of the factors relevant to the CAA section 183(e)(1)(C) determination. In the first part, we determine that the most effective means of achieving VOC emission reductions in this category is through controls at the point of use of the product, (i.e., through controls on facilities that apply surface coatings to flat wood paneling products), and this can only be accomplished through a CTG. We further explain that the approaches in the draft CTG are consistent with existing effective state and local VOC strategies. In the second part, we discuss how the distribution and place of use of the products in this category also support the use of a CTG. We further explain that there are control approaches for this category that result in significant VOC emission reductions and that such reductions could only be obtained by controlling the use of the product through a CTG. Such reductions could not be obtained through a regulation under CAA section 183(e) because the controls affect the end-user, which is not a regulated entity under CAA section 183(e)(1)(C). Accordingly, for these reasons and the reasons described more fully below, we believe that a CTG will achieve much greater VOC emission reductions than a rule for this category.

1. The Most Effective Entity To Target for VOC Reductions and Consistency With State and Local VOC Strategies

To evaluate the most effective entity to target for VOC reductions, it is important to first identify the primary sources of VOC emissions. There are two main sources of VOC emissions from flat wood paneling coating: (1)

Evaporation of VOC from coatings and adhesives; and (2) evaporation of VOC from cleaning materials. We address each of these sources of VOC emissions, in turn, below, as we discuss the CTG versus regulation approach.

a. Coatings and Adhesives

The industry currently uses primarily waterborne coatings, although some products (e.g., tileboard and fire-resistant paneling) still require solvent-borne coatings to provide adequate water, weather, and fire resistance. Quick drying time is another important reason why manufacturers use solvent-borne coatings, especially when fast line speeds are used. A national rule could contain limits for the as-sold VOC content of coatings and adhesives, but given the nature of the flat wood paneling coating process, this would result, in little, if any, reduction in VOC emissions. A national rule could, for example, set lower VOC content limits for waterborne and other low-VOC content materials and higher VOC content limits for solvent-borne materials without specifying which flat wood paneling products must be coated with each type of material. This rule structure would leave facilities free to choose which type of material to use. Further, many coatings and adhesives used in flat wood paneling coating are not identified by the supplier specifically as flat wood paneling coatings and would fall outside of the scope of such a national rule. Thus, such a rule would not compel anyone to use lower VOC content materials and would achieve little, if any, VOC emission reduction.

Control devices, such as thermal oxidizers, catalytic oxidizers, or carbon adsorbers, can achieve a significant reduction in VOC emissions from high VOC content materials. In light of the significant reductions in VOC emissions obtained with such devices, existing State and local regulations that address flat wood paneling coating allow the use of high VOC content materials in conjunction with control devices. These regulations require the use of such controls or the use of equivalent low-VOC content materials. In addition, the 2003 NESHAP contains a compliance option that allows the facility to lower the emission rate by using add-on controls.

We could not require such control devices at flat wood paneling facilities through a national rule, because, pursuant to CAA section 183(e)(1)(C) and (e)(3)(A), the regulated entities subject to a national rule would be the coating and adhesive manufacturers and suppliers, not the flat wood paneling facilities. The draft CTG applies to these facilities, as the end users of the coatings and adhesives, and specifically recommends limiting emissions by the use of low-VOC coatings or to control emissions through the operation of control devices. Given the significant reductions achievable through available use of add-on control devices, the most effective entity to regulate to address VOC emissions associated with flat wood paneling coatings is the facility using the coatings.

b. Cleaning Materials

There are two primary means to control VOC emissions associated with the cleaning materials used in the flat wood paneling coating process: (1) Limiting the VOC content of the cleaning materials, and (2) implementing work practices governing the use of the product.

A national rule affecting solvent manufacturers that supply cleaning materials to the flat wood paneling industry that limits the VOC content of VOC in the cleaning materials sold would suffer from the same deficiencies noted above with regard to lithographic printing fountain solutions, lithographic printing and letterpress printing cleaning materials, and flexible packaging printing cleaning materials. Specifically, although flat wood paneling coaters may purchase cleaning materials from vendors serving their respective industry, nothing in a national rule governing manufacturers would preclude them from purchasing bulk solvents or other multipurpose cleaning materials from other vendors. The general availability of bulk solvents or multipurpose cleaning materials from vendors that would not be subject to the regulation would directly undermine the effectiveness of the regulation.

A national rule also could, in theory, limit the VOC content of all cleaning materials and all solvents sold regardless of specified end use, which would ensure that only low-VOC materials are available to the flat wood paneling coating industry. Such an approach is unreasonable and impractical. Cleaning materials and solvents are sold for multiple different commercial and industrial purposes. Reducing the vapor pressure of all cleaning materials and solvents merely to achieve VOC emission reductions from the flat wood paneling coating industry would preclude the use of such materials in many important, legitimate contexts.

The more effective approach for obtaining VOC reductions from cleaning materials used by flat wood paneling coaters is to control the use of such materials by the coaters through a CTG. Significantly, we could not impose work practices through a CAA section 183(e) rule. Work practices, by their nature, are directed at the end-user of the product. The draft CTG recommends work practices such as keeping solvents and shop towels in closed containers. This measure alone results in significant reductions in VOC cleaning emissions. These reductions would not be possible through a CAA section 183(e) regulation because, by statute, such regulations do not apply to the end-user. Finally, the approaches recommended in the CTG are consistent with approaches taken by States and localities for cleaning materials, and these approaches have proven effective in reducing VOC emissions.

Based on the nature of the flat wood paneling coating process, the sources of significant VOC emissions from this process, and the available strategies for reducing such emissions, the most effective means of achieving VOC emission reductions from this product category is through controls at the point of use of the products, (i.e., through controls on flat wood paneling coaters), and this can only be accomplished through a CTG. The approaches described in the draft CTG are also consistent with effective state and local VOC control strategies. These two factors alone demonstrate that a CTG will be substantially as effective as a national regulation.

2. The Product's Distribution and Place of Use and Likely VOC Emission Reductions Associated With a CTG Versus a Regulation

The factors described in the above section, taken by themselves, weigh heavily in favor of the CTG approach. The other two factors relevant to the CAA section 183(e)(3)(C) determination only further confirm that a CTG will be substantially as effective as a national regulation for flat wood paneling coatings.

First, the products described above are used at commercial facilities in specific, identifiable locations. This stands in contrast to other consumer products, such as architectural coatings, that are widely distributed and used by innumerable small users (e.g., individual consumers in the general public). Because the VOC emissions are occurring at commercial manufacturing facilities, implementation and enforcement of controls concerning the use of products are feasible and therefore the nature of the product's place of use further counsels in favor of the CTG approach.

Second, as described above, a CTG will achieve equal or greater emission reduction than a national rule for each source of VOC emissions from flat wood paneling coating. In total, a CTG will achieve significantly more emission reduction than a national rule for this category. A CTG will achieve a significant greater emission reductions because, as explained above, there are certain control strategies, applicable to the end-user of the product, that achieve significant emission reductions. In particular, a CTG will achieve a significant reduction of VOC emissions from coatings and adhesives through the use of control devices. A CTG provides for work practices associated with cleaning materials. The VOC reductions associated with these measures could not be obtained through a national regulation, because they require the implementation of measures by the end-user.

In addition, there are certain strategies that arguably could be implemented through rulemaking, but are far more effective if implemented directly at the point of use of the product. For the reasons stated above it is more effective to control the VOC content of coatings and adhesives through a CTG than through a regulation

Upon considering the above factors in light of the facts and circumstances associated with this product category, we propose to determine that a CTG for flat wood paneling coatings will be substantially as effective as a national regulation.

Upon considering the above factors in light of the facts and circumstances associated with this product category, we propose to determine that a CTG for flat wood paneling coatings will be substantially as effective as a national regulation.

V. Industrial Cleaning Solvents

A. Industry Characterization

1. Source Category Description

This category of consumer and commercial products includes the industrial cleaning solvents used by many industries. This category includes a variety of products used to remove contaminants such as adhesives, inks, paint, dirt, soil, oil, and grease from parts, products, tools, machinery, equipment, vessels, floors, walls, and other production related work areas. Cleaning operations are performed for a variety of reasons including safety, operability, and to avoid contamination of the products being manufactured or repaired at the facility. The cleaning solvents used in these operations are, in many cases, generally available bulk solvents that are used for a multitude of applications not limited to cleaning. For example, naphtha may be used as a cleaning solvent, as a paint thinner, or as an ingredient used in the manufacture of paint.

2. Sources of VOC Emissions and Controls

In general, VOC emissions occur from industrial cleaning solvents through evaporation during cleaning activities such as wiping, flushing, and brushing, as well as from storage and disposal of used shop towels and solvent. Because a portion of all solvents evaporate during use, such solvent-based cleaning materials can result in large amounts of emissions of VOC.

In 1994, EPA completed a study of industrial cleaning solvents that characterized cleaning operations carried out within six focus industries (automotive, electrical equipment, magnetic tape, furniture, packaging, and photographic supplies) to evaluate sources of evaporative emissions from VOC solvents used as cleaning materials. We believe that the range of cleaning activities performed in these industries provided a good variety of cleaning operations for the study, and that the information obtained relevant to VOC emission sources and possible control techniques can be applied to virtually any industry. During the study, EPA collected information on emissions from industrial cleaning solvents used in approximately 300 individual cleaning operations across the six focus industries. EPA classified these operations into nine "unit operations" (UO). We believe that any given industrial cleaning activity would fall into one or more of these UO: (1) Spray gun cleaning; (2) spray booth cleaning; (3) large manufactured components cleaning; (4) small manufactured components cleaning; (5) parts cleaning; (6) equipment cleaning; (7) floor cleaning; (8) line cleaning; and (9) tank cleaning. The purpose of identifying these UO is to assist State and local agencies in identifying the sources of VOC emissions from cleaning activities and to provide a structure for developing and applying control techniques to mitigate VOC emissions from industrial cleaning solvents used in these UO.

In February 1994, EPA published an Alternative Control Techniques (ACT) document (EPA–453/R–94–015) to provide information to State and local agencies on sources and various means of controlling VOC emissions from industrial cleaning operations. The ACT document identified the cleaning UO listed above and presented techniques available to reduce solvent losses, including the anticipated costs of control and potential for emissions reductions for these options. The ACT document also provided a quantitative overview of cleaning solvents used and a model solvent management system for accounting and tracking solvent usage. The model solvent management system was provided as a tool for facilities to use in tracking their solvent usage. The ACT document also provided a methodology for calculating emissions in a consistent way.

Although the industrial cleaning solvent product category includes a variety of different products with differing VOC contents, and although these products are used in different ways by a wide range of industries, we believe that there are two basic approaches to achieve VOC emission reductions. First, the users of the products can control emissions through work practices targeted at the activities and sources of emissions specific to the user's industry (e.g., keeping solvent containers covered, properly storing and disposing of used shop towels and solvent, etc.). Second, users can also reduce overall VOC emissions through solvent substitution (*e.g.*, use of low-VOC, no-VOC, or low-vapor pressure solvents). Theoretically, solvent substitution could be achieved at the point of manufacture or at the point of use, but in practice it is usually the user who selects the solvent or mixture of solvents to use in the various industrial cleaning operations throughout a facility. Either individually or in tandem, these two general approaches are effective strategies to achieve significant emission reductions from this product category, notwithstanding the variation in the products, their users, and their specific uses.

3. State and Local Regulations

Many State and local agencies, including a number of the California Air Quality Management Districts (AQMDs), have developed strategies for reducing VOC emissions from industrial cleaning solvents. Typically, these strategies include both work practices governing the use of the products and VOC limits governing the VOC content of the products. A table identifying and summarizing some of these existing State and local measures is included in the draft CTG document for this product category.

To identify potential control recommendations for the draft CTG, EPA reviewed the existing State and local regulations governing VOC emissions from this product category. The review indicated that the

regulations in three of the California AQMDs (South Coast, Bay Area, and Sacramento) are good models to evaluate, because these rules are consistent with each other in format and approach, the technical information developed to support these regulations is readily available, and these regulations are more current than those of other jurisdictions. Additionally, several case studies were available from the California AQMDs pertaining to their rules that help illustrate how specific facilities achieved VOC reductions and at what cost. Moreover, many other State and local agencies either have, or are considering, using the current regulations from the California AQMDs as models for the format and content their own control strategies. If the California AQMD strategies are effective, EPA believes that there can be a benefit to extending these measures to other nonattainment areas and maintaining nationwide consistency, as appropriate.

The regulations adopted in the California AQMDs all have requirements for both work practices and VOC content limits for solvent cleaning materials. A comparison of the various AQMD regulations governing VOC emissions from industrial cleaning solvents indicates that the work practice provisions are similar and require product users to implement generally accepted practices that have been shown to be effective in mitigating evaporative losses from solvent storage, handling, and disposal activities. These work practices are further discussed in the draft CTG and in section B below.

Although the work practice requirements are similar among the AQMDs, the VOC content limits and rule applicability differ somewhat from District to District. For example, South Coast AQMD Rule 1171 (2005) has a "general use" VOC limit of 25 grams VOC per liter of cleaning material that applies to most industries. In cases where water based cleaners or low-VOC solvent cleaners cannot be used, however, South Coast AQMD allows higher limits for a number of specific industries as provided for in section 1171(c) of their rule.

By comparison, Bay Area AQMD Regulation 8, Rule 4, provides for a "general use" limit of 50 grams VOC per liter of cleaning material, unless emissions are controlled by an emission control system with an overall abatement efficiency of at least 85 percent. The Bay Area rule exempts relatively few specific operations (e.g., electrical apparatus components, electronic components, precision optics, research and development laboratories, etc.) from the "general use" limit (see Bay Area AQMD's section 8–4–116). In addition, the Bay Area rule exempts cleaning operations subject to other specific Bay Area AQMD rules. There are 18 such exemptions listed in Bay Area AQMD's section 8–4–117 (e.g., architectural coating, light and medium duty motor vehicle assembly plants, plastic parts and products, etc.).

EPA's review of existing and State and local approaches to reduce VOC emissions from this product category indicates that strategies that include both work practices and VOC content limits can be effective and should be the basis for a CTG under CAA section 183(e).

B. Recommended Control Techniques

The following sections describe recommendations EPA is providing in the draft CTG document for industrial cleaning solvents, including a discussion of the recommended control measures and a description of industries to which these recommendations apply. These recommendations are discussed in more detail in the draft CTG document, which also incorporates the entire 1994 ACT document.

1. Control Measures

Based on our analysis of State and local requirements, primarily the California AQMD measures, the draft CTG recommends both work practices and a generally applicable VOC content limit for most operations modeled after the Bay Area AQMD rule.

a. Work Practices

The draft CTG recommends practices similar to those required by the California AQMDs. Specifically, these are: (1) Covering open containers and used applicators; (2) minimizing air circulation around cleaning operations; (3) properly disposing of used solvent and shop towels; and (4) implementing equipment practices that minimize emissions (e.g., keeping parts cleaners covered, maintenance of cleaning equipment to repair solvent leaks, etc.).

b. VOC Content Limit

The draft CTG recommends a generally applicable VOC content limit of 50 grams VOC per liter (0.42 1b/gal) of cleaning material, unless emissions are controlled by an emission control system with an overall abatement efficiency of at least 85 percent. This limit is modeled on the "general use" category of the Bay Area AQMD solvent cleaning regulations, taking into account the specific exclusions provided for in the Bay Area AQMD rule and described earlier. In addition to the Bay Area exclusions, and as discussed earlier, the more stringent South Coast AQMD "general use" limit is accompanied by higher limits for several individual operations (e.g., cleaning of ultraviolet ink application equipment, screen printing, cleaning of coating application equipment, etc.). When developing RACT measures for industrial cleaning operations, we suggest that State and local agencies consider the specific industries and operations in their jurisdictions and the individual requirements of those operations and tailor their rules to those specific scenarios accordingly. Furthermore, in considering existing cleaning requirements as bases for specific exemptions from their general industrial cleaning solvents rules, State and local agencies should take into account how current those measures are. EPA believes that more recent rules are likely to be more effective than older, possibly outdated, rules. We remind the States that the ultimate determination of whether any specific State or local measures meet any applicable RACT requirement will occur during the notice and comment rulemaking process associated with EPA action on SIP submissions.

c. Alternative Vapor Pressure Limit

In addition to the VOC content limit recommended here, EPA solicits comment on possible use of a composite vapor pressure limit, for example, 8 millimeters of mercury (mmHg) at 20 degrees Celsius, as (1) a replacement for the 50 g/l VOC content limit entirely; or (2) an alternative limit that may be used in lieu of the 50 g/l VOC content limit for specific operations as determined by the State or local agency.

EPA is considering this option because, historically, some State and local agencies have specified composite vapor pressure limits in their cleaning requirements. For example some States (e.g., Illinois, Connecticut, New York, etc.) limit solvents used in cold cleaning to 1.0 mmHg. California's Ventura County Air Pollution Control District allows a composite vapor pressure of 33 mmHg for solvents used for cleaning of coating application equipment and other cleanup of uncured coatings, adhesives, inks, and resins and for cleaning of electronic and electrical components, medical devices, and aerospace components.

2. Applicability

In the draft CTG, EPA recommends that, in general, these measures should have broad applicability to any industrial cleaning operations that have VOC emissions of at least 6.8 kg/day (15

lb/day), before controls. This level of emissions has been the applicability threshold for many CTG in the past. Furthermore, it is consistent with the intent of CAA section 183(e) to address individually small uses of consumer and commercial products that, in the aggregate, are significant sources of VOC emissions. We recommend that, for purposes of determining this threshold, aggregate emissions from all solvent cleaning activities associated with covered operations at a given facility are included. As described above, we also recommend that specific industry category exclusions, similar to the ones provided for in the Bay Area and South Coast rules but tailored to the States'' individual situations, accompany the applicability threshold.

In addition to the exclusions a State or local agency may specify as a result of the existence of effective measures that address cleaning operations associated with specific source categories within its jurisdiction, we recommend that the States exclude from applicability those cleaning operations in the following categories listed for regulation under CAA section 183(e): Aerospace coatings, wood furniture coatings, shipbuilding and repair coatings, flexible packaging printing materials, lithographic printing materials, letterpress printing materials, flat wood paneling coatings, large appliance coatings, metal furniture coatings, paper film and foil coating, plastic parts coatings, miscellaneous metals parts coatings, fiberglass boat manufacturing materials, miscellaneous industrial adhesives, and auto and light-duty truck assembly coatings.[11] For three of these product categories (i.e., aerospace coatings, wood furniture coatings, and shipbuilding and repair coatings), EPA has already issued CTGs that address cleaning operations. For the remaining categories, EPA intends to include control measures for cleaning associated with these categories if the Agency determines that a CTG is appropriate for the respective categories.

C. Impacts of Recommended Control Techniques

EPA estimates that there are approximately 2,550 facilities in ozone nonattainment areas that would be affected by the draft CTG. These facilities had emissions that exceed the emission threshold of 6.8 kg (15 1b) of VOC per day. Total aggregate VOC emissions from solvent cleaning operations from these sources are approximately 64,000 Mg/yr (71,000 tpy). EPA used studies published by the Bay Area AQMD to estimate the cost of compliance for the measures recommended in the draft CTG. According to these estimates, EPA believes that affected sources may either incur minimal additional costs or realize a savings on a case-by-case basis, depending primarily on facts such as how much they currently spend to operate high-VOC content solvent-based parts cleaners, and the cost of organic solvent disposal.

The Bay Area AQMD studies indicate that replacing high-VOC cleaning materials with low-VOC, water-based cleaning materials, for applications in which these materials are similar in effectiveness to high-VOC materials, results in a cost savings. The CTG for industrial cleaning solvents is guidance for the States. Although States can adopt the recommendations in the CTG, they may choose not to follow those recommendations and instead adopt other technically-sound approaches that meet the requirements of RACT in the CAA and EPA's implementing regulations. Accordingly, there is necessarily some uncertainty in any prediction of costs and emission impacts associated with the recommendations in the CTG. Nevertheless, assuming that States address the VOC emissions from this product category in accordance with the recommendations in the CTG or comparable approaches, EPA anticipates a net cost savings.[12] We based this prediction on an assumption that substitution of low-VOC materials for high-VOC materials is possible for all uses. Because this assumption is not true for some applications, this prediction may not be valid in all cases.

D. Considerations in Determining Whether a CTG Will Be Substantially as Effective as a Regulation

In determining whether to develop a national rule or a CTG for the product category of industrial cleaning solvents under CAA section 183(e)(3)(C), we analyzed the four factors identified above in Section I.D in light of the specific facts and circumstances associated with this product category. Based on that analysis, we propose to determine that a CTG will be substantially as effective as a rule in achieving VOC emission reductions in ozone nonattainment areas from industrial cleaning solvents.

This section is divided into two parts, each of which addresses two of the factors relevant to the CAA section 183(e)(1)(C) determination. In the first part, we determine that the most effective means of achieving VOC emission reductions in this category is through controls at the point of use of the product, (i.e., through controls on facilities that conduct solvent cleaning), and this can only be accomplished through a CTG. We further explain that the approaches in the draft CTG are consistent with existing effective state and local VOC strategies. In the second part, we discuss how the distribution and place of use of the products in this category also support the use of a CTG. We further explain that there are control approaches for this category that result in significant VOC emission reductions and that such reductions could only be obtained by controlling the use of the product through a CTG. Such reductions could not be obtained through a regulation under CAA section 183(e) because the controls affect the end-user, which is not a regulated entity under CAA section 183(e)(1)(C). Accordingly, for these reasons and the reasons described more fully below, we believe that a CTG will achieve much greater VOC emission reductions than a rule for this category.

1. The Most Effective Entity To Target for VOC Reductions and Consistency With State and Local VOC Strategies

There are two primary means to control VOC emissions associated with the industrial cleaning solvents product category: (1) Limiting the VOC content of the cleaning materials, and (2) implementing work practices governing the use of the products.

A national rule affecting industrial cleaning solvent manufacturers that limits the VOC content of the cleaning materials sold suffers from the same deficiencies noted above with regard to lithographic printing, letterpress printing, flexible packaging printing, and flat wood paneling coating. Specifically, although facilities performing cleaning operations generally purchase cleaning materials from vendors serving their respective industry, nothing in a national rule governing manufacturers would preclude them from purchasing bulk solvents or other multipurpose cleaning materials from other vendors. The general availability of bulk solvents or multipurpose cleaning materials from vendors that would not be subject to the

[11] EPA may amend the list and exercise its discretion in scheduling its actions under CAA section 183(e) in order to achieve an effective regulatory program. Should EPA revise the list in the future, these categories could change.

[12] From a purely economic perspective, the CTG does not produce a cost savings, because the recommendations contained in the document represent control methods that are currently available to facilities. Facilities can implement the recommended approach of using low-VOC materials today and recognize a cost savings.

regulation would directly undermine the effectiveness of the regulation.

A national rule also could, in theory, limit the VOC content of all cleaning materials and all solvents sold regardless of specified end use, which would ensure that only low-VOC materials are available for any use. Such an approach is unreasonable and impractical. Cleaning materials and solvents are sold for multiple different commercial and industrial purposes. Reducing the VOC content of all materials merely to achieve VOC emission reduction from two limited product categories, could preclude the use of such materials in many important, legitimate contexts. Furthermore, many general-purpose solvents used for cleaning are single compounds (e.g., toluene) or are mixtures (e.g., mineral spirits) that are by nature 100 percent VOC. Consequently, they cannot be reformulated to low-VOC content.

The more effective approach for obtaining VOC reductions from industrial cleaning solvents is to control the use of such materials through a CTG. The draft CTG recommends limiting the VOC content of cleaning materials. With the CTG, the VOC content restrictions would apply to the facility performing cleaning operations regardless of the source of the cleaning materials.

Significantly, we could not impose work practices through a CAA section 183(e) rule. Work practices, by their nature, are directed at the end-user of the product. The draft CTG recommends work practices such as keeping solvents and shop towels in closed containers. This measure alone results in significant reductions in VOC cleaning emissions, when used in conjunction with low-VOC cleaning materials. These reductions would not be possible through a CAA section 183(e) regulation because, by statute, such regulations do not apply to the end-user. Finally, the approaches recommended in the CTG are consistent with approaches taken by States and localities for industrial cleaning operations, and these approaches have proven effective in reducing VOC emissions.

Based on the sources of significant VOC emissions from industrial cleaning solvents and the available strategies for reducing such emissions, the most effective means of achieving VOC emission reductions from this product category is through controls at the point of use of the product (i.e., through controls on facilities performing solvent cleaning activities), and this can only be accomplished through a CTG. The approaches described in the draft CTG are also consistent with effective state and local VOC control strategies. These two factors alone demonstrate that a CTG will be substantially as effective as a national regulation.

2. The Product's Distribution and Place of Use and Likely VOC Emission Reductions Associated With a CTG Versus a Regulation

The factors described in the above section, taken by themselves, weigh heavily in favor of the CTG approach. The other two factors relevant to the CAA section 183(e)(3)(C) determination only further confirm that a CTG will be substantially as effective as a national regulation for industrial cleaning solvents.

First, the products described above are used at manufacturing, repair, service, and other facilities in specific, identifiable locations. This stands in contrast to other consumer products, such as architectural coatings, that are widely distributed and used by innumerable small users (e.g. individual consumers in the general public). Because the VOC emissions are occurring at commercial facilities, implementation and enforcement of controls concerning the use of products are feasible and therefore the nature of the product's place of use further counsels in favor of the CTG approach.

Second, a CTG will achieve equal or greater emission reduction than a national rule for each source of VOC emissions from industrial cleaning solvents, and, in total, a CTG will achieve significantly more emission reduction than a national rule for this category. A CTG will achieve a significant VOC emission reduction from cleaning materials through the combined use of low-VOC cleaning materials and work practices. A national rule could not effectively regulate the VOC content of cleaning materials, and a national rule cannot require work practices. In summary, a CTG will achieve a significant reduction in VOC emissions from the industrial cleaning solvents category while a national rule would achieve little, if any, emission reduction.

Upon considering the above factors in light of the facts and circumstances associated with this product category, we propose to determine that a CTG for industrial cleaning solvents will be substantially as effective as a national regulation.

VI. Statutory and Executive Order (EO) Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether a regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA has determined that this action is not a "significant regulatory action" within the meaning of the Executive Order.

B. Paperwork Reduction Act

This action does not contain any information collection requirements and therefore is not subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less

than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed determination, I certify that this action will not have a significant economic impact on a substantial number of small entities because it imposes no regulatory requirements. EPA is proposing take final action to list the five Group II consumer and commercial product categories addressed in this notice for purposes of CAA section 183(e) of the Act. The listing action alone does not impose any regulatory requirements. EPA's proposed determination that a CTG will be substantially as effective as a national regulation in achieving VOC emission reductions in ozone nonattainment areas means that EPA has concluded that it is not appropriate to issue federal regulations under CAA section 183(e) to regulate VOC emissions from these five product categories. Instead, EPA has concluded that it is appropriate to issue guidance in the form of CTG that provide recommendations to States concerning potential methods to achieve needed VOC emission reductions from these product categories. In addition to the proposed determination, EPA is also taking comment on draft CTG for these five product categories. When finalized, these CTG will be guidance documents. EPA does not directly regulate any small entities through the issuance of a CTG. Instead, EPA issues CTG to provide States with guidance on appropriate regulations to obtain VOC emission reductions from the affected sources within certain nonattainment areas. EPA's issuance of a CTG does trigger an obligation on the part of the States to issue State regulations, but States are not obligated to issue regulations identical to the Agency's CTG. States may follow the guidance or deviate from it, and the ultimate determination of whether a State regulation meets the RACT requirements of the CAA would be determined through notice and comment rulemaking in the Agency's action on each State's State Implementation Plan. Thus, States retain discretion in determining what degree to follow the CTGs.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) (UMRA), establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under UMRA section 202, 2 U.S.C. 1532, EPA generally must prepare a written statement, including a cost-benefit analysis, for any proposed or final rule that "includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more * * * in any one year." A "Federal mandate" is defined under section 421(6), 2 U.S.C. 658(6), to include a "Federal intergovernmental mandate" and a "Federal private sector mandate." A "Federal intergovernmental mandate," in turn, is defined to include a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," section 421(5)(A)(i), 2 U.S.C. 658(5)(A)(i), except for, among other things, a duty that is "a condition of Federal assistance," section 421(5)(A)(i)(I). A "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector," with certain exceptions, section 421(7)(A), 2 U.S.C. 658(7)(A).

EPA has determined that the listing action, the proposed determination that a CTG would be substantially as effective as a regulation for these product categories, and the proposed draft CTGs for these categories, do not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, or tribal governments, in the aggregate, or the private sector in any one year. Thus, this action is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, we have determined that the listing action, the proposed determination and the proposed draft CTGs contain no regulatory requirements that might significantly or uniquely affect small governments because they contain no regulatory requirements that apply to such governments or impose obligations upon them. Therefore, this action is not subject to the requirements of section 203 of UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the EO 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."

The listing action, the proposed determination that CTGs are substantially as effective as regulations for these product categories, and the proposed draft CTGs do not have federalism implications. They do 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 EO 13132. The CAA establishes the relationship between the Federal Government and the States, and this action does not impact that relationship. Thus, EO 13132 does not apply to the proposed determination and proposed draft CTGs. However, in the spirit of EO 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA is soliciting comment on the listing action, the proposed determination, and the proposed draft CTGs from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

EO 13175, entitled "Consultation and Coordination With Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

The listing action, the proposed determination that CTGs would be substantially as effective as regulations to achieve VOC emission reductions from these product categories, and the proposed draft CTGs do not have Tribal implications as defined by EO 13175. They do not have a substantial direct effect on one or more Indian Tribes, in that the listing action, the proposed determination, and the proposed draft CTGs impose no regulatory burdens on tribes. Furthermore, the listing action, the proposed determination, and the proposed draft CTGs do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Authority Rule (TAR) establish the relationship of the Federal government and Tribes in implementing the Clean Air Act. Because listing action, the proposed determination, and the proposed draft CTGs do not have Tribal implications, EO 13175 does not apply.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, "Protection of Children From Environmental Health and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that (1) Is determined to be "economically significant" as defined under EO 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, Section 5B501 of the EO directs the Agency to evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

The listing action, the proposed determination, and the proposed draft CTGs are not subject to Executive Order 13045 because they are not economically significant regulatory actions as defined by Executive Order 12866. In addition, EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health and safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulations. The listing action, the proposed determination, and the proposed draft CTGs are not subject to Executive Order 13045 because they do not include regulatory requirements based on health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 (66 FR 28355, May 22, 2001) provides that agencies shall prepare and submit to the Administrator of the Office of Regulatory Affairs, OMB, a Statement of Energy Effects for certain actions identified as "significant energy actions." Section 4(b) of EO 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of final rulemaking, and notices of final rulemaking: (1)(i) That is a significant regulatory action under EO 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a "significant energy action." EPA has determined that listing action, the proposed determination, and the proposed draft CTGs are a not significant regulatory action under EO 12866, and that they are not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. 104–113; Section 12(d), 15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in their regulatory and procurement activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. NTTAA directs EPA to provide Congress, through annual reports to OMB, with explanations when an agency does not use available and applicable VCS.

The listing action, the proposed determination that CTGS will be substantially as effective as regulations to achieve VOC emission reductions, and the proposed draft CTGs do not involve technical standards and therefore the NTTAA does not apply.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," provides for Federal agencies to consider the impact of programs, policies, and activities on minority populations and low-income populations, including tribes.

EPA believes that the listing action, the proposed determination, and the proposed draft CTGs should not raise any environmental justice issues. The purpose of section 183(e) is to obtain VOC emission reductions to assist in the attainment of the ozone NAAQS. The health and environmental risks associated with ozone were considered in the establishment of the ozone NAAQS. The level is designed to be protective of the public with an adequate margin of safety. EPA's listing of the products, determination that CTGs are substantially as effective as regulations, and proposed draft CTGs, are actions intended to help States achieve the NAAQS in the most appropriate fashion.

Dated: July 27, 2006.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, part 59, Subpart A is proposed to be amended as follows:

PART 59—[AMENDED]

1. The authority citation for part 59 continues to read as follows:

Authority: 42 U.S.C. 7511b(e).

2. Subpart A is added to read as follows:

Subpart A—General

§ 59.1 Final Determinations Under Section 183(e)(3)(C).

This section identifies the consumer and commercial product categories for which EPA has determined that CTGs will be substantially as effective as regulations in reducing VOC emissions in ozone nonattainment areas:

(a) Wood furniture coatings;

(b) Aerospace coatings;

(c) Shipbuilding and repair coatings;

(d) Lithographic printing materials;

(e) Letterpress printing materials;

(f) Flexible packaging printing materials;

(g) Flat wood paneling coatings; and

(h) Industrial cleaning solvents.

[FR Doc. 06–6640 Filed 8–3–06; 8:45 am]

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Federal Register

Friday,
August 4, 2006

Part VII

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1 and Parts 6, 12, 26, et al.

Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR—2006–0023]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–12; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005–12. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://acquisition.gov/far.*

DATES: For effective date and comment date, see separate document which follow.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–12, FAR case 2006–014. Interested parties may also visit our Web site at *http://acquisition.gov/far.* For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

Item	Subject	FAR case	Analyst
I	Local Community Recovery Act of 2006 (Interim)	2006–014	Cundiff.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments to this FAR case, refer to the specific item number and subject set forth in the document following this item summary.

FAC 2005–12 amends the FAR as specified below:

Item I—Local Community Recovery Act of 2006 (Interim) (FAR Case 2006–014)

This interim rule adds a local area set-aside to the FAR for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities. The contracting officer defines the set-aside area. The rule implements the Local Community Recovery Act of 2006, which strengthens the government's ability to promote local economic recovery. The local area set-aside does not replace small business set-asides. Both can be used at the same time. The rule imposes subcontracting restrictions when a local area set-aside is used. No competition justification is required for the local area set-aside.

Dated: July 28, 2006.

Ralph De Stefano,

Director, Contract Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-12 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-12 is effective August 4, 2006.

Dated: July 28, 2006.

Col. Casey D. Blake,

Director of Operations for Defense Procurement and Acquisition Policy.

Dated: July 28, 2006.

Roger D. Waldron,

Acting Senior Procurement Executive, General Services Administration.

Dated: July 28, 2006.

Lou Becker,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 06–6671 Filed 8–3–06; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 6, 12, 26, and 52

[FAC 2005–12; FAR Case 2006–014; Docket 2006–0020, Sequence 8]

RIN 9000–AK54

Federal Acquisition Regulation; FAR Case 2006–014, Local Community Recovery Act of 2006

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Local Community Recovery Act of 2006. The Local Community Recovery Act of 2006 amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency.

DATES: *Effective Date:* August 4, 2006.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before October 3, 2006 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–12, FAR case 2006–014, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov/far.* Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acquisition.gov/comp/far/ProposedRules/comments.htm.* Click on the FAR case number to submit comments.
- E-mail: *farcase.2006–014@gsa.gov.* Include FAC 2005–12, FAR case 2006–014 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–12, FAR case 2006–014, in all correspondence related to this case. All comments received will be posted without change to *http://www.acquisition.gov/comp/far/*

ProposedRules/comments.htm, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Rhonda Cundiff, Procurement Analyst, at (202) 501–0044. Please cite FAC 2005–12, FAR case 2006–014. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements the Local Community Recovery Act of 2006 (Pub. L. 109–218). The Local Community Recovery Act of 2006 amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150) to authorize set-asides for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. The set-aside may be used together with other authorized set-asides, for example, those in FAR Part 19 for small businesses.

The contracting officer determines the geographic area for a specific local area set-aside. The local area set-aside may be the whole of, or some subpart of, the affected area (*e.g.*, one or more counties, including across state lines). However, it may not be outside of the declared disaster/emergency area.

This rule also imposes subcontracting restrictions when a local area set-aside is used. To promote local recovery efforts, the rule requires certain percentages of the contract to be expended for employees of the contractor or employees of other local area businesses. If the contract includes other subcontracting restrictions (*e.g.*, FAR 52.219–3, 52.219–14, 52.219–27, 52.226–5, or 52.236–1), the contractor must meet all the subcontracting restrictions in the contract.

In addition, the rule establishes a new FAR Subpart 6.6 to clarify the competition justification requirements for Stafford Act acquisitions. The coverage on the Stafford Act previously located at FAR 6.302–5 has been moved to the new subpart.

The Councils would like to hear the views of interested parties on the sufficiency of these provisions. In particular, the Councils are interested in input on whether the "Restrictions on Subcontracting Outside Disaster or Emergency Area" and the "Disaster or Emergency Area Representation" should apply to preferences other than local area set-asides; and whether the percentages for general or specialty construction should be raised. The Councils are also interested in input regarding the placement of various Stafford-Act-related coverage in the FAR: that is, comments addressing the optimal combination of regulatory treatment in FAR Subparts such as 6.2, 6.3, 6.6, and 26.2.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected 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 it authorizes a set-aside for local businesses in an area affected by a major disaster or emergency to promote economic recovery. The set-aside does not replace the small business set-aside. Both set-asides can apply to the acquisition. The local set-aside will encourage use of local small businesses. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 6, 12, 26, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005–12, FAR case 2006–014), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule implements the Local Community Recovery Act of 2006 (Pub. L. 109–218). The Local Community Recovery Act of 2006 amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150) to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. This action is necessary to improve the Government's ability to target local businesses and promote local economic recovery in an affected area. The statute went into effect April 20, 2006. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 6, 12, 26, and 52

Government procurement.

Dated: July 28, 2006.

Ralph De Stefano,

Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 6, 12, 26, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 6, 12, 26, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 6—COMPETITION REQUIREMENTS

6.302–5 [Amended]

■ 2. Amend § 6.302–5 by removing paragraph (b)(5) and redesignating paragraphs (b)(6) and (b)(7) as (b)(5) and (b)(6), respectively.

■ 3. Add Subpart 6.6 to read as follows:

Subpart 6.6—Stafford Act Preference for Local Area Contractor

Sec.

6.601 Scope of subpart.

This subpart prescribes competition policies and procedures for procurements under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150).

6.602 Set-asides for local firms during a major disaster or emergency.

(a) To fulfill the statutory requirements relating to Pub. L. 109–218, part of the Stafford Act, contracting officers may set-aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete (see Subpart 26.2).

(b) No separate justification or determination and findings are required under this part to set-aside a contract action. The set-aside shall be based on a specific geographic area, within a Presidential declaration(s) of disaster or emergency.

6.603 Use of procedures other than set-aside.

When implementing the Stafford Act preference by using procedures other than a set-aside under section 6.602, the requirements for a justification to support the use of this authority are in 6.303. These procurements qualify as other than full and open competition.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend § 12.301 by adding paragraph (e)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(e) * * *

(4) When setting aside under the Stafford Act (Subpart 26.2), include the representation at 52.226–3, the notice at 52.226–4, and the clause at 52.226–5 in the solicitation. This representation is not in the Online Representations and Certifications Application (ORCA) Database.

* * * * *

PART 26—OTHER SOCIOECONOMIC PROGRAMS

■ 5. Amend § 26.200 by removing "6.302–5" and adding "Subpart 6.6" in its place.

■ 6. Add §§ 26.202 and 26.203 to read as follows:

26.202 Procedures to accomplish the local area preference.

(a) *Local area set-aside.* The contracting officer may set-aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete (see 6.602).

(1) The contracting officer, in consultation with the requirements office, shall define the specific geographic area for the local set-aside.

(2) A major disaster may result in numerous Presidential declarations spanning counties in several contiguous States. The designated area need not include all the counties in the declared disaster/emergency area(s), but cannot go outside it.

(3) The contracting officer shall also consider whether a local area set-aside should be further restricted to small business concerns in the designated area (see Part 19).

(b) *Other appropriate procedures.* The contracting officer may use other appropriate procedures to give preference to those organizations, firms, or individuals residing or doing business primarily in the area affected by the major disaster or emergency to the extent feasible and practicable. For example, the contracting officer may implement the preference by using an evaluation factor. (See 6.603).

26.203 Solicitation provisions and contract clause.

(a) The contracting officer shall insert the provision at 52.226–3, Disaster or Emergency Area Representation, for acquisitions using the local area set-aside. For commercial items see 12.301(e)(4).

(b) The contracting officer shall insert the provision 52.226–4, Notice of Disaster or Emergency Area Set-aside in solicitations and contracts for acquisitions that are set-aside for a Disaster or Emergency Area under 26.203(a).

(c) The contracting officer shall insert clause 52.226–5, Restrictions on Subcontracting Outside Disaster or Emergency Area, in all solicitations and contracts that contain the provision at 52.226–3.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Amend § 52.212–5 by revising the date of the clause and paragraphs (b)(27) and (b)(28) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS (AUG 2006)

* * * * *

(b) * * *

____ (27) 52.226–4, Notice of Disaster or Emergency Area Set-Aside (42 U.S.C. 5150).

____ (28) 52.226–5, Restrictions on Subcontracting Outside Disaster or Emergency Area (42 U.S.C. 5150).

* * * * *

■ 8. Add §§ 52.226–3, 52.226–4, and 52.226–5 to read as follows:

52.226–3 Disaster or Emergency Area Representation.

As prescribed in 26.203(a), insert the following provision:

DISASTER OR EMERGENCY AREA REPRESENTATION (AUG 2006)

(a) *Set-aside area.* The area covered in this contract is: _____ [*Contracting Officer to fill in with definite geographic boundaries.*]

(b) *Representations.* The offeror represents as part of its offer that it □ is, □ is not a firm residing or primarily doing business in the designated area.

(c) Factors to be considered in determining whether a firm resides or primarily does business in the designated area include—

(1) Location(s) of the firm's permanent office(s) and date any office in the designated area(s) was established;

(2) Existing state licenses;

(3) Record of past work in the designated area(s) (*e.g.*, how much and for how long);

(4) Contractual history the firm has had with subcontractors and/or suppliers in the designated area;

(5) Percentage of the firm's gross revenues attributable to work performed in the designated area;

(6) Number of permanent employees the firm employs in the designated area;

(7) Membership in local and state organizations in the designated area; and

(8) Other evidence that establishes the firm resides or primarily does business in the designated area.

(d) If the offeror represents it is a firm residing or primarily doing business in the designated area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

(End of provision)

52.226–4 Notice of Disaster or Emergency Area Set-Aside.

As prescribed in 26.203(b), insert the following provision:

NOTICE OF DISASTER OR EMERGENCY AREA SET-ASIDE (AUG 2006)

(a) *Set-aside area.* Offers are solicited only from businesses residing or primarily doing business in _____ [*Contracting Officer to fill in with definite geographic boundaries.*] Offers received from other businesses shall not be considered.

(b) This set-aside is in addition to any small business set-aside contained in this contract.

(End of provision)

52.226–5 Restrictions on Subcontracting Outside Disaster or Emergency Area.

As prescribed in 26.203(c), insert the following clause:

RESTRICTIONS ON SUBCONTRACTING OUTSIDE DISASTER OR EMERGENCY AREA (AUG 2006)

The Contractor agrees that in performance of the contract in the case of a contract for—

(a) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the Contractor or employees of other businesses residing or primarily doing business in the area designated in FAR 52.226–4;

(b) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The Contractor or employees of other businesses residing or primarily doing business in the designated area shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials;

(c) *General construction.* The Contractor will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the designated area; or

(d) *Construction by special trade Contractors.* The Contractor will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the designated area.

(End of clause)

[FR Doc. 06–6672 Filed 8–3–06; 8:45 am]
BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR—2006–0023]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-12; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rule appearing in Federal Acquisition Circular (FAC) 2005-12 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2005-12 which precedes this document. These documents are also available via the Internet at *http://acquisition.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurieann Duarte, FAR Secretariat, (202) 501-4225. For clarification of content, contact the analyst whose name appears in the table below.

Item	Subject	FAR case	Analyst
I	Local Community Recovery Act of 2006 (Interim)	2006–014	Cundiff.

SUPPLEMENTARY INFORMATION:

Item I—Local Community Recovery Act of 2006 (Interim) (FAR Case 2006–014)

This interim rule adds a local area set-aside to the FAR for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities. The contracting officer defines the set-aside area. The rule implements the Local Community Recovery Act of 2006, which strengthens the government's ability to promote local economic recovery. The local area set-aside does not replace small business set-asides. Both can be used at the same time. The rule imposes subcontracting restrictions when a local area set-aside is used. No competition justification is required for the local area set-aside.

Dated: July 28, 2006.

Ralph De Stefano,

Director, Contract Policy Division.

[FR Doc. 06–6673 Filed 8–3–06; 8:45 am]
BILLING CODE 6820–EP–S

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Friday, August 4, 2006

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H.R. 4456/P.L. 109–258

To designate the facility of the United States Postal Service located at 2404 Race Street in Jonesboro, Arkansas, as the "Hattie W. Caraway Station". (Aug. 2, 2006; 120 Stat. 661)

H.R. 4561/P.L. 109–259

To designate the facility of the United States Postal Service located at 8624 Ferguson Road in Dallas, Texas, as the "Francisco 'Pancho' Medrano Post Office Building". (Aug. 2, 2006; 120 Stat. 662)

H.R. 4688/P.L. 109–260

To designate the facility of the United States Postal Service located at 1 Boyden Street in Badin, North Carolina, as the "Mayor John Thompson 'Tom' Garrison Memorial Post Office". (Aug. 2, 2006; 120 Stat. 663)

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H.R. 4995/P.L. 109–262

To designate the facility of the United States Postal Service located at 7 Columbus Avenue in Tuckahoe, New York, as the "Ronald Bucca Post Office". (Aug. 2, 2006; 120 Stat. 665)

H.R. 5245/P.L. 109–263

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H.R. 4019/P.L. 109–264

To amend title 4 of the United States Code to clarify the treatment of self-employment for purposes of the limitation on State taxation of retirement income. (Aug. 3, 2006; 120 Stat. 667)

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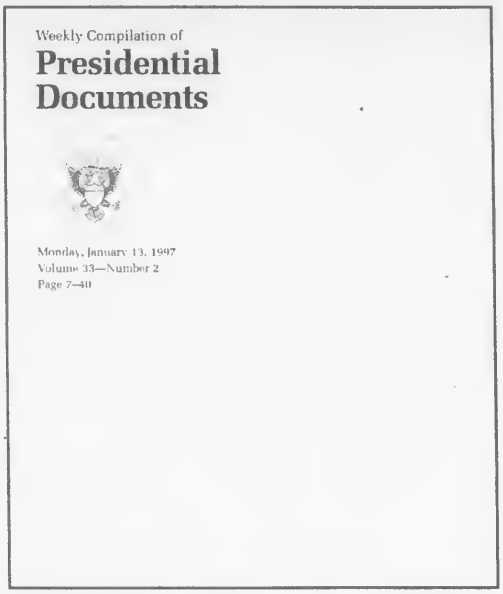

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