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WHEN: Tuesday, September 14, 2010
9 a.m.-12:30 p.m.

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

Rules and Regulations

Federal Register

Vol. 75, No. 153

Tuesday, August 10, 2010

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2416

Enforcement of Nondiscrimination on the Basis of Disability in Programs or Activities Conducted by the Federal Labor Relations Authority; Correction

AGENCY: Federal Labor Relations Authority.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to technical amendments to regulations which were published in the **Federal Register** of Thursday, October 8, 2009. The regulations relate to the enforcement of nondiscrimination on the basis of disability in programs and activities conducted by the Federal Labor Relations Authority (Authority). The corrections being made will remove a requirement that the Authority conduct a self-appraisal of its policies and practices for compliance with section 504 of the Rehabilitation Act of 1973 by September 6, 1989.

DATES: Effective on January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Rosa M. Koppel, Solicitor, (202) 218–7999.

SUPPLEMENTARY INFORMATION:

Background

The Authority published in the **Federal Register** of October 8, 2009 (74 FR 51741) a document containing technical amendments to 5 CFR parts 2415, 2416, 2424, and 2429 of the Authority's regulations. Although the preamble lists as technical amendments the deletion, as outdated, of section 2416.110 and the renumbering of section 2416.111 as section 2416.110, the document inadvertently omitted instructions that actually indicate this removal and renumbering. In addition, the document needs an instruction that the reservation of section numbers following the renumbered section 2416.111 be revised to include section numbers 2416.111 through 2416.129.

Need for Correction

As published, the regulations contain errors that need to be corrected.

List of Subjects in 5 CFR Part 2416

Government employees, Enforcement of nondiscrimination on the basis of disability in programs or activities conducted by the Federal Labor Relations Authority.

■ Accordingly, 5 CFR part 2416 is corrected by making the following correcting amendments:

PART 2416—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL LABOR RELATIONS AUTHORITY

■ 1. The authority citation for part 2416 continues to read as follows:

Authority: 29 U.S.C. 794.

§ 2416.110 [Removed]

■ 2. Section 2416.110 is removed.

§ 2416.11 [Redesignated as moved § 2416.110]

■ 3. Section 2416.111 is redesignated as § 2416.110.

Carol Waller Pope,

Chairman.

[FR Doc. 2010–19644 Filed 8–9–10; 8:45 am]

BILLING CODE 6727–01–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 652

RIN 0578–AA48

Technical Service Provider Assistance

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

ACTION: Final rule; Correcting amendment.

SUMMARY: The Natural Resources Conservation Service (NRCS) published a final rule in the **Federal Register** of February 12, 2010, amending its regulations for technical service provider (TSP) provisions under the Food Security Act of 1985. This document correctly amends those provisions by expanding the definition Technical Service Provider Assistance, which contained an error in the omission of "Indian Tribe" in the definition of Technical Service Provider.

DATES: *Effective Date:* This amendment is effective on August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Angel Figueroa, Team Leader, Technical Service Provider Team, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5236 South Building, Washington, DC 20250; *Telephone:* (202) 720–6731; *Fax:* (202) 720–5334; or *e-mail: angel.figueroa@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: This document correctly amends the Natural Resources Conservation Service (NRCS) regulations for technical service provider (TSP) provisions the requirements. This amendment is necessary due to an error of omission in the agency's final rule published in the **Federal Register** of Friday, February 12, 2010 (75 FR 6839). In that document, on page 6846, in the third column, the *Technical Service Provider* definition reads "Technical service provider means an individual, entity, or public agency either * * *". It should read "*Technical service provider* means an individual, entity, Indian Tribe, or public agency either * * *"

List of Subjects in 7 CFR Part 652

Natural resources, Soil conservation, Technical assistance, Technical service, Water resources.

■ For the reasons stated in the preamble, NRCS correctly amends part 652 of Title 7 of the CFR as set forth below:

PART 652—TECHNICAL SERVICE PROVIDER ASSISTANCE

■ 1. The authority citation for part 652 continues to read as follows:

Authority: 16 U.S.C. 3842.

■ 2. Section § 652.2 is amended by revising the introductory text of the definition of "Technical service provider" to read as follows:

Subpart A—General Provisions

§ 652.2 Definitions.

* * * * *

Technical service provider means an individual, entity, Indian Tribe, or public agency either:

* * * * * .

Signed this 4th day of August 2010, in Washington, DC.

Teressa Davis,

Rulemaking Manager, Natural Resources Conservation Service.

[FR Doc. 2010–19623 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF JUSTICE

28 CFR Part 79

[CIV Docket No. 111; AG Order No. 3185–2010]

RIN 1105–AB33

Radiation Exposure Compensation Act: Allowance for Costs and Expenses

AGENCY: Civil Division, Department of Justice.

ACTION: Final rule.

SUMMARY: By this rule the Department of Justice ("the Department") amends its existing regulations implementing the Radiation Exposure Compensation Act ("RECA" or "the Act") to conform to the decision of the Tenth Circuit in the case of *Hackwell* v. *United States,* 491 F.3d 1229, 1241 (10th Cir. 2007). The Tenth Circuit held that the plain meaning of "services rendered" in section 9(a) of the Act revealed Congress' unambiguous intent to exclude "costs incurred" from the attorney fee limitation. Consequently, the court invalidated 28 CFR 79.74(b) as "contrary to the RECA's plain language." Accordingly, the Department is amending its regulation at § 79.74(b) to strike the language "including costs incurred" from the agency's limitation on payments to attorneys representing claimants under RECA.

DATES: This rule is effective on: September 9, 2010. This final rule will apply to all claims pending with the Radiation Exposure Compensation Act Program ("the Program") as of this date.

FOR FURTHER INFORMATION CONTACT: Gerard W. Fischer (Assistant Director), (202) 616–4090, and Dianne S. Spellberg (Senior Counsel), (202) 616–4129.

Background

On October 5, 1990, Congress passed the Radiation Exposure Compensation Act. The Act offers an apology and monetary compensation to individuals (or their survivors) who have contracted certain cancers and other serious diseases following exposure to radiation released during above-ground atmospheric nuclear weapons tests or following their employment in the uranium production industry during specified periods. On July 10, 2000, the RECA Amendments of 2000 ("the 2000 Amendments") were enacted, providing expanded coverage to individuals who developed one of the compensable diseases in the Act, adding two new claimant categories (uranium millers and ore transporters), and lowering the amount of attorney's fees from 10% of the lump sum compensation award to 2% of the award in connection with the filing of an initial claim.

On April 22, 2004, the Department promulgated revised regulations implementing the 2000 Amendments (codified as amended at 42 U.S.C. 2210 note (2006)). Among other changes, the 2000 Amendments revised section 9 of the Act to limit attorneys representing claimants before the program from receiving, "for services rendered in connection with the claim," more than 2 percent of the final award for the filing of an initial claim, and more than 10 percent of the final award with respect to any claim filed prior to July 10, 2000, or resubmission of a denied claim. The Department implemented this statutory provision at 28 CFR 79.74(b). Specifically, the Department interpreted "services rendered" to include "costs incurred" within the statutory percentage limit on the amount an attorney may receive from a successful claim.

The Hackwell Litigation

On April 21, 2004, plaintiff Kim Hackwell alleged that her co-plaintiff, a law firm, had refused to represent her because of § 79.74(b) of the Department's regulation. The plaintiffs challenged the regulation as contrary to section 9(a) of the RECA statute limiting attorney compensation for "services rendered." In addition, plaintiffs argued the regulation was an invalid preemption of state law, and a violation of the Fifth and Tenth Amendments. The district court dismissed the suit for failure to state a claim, holding that the regulation was a "reasonable interpretation" of the statute and that the Department "did not exceed its statutory authority in implementing Congress's compensation limitation." *Hackwell* v. *United States,* No. 04–cv–00827–EWN (D. Colo. Sept. 28, 2005).

On appeal, the Tenth Circuit held that the plain meaning of "services rendered" in section 9(a) of the Act revealed Congress's unambiguous intent to exclude "costs incurred" from the attorney fee limitation. Consequently, the court invalidated § 79.74(b) as "contrary to the RECA's plain language." *Hackwell* v. *United States,* 491 F.3d 1229, 1241 (10th Cir. 2007). The case was remanded to the district court for further proceedings. In its July 23, 2008 remand decision, the district court enjoined the Department from enforcing § 79.74(b) and directed that attorneys may recover expenses and costs from their clients even in regard to claims under the Act that are unsuccessful. *Hackwell* v. *United States,* No. 04–cv–00827–EWN, 2008 WL 2900933, at *9 (D. Colo. July 23, 2008).

The Department issued a Notice of Allowance for Costs and Expenses in the **Federal Register** on October 23, 2008, to announce its policy consistent with the decision in *Hackwell. See* Notice of Allowance for Costs and Expenses, 73 FR 63196 (Oct. 23, 2008). Accordingly, the Department no longer enforces its regulatory provision, 28 CFR 79.74(b), prohibiting attorneys from receiving reimbursement for expenses and costs from their clients in connection with claims filed under the Act, in addition to the statutory attorney's fee. Moreover, attorneys may collect expenses and costs regardless of whether a claim is approved or denied.

Discussion of Changes Made by This Rule

This rule finalizes the Department's announced intentions to revise the regulation published in its Notice of Allowance. Also, this rule conforms the Department's regulation at § 79.74(b) with the Tenth Circuit's decision in *Hackwell* and the policy statement promulgated in the Department's October 23, 2008 Notice. Further, this rule strikes the language "including costs incurred" found in 28 CFR 79.74(b)(1), (2) and (3), and affirmatively excludes costs from the limitation on attorney reimbursement for "services rendered." Finally, the rule permits attorneys to recover costs and expenses regardless of whether the claim is approved or denied.

Administrative Procedure Act

This rule merely conforms Department regulations to the opinion of the Tenth Circuit and does not expand upon that opinion or the provisions of the Act. In addition, this rule complies with the injunction imposed by the District of Colorado and codifies the Department's intention to permit attorneys to receive reimbursement for expenses and costs from their clients in connection with claims filed under the Act, in addition to the statutory attorney's fee. For the foregoing reasons, the Department finds that it would be unnecessary and contrary to the public interest to provide for notice and comment on this rule. Accordingly, the Department finds that good cause exists for exempting this rule from the provisions of the Administrative Procedure Act requiring notice of proposed rulemaking (5 U.S.C. 553(b)) and the opportunity for public comment (5 U.S.C. 553(d)).

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: The rule affects claimants or beneficiaries in their individual capacity only. It does not affect small entities as that term is defined under 5 U.S.C. 601(6).

Further, although the vast majority of claimants successfully file claims under the Act without the assistance of counsel, in the small number of claims where claimants desire the services of an attorney, this regulation will allow attorneys to recover expenses, which was previously prohibited.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation. Permitting attorneys representing claimants under RECA to recoup costs and expenses in addition to the statutory fee limitation will not lead to an annual effect of greater than $100,000,000 or have an adverse material effect on the economy or public welfare. Neither does this rule present any conflict with other federal law or regulation. This rule does not materially alter the budgetary impact of RECA entitlements because awards under RECA are set by statute and the Department of Justice does not anticipate a significant fluctuation in claim intake as a result of the revision. Moreover, the rule does not materially alter the rights and obligations of recipients of a RECA award because claimants retain the option to proceed with their RECA claim *pro se*. Finally, this action brings Department regulations into compliance with the Tenth Circuit's decision in *Hackwell* and does not raise novel legal issues arising out of legal mandates.

Accordingly, the Department has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review and therefore this rule has not been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation 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. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

This regulation will not 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, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a "major rule" as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804 (2006). This rule will not result in an annual effect on the economy of $100,000,000 or more, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. Moreover, this rule will not result in a significant increase in costs or prices for consumers, individual industries, government agencies or geographic regions because potential consumers of legal counsel for RECA claims retain the right to file *pro se*. In addition, to the extent the rule enables attorneys representing claimants or beneficiaries to provide more effective counsel, the rule may reduce costs or prices for consumers by enabling claimants to submit successful claims more efficiently on first filing.

Paperwork Reduction Act

No additional information collection is associated with this regulatory revision.

List of Subjects in 28 CFR Part 79

Administrative practice and procedure, Authority delegations (Government agencies), Cancer, Claims, Radiation Exposure Compensation Act, Radioactive materials, Reporting and recordkeeping requirements, Underground mining, Uranium mining, Uranium.

■ Accordingly, for the reasons set forth in the preamble, 28 CFR part 79 is amended as follows:

■ 1. The authority citation for part 79 continues to read as follows:

Authority: Secs. 6(a), 6(i) and 6(j), Pub. L. 101–426, 104 Stat. 920, as amended by secs. 3(c)–(h), Pub. L. 106–245, 114 Stat. 501 and sec. 11007, Pub. L. 107–273, 116 Stat. 1758 (42 U.S.C. 2210 note; 5 U.S.C. 500(b)).

■ 2. In section 79.74, revise paragraph (b) to read as follows:

§ 79.74 Representatives and attorney's fees.

(a) * * *

(b) *Fees.* (1) Notwithstanding any contract, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may not receive from a claimant or beneficiary any fee for services rendered in connection with an unsuccessful claim. The attorney of a claimant or beneficiary may recover costs incurred in connection with an unsuccessful claim.

(2) Notwithstanding any contract and except as provided in paragraph (b)(3) of this section, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may receive from a claimant or beneficiary no more than 2% of the total award for all services rendered in connection with a successful claim, exclusive of costs.

(3)(i) If an attorney entered into a contract with the claimant or beneficiary for services before July 10, 2000, with respect to a particular claim, then that attorney may receive up to 10% of the total award for services rendered in connection with a successful claim, exclusive of costs.

(ii) If an attorney resubmits a previously denied claim, then that attorney may receive up to 10% of the total award to the claimant or beneficiary for services rendered in connection with that subsequently successful claim, exclusive of costs.

Resubmission of a previously denied claim includes only those claims that were previously denied and refiled under the Act.

(4) Any violation of paragraph (b) of this section shall result in a fine of not more than $5,000.

* * * * *

Dated: August 2, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–19633 Filed 8–9–10; 8:45 am]

BILLING CODE 4410–12–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0659]

Drawbridge Operation Regulations; Pequonnock River, Bridgeport, CT, Maintenance

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Metro North (Peck) Bridge across the Pequonnock River, mile 0.3, at Bridgeport, Connecticut. The deviation allows the bridge to remain in the closed position to facilitate scheduled maintenance for three months.

DATES: This deviation is effective from August 7, 2010 through November 7, 2010.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0659 and are available online at *www.regulations.gov*, inserting USCG–2010–0659 in the "Keyword" and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 668–7165, e-mail *judy.k.leung-yee@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Metro North (Peck) Bridge, across the Pequonnock River at mile 0.3, at Bridgeport, Connecticut, has a vertical clearance in the closed position of 26 feet at mean high water and 32 feet at mean low water. The drawbridge operation regulations are listed at 33 CFR 117.219(c).

The owner of the bridge, Metro North Railroad, requested a temporary deviation from the regulations to facilitate scheduled bridge maintenance, mitre rail rehabilitation, at the bridge.

Under this temporary deviation the Metro North (Peck) Bridge may remain in the closed position from August 7, 2010 through November 7, 2010. Vessels that can pass under the bridge in the closed position may do so at all times.

The Metro North (Peck) Bridge received no requests to open in both 2008 and 2009. Waterway users were advised of the requested bridge closure and offered no objection.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: July 30, 2010.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2010–19631 Filed 8–9–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 217, and 243

[DFARS Case 2008–D034]

RIN 0750–AG27

Defense Federal Acquisition Regulation Supplement; Management of Unpriced Change Orders

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: The Department of Defense (DoD) is adopting as final a proposed rule amending the DFARS to make requirements for DoD management and oversight of unpriced change orders consistent with those that apply to other undefinitized contract actions. This final rule adds new policy to address section 812 of the National Defense Authorization Act for Fiscal Year 2010.

DATES: *Effective Date:* August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060, Telephone 703–602–1302; facsimile 703–602–0350. Please cite DFARS Case 2008–D034.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed rule addressed DFARS subpart 217.74, which prescribes policies and procedures for the management and oversight of undefinitized contract actions (UCAs). In the current DFARS, unpriced change orders that are issued in accordance with FAR part 43 and DFARS part 243 are excluded from the scope of subpart 217.74. A rule was proposed because of the need for full accountability and enhanced oversight of unpriced contractual actions, including unpriced change orders.

The proposed rule was published in the **Federal Register** at 74 FR 37669 on July 29, 2009. Two respondents submitted comments in response to the proposed rule. One respondent deemed this "a new rule that is very much needed," while the other respondent requested that the proposed rule be withdrawn. To enhance transparency and accountability, DoD has determined to proceed with this rule. The comments submitted by the respondents are addressed in the following paragraphs.

Comment: Make a separate limitation on obligations applicable to small businesses.

One respondent addressed the percentage limitation on obligations prior to definitization, which the proposed rule, at DFARS 243.204–70–4(a), set at 50 percent. There is an exception in the proposed rule allowing an increase from 50 percent to 75 percent when a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government. The respondent recommended that the latter percentage be increased from 75 percent to 95 percent for small, small disadvantaged, and HUBZone businesses. In support of its position, the respondent cited frequent instances where it believed that a particular agency had requested multiple audits as a delaying tactic to avoid definitization. When definitization is delayed, the contractor can perform up to half of the work that has been required unilaterally by the Government without being reimbursed. According to the respondent, this burden would impact small and small disadvantaged businesses disproportionately, because they do not have the internal cash flow generally available to large businesses.

Response: This is an issue of faulty execution on the part of the agency cited, not a problem with the policy. Enabling an unpriced contract action to continue in an unpriced state up to 95 percent of the not-to-exceed price, would only place contractors at greater risk and give contracting officers even less incentive to definitize the action in a timely manner.

Comment: Limiting a contractor's profit for reduced risk doesn't consider that the contractor's risk is increased while a contract obligation is undefinitized.

The new section 243.204–70–6 (Allowable profit) requires the Government to consider "(a) Any reduced cost risk to the contractor" when a substantial portion of the required performance has been completed before the contract action is definitized. Both respondents objected to the regulation's assumption that a contractor's cost risk declines in this situation. One respondent stated that it would be grossly unfair for DoD to retain the uniquely Government right to issue unilateral change orders and then penalize contractors by decrementing allowable profit on incurred costs. The other respondent claimed that the contractor experiences increased, not decreased, cost risk during the period that the change order remains undefinitized.

Response: The respondents have not acknowledged that the Government also incurs increased cost risk during the period prior to definitization of the contract action. The intent of this coverage is to (1) increase transparency; (2) provide management oversight to prevent abuses in the definitization process; and (3) provide incentives for both the Government and contractors to definitize UCAs as quickly as reasonably possible. Therefore, this portion of the proposed rule will not be changed because doing so would reduce a big incentive to definitize an action in the minimum reasonable time. Further, the 50 percent and 75 percent limitations are established by statute (10 U.S.C. 2326(b)(3)), and DoD does not have authority to modify them.

Comment: Foreign military sales, special access programs, congressionally mandated long-lead procurement contracts, and purchases under the simplified acquisition threshold are exempted from the definition of undefinitized contract action (UCA).

One respondent cites 10 U.S.C. 2326 as exempting the above categories from the definition of UCA. Therefore, according to the respondent, DoD is prohibited from including these types of change orders in the UCA definition.

Response: The Congress recently took a different position on this issue. It is a matter of statutory construction that later-enacted laws take precedence over prior-enacted laws. This rule of statutory construction is particularly relevant here. In this case, section 812 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), enacted October 28, 2009, requires DoD to extend the limitations on cost reimbursement and profit/fee to all categories of undefinitized contract actions.

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

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the change is to internal Government operating procedures. The rule makes requirements for DoD management and oversight of unpriced change orders consistent with those that apply to other undefinitized contract actions.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 215, 217, and 243

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 215, 217, and 243 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 217, and 243 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

215.404–71–3 [Amended]

■ 2. Amend section 215.404–71–3 in the first sentence of paragraph (d)(2), by revising the parenthetical to read "(*also see* 217.7404–6(a) and 243.204–70–6)".

PART 217—SPECIAL CONTRACTING METHODS

■ 3. Amend section 217.7401 in paragraph (d) by adding a third sentence to read as follows:

217.7401 Definitions.

* * * * *

(d) * * * For policy relating to definitization of change orders, see 243.204–70.

■ 4. Revise section 217.7402 to read as follows:

217.7402 Exceptions.

(a) The following undefinitized contract actions (UCAs) are not subject to this subpart. However, the contracting officer shall apply the policy and procedures to them to the maximum extent practicable (also see paragraph (b) of this section):

(1) UCAs for foreign military sales;

(2) Purchases at or below the simplified acquisition threshold;

(3) Special access programs;

(4) Congressionally mandated long-lead procurement contracts.

(b) If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subpart for a particular contract action that falls within one of the categories in paragraph (a)(1), (3), or (4) of this section, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

■ 5. Amend section 217.7405 by adding paragraph (c) to read as follows:

217.7405 Plans and reports.

* * * * *

(c) Consolidated UCA Management Reports shall include information about all change orders that are not forward priced (*i.e.*, unpriced) and have an estimated value exceeding $5 million.

■ 6. Revise section 217.7406 to read as follows:

217.7406 Contract clauses.

(a) Use the clause at FAR 52.216–24, Limitation of Government Liability, in—

(1) All UCAs;

(2) Solicitations associated with UCAs;

(3) Basic ordering agreements;
(4) Indefinite-delivery contracts;
(5) Any other type of contract providing for the use of UCAs; and
(6) Unpriced change orders with an estimated value exceeding $5 million.
(b)(1) Use the clause at 252.217–7027, Contract Definitization, in—
(i) All UCAs;
(ii) Solicitations associated with UCAs;
(iii) Basic ordering agreements;
(iv) Indefinite-delivery contracts;
(v) Any other type of contract providing for the use of UCAs; and
(vi) Unpriced change orders with an estimated value exceeding $5 million.
(2) Insert the applicable information in paragraphs (a), (b), and (d) of the clause.
(3) If, at the time of entering into the UCA or unpriced change order, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.403–1, 15.403–2, or 15.403–3 for not requiring submission of cost or pricing data, the words "and cost or pricing data" may be deleted from paragraph (a) of the clause.

PART 243—CONTRACT MODIFICATIONS

■ 7. Revise section 243.204 to read as follows:

243.204 Administration.

Follow the procedures at PGI 243.204 for administration of change orders.

243.204–70 [Redesignated as 243.204–71]

■ 8. Redesignate section 243.204–70 as section 243.204–71.

■ 9. Add a new section 243.204–70 to read as follows:

243.204–70 Definitization of change orders.

243.204–70–1 Scope.

(a) This subsection applies to unpriced change orders with an estimated value exceeding $5 million.
(b) Unpriced change orders for foreign military sales and special access programs are not subject to this subsection, but the contracting officer shall apply the policy and procedures to them to the maximum extent practicable. If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subsection for an unpriced change order for a foreign military sale or a special access program, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

243.204–70–2 Price ceiling.

Unpriced change orders shall include a not-to-exceed price.

243.204–70–3 Definitization schedule.

(a) Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—
(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a qualifying proposal); or
(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.
(b) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely qualifying proposal, the contacting officer may suspend or reduce progress payments under FAR 32.503–6, or take other appropriate action.

243.204–70–4 Limitations on obligations.

(a) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation on obligations before definitization may be increased to no more than 75 percent (*see* 232.102–70 for coverage on provisional delivery payments).
(b) Obligations should be consistent with the contractor's requirements for the undefinitized period.

243.204–70–5 Exceptions.

(a) The limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 do not apply to unpriced change orders for the purchase of initial spares.
(b) The limitations in 243.204–70–4(a) do not apply to unpriced change orders for ship construction and ship repair.
(c) The head of the agency may waive the limitations in 243.204–70–2, 243.204–70–3, and 243.204–70–4 for unpriced change orders if the head of the agency determines that the waiver is necessary to support—
(1) A contingency operation; or
(2) A humanitarian or peacekeeping operation.

243.204–70–6 Allowable profit.

When the final price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—
(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;
(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and
(c) The extent to which costs have been incurred prior to definitization of the contract action (see 215.404–71–3(d)(2)). The risk assessment shall be documented in the contract file.

243.204–70–7 Plans and reports.

To provide for enhanced management and oversight of unpriced change orders, departments and agencies shall—
(a) Include in the Consolidated Undefinitized Contract Action (UCA) Management Plan required by 217.7405, the actions planned and taken to ensure that unpriced change orders are definitized in accordance with this subsection; and
(b) Include in the Consolidated UCA Management Report required by 217.7405, each unpriced change order with an estimated value exceeding $5 million.

■ 10. Add section 243.205–72 to read as follows:

243.205–72 Unpriced change orders.

See the clause prescriptions at 217.7406 for all unpriced change orders with an estimated value exceeding $5 million.

[FR Doc. 2010–19674 Filed 8–9–10; 8:45 am]
BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 231, and 252

[DFARS Case 2006–D057]

Defense Federal Acquisition Regulation Supplement; Excessive Pass-Through Charges

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule to delete the DFARS language implementing section 852 of the National Defense Authorization Act for Fiscal Year 2007 that ensures that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in

relation to the cost of work performed by the relevant contractor or subcontractor. The interim DFARS rule language, which implements the requirements of section 852, was made obsolete with the publication of the FAR interim rule at 74 FR 52853 on October 14, 2009.

DATES: *Effective Date*: August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Gomersall, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 703–602–0302; facsimile 703–602–0350. Please cite DFARS Case 2006–D057.

SUPPLEMENTARY INFORMATION:

A. Background

Section 852 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007 required DoD to prescribe regulations to ensure that pass-through charges on contracts or subcontracts that are entered into for or on behalf of DoD are not excessive in relation to the cost of work performed by the relevant contractor or subcontractor. DoD published an interim rule at 72 FR 20758 on April 26, 2007, to amend the DFARS to include a solicitation provision and contract clause in DoD contracts to implement the requirements of section 852.

Fourteen sources submitted comments on the interim rule. Public comments were addressed in a second interim rule published at 73 FR 27464 on May 13, 2008, when the interim rule language was revised in response to comments received. DoD determined at that time that it did not expect the rule to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* FAR interim rule 2008–031, published at 74 FR 52853 on October 14, 2009, implemented the requirements of section 866 of the NDAA for FY09 on the issue of excessive pass-through charges. The FAR rule language is duplicative of the interim DFARS rule language implementing section 852.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This final rule removes interim rule DFARS language made obsolete by publication of FAR rule language on October 14, 2009. Therefore, the Regulatory Flexibility Act does not apply to this final rule because it does not constitute a significant DFARS revision within the meaning of 41 U.S.C. 418b and FAR 1.501, and publication for public comment was not required.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose additional information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 215, 231, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 215, 231, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 231, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

215.408 [Amended]

■ 2. Section 215.408 is amended by removing paragraphs (3) and (4).

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

231.201–2 [Removed]

■ 3. Section 231.201–2 is removed.

231.203 [Removed]

■ 4. Section 231.203 is removed.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.217–7003 [Removed and Reserved]

■ 5. Section 252.217–7003 is removed and reserved.

252.217–7004 [Removed and Reserved]

■ 6. Section 252.217–7004 is removed and reserved.

[FR Doc. 2010–19672 Filed 8–9–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 225 and 252

[DFARS Case 2009–D024]

Defense Federal Acquisition Regulation Supplement; Reporting of Commercially Available Off-the-Shelf Items That Contain Specialty Metals—Deletion of Obsolete Clause

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing this final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) by deleting the requirement for contractors to report commercially available off-the-shelf items that contain foreign specialty metals and are incorporated into noncommercial end items.

DATES: *Effective Date:* August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–0328; facsimile 703–602–0350. Please cite DFARS Case 2009–D024.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule deletes DFARS clause 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items. This requirement was incorporated in the DFARS to implement section 804, paragraph (i), of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Paragraph (i) requires the Government to report to Congress for fiscal years 2008 and 2009 on the use of the exception to the specialty metals restrictions of 10 U.S.C. 2533b for commercially available off-the-shelf items that are incorporated in noncommercial end items. In order to obtain information for this report, the DFARS clause 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, was added to the DFARS on July 29, 2009 (74 FR 37626). This requirement is now obsolete, because the reporting requirement does not extend beyond fiscal year 2009.

DoD is issuing this rule as a final rule because this rule does not have a significant effect beyond the internal operating procedures of DoD and does not have a significant cost or administrative impact on contractors or offerors. Therefore, public comment is not required in accordance with 41 U.S.C. 418b(a).

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This rule will not have a significant economic impact upon a substantial number of small entities because this final rule does not constitute a significant DFARS revision within the meaning of 41 U.S.C. 418b and FAR 1.501, and did not require publication for public comment.

C. Paperwork Reduction Act

This rule will eliminate 306,800 information collection hours currently approved under Office of Management and Budget Control Number 0704–0459.

List of subjects in 48 CFR Parts 225 and 252

Government procurement.

Ynette R. Shelkin,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 225 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

225.7003–3 [Amended]

■ 2. Section 225.7003–3 is amended by removing paragraph (b)(2)(iii).

225.7003–5 [Amended]

■ 3. Section 225.7003–5 is amended by removing paragraph (c) and redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7029 [Removed and Reserved]

■ 4. Section 252.225–7029 is removed and reserved.

[FR Doc. 2010–19666 Filed 8–9–10; 8:45 am]
BILLING CODE 5001–08–P

Proposed Rules

Federal Register
Vol. 75, No. 153
Tuesday, August 10, 2010

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0764; Directorate Identifier 2009–NM–260–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 737–900ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Model 737–900ER series airplanes. This proposed AD would require doing a one-time general visual inspection for a keyway in two fuel tank access door cutouts, and related investigative and corrective actions if necessary. This proposed AD results from reports of cracks emanating from the keyway of the fuel tank access hole. We are proposing this AD to detect and correct such cracking, which could result in the loss of the lower wing skin load path and consequent structural failure of the wing.

DATES: We must receive comments on this proposed AD by September 24, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P. O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0764; Directorate Identifier 2009–NM–260–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We have received reports of cracks, ranging from 0.02 to 0.380 inch in length emanating from the keyway of the fuel tank access hole on the wing lower skin between wing rib numbers 8 and 9 on Model 777–200LR and 777–300ER series airplanes. The fuel tank access door at this location has a fuel measuring stick installed, and the keyway is used to ensure that the fuel measuring stick is oriented correctly when the fuel tank access door is installed. The crack is believed to be the result of fatigue due to the position of the keyway. The lower wing skins on Model 737–900ER series airplanes have fuel tank access holes with the same configuration as that of the affected fuel tank access holes on Model 777–300ER series airplanes. The affected fuel tank access holes on the Model 737–900ER series airplanes are located between ribs 4 and 5, between wing stations 180 and 204.25. These fuel tank access holes are for fuel tank access doors 531BB and 631BB. Although cracks have not yet been reported on any Model 737–900ER series airplanes, damage tolerance analysis shows potential for Model 737–900ER series airplanes lower wing skins to crack at the noted locations. This condition, if not corrected, could result in the loss of the lower wing skin load path and consequent structural failure of the wing.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 737–57A1308, Revision 1, dated October 1, 2009. The service bulletin describes procedures for a general visual inspection for a keyway in the fuel tank access door cutout on the left and right wings, and related investigative and corrective actions if necessary. The related investigative action is a high frequency eddy current inspection for cracking of the keyway. The corrective actions include changing the profile of the keyway for the fuel tank access door cutout, repairing any cracking of the keyway of the access door cutout, and contacting Boeing for certain repair instructions and doing the repair.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under "Difference Between the Proposed AD and Service Bulletin."

Difference Between the Proposed AD and Service Bulletin

Boeing Alert Service Bulletin 737–57A1308, Revision 1, dated October 1, 2009, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

Using a method that we approve; or

Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA), whom we have authorized to make those findings.

Other Relevant Rulemaking

The lower wing skins on Model 777–200LR and 777–300ER series airplanes have fuel tank access holes with the same configuration as those of the affected fuel tank access holes on the Model 737–900ER airplanes. Therefore, Model 777–200LR and 777–300ER series airplanes may be subject to the identified unsafe condition. We are considering similar rulemaking related to the identified unsafe condition for certain Model 777–200LR and 777–300ER series airplanes.

Costs of Compliance

We estimate that this proposed AD would affect 30 airplanes of U.S. registry. We also estimate that it would take 3 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators to be $7,650, or $255 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2010–0764; Directorate Identifier 2009–NM–260–AD.

Comments Due Date

(a) We must receive comments by September 24, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to The Boeing Company Model 737–900ER series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–57A1308, Revision 1, dated October 1, 2009.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Unsafe Condition

(e) This AD results from reports of cracks emanating from the keyway of the fuel tank access hole. The Federal Aviation Administration is issuing this AD to detect and correct such cracking, which could result in the loss of the lower wing skin load path and consequent structural failure of the wing.

Compliance

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

Inspection

(g) Before the accumulation of 7,500 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do a one-time general visual inspection for a keyway in the fuel tank access door cutouts 531BB and 631BB, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–57A1308, Revision 1, dated October 1, 2009 ("the service bulletin").

Note 1: For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

(1) If both access door cutouts do not have a keyway, no further action is required by this AD.

(2) If any access door has a keyway, before the accumulation of 7,500 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, do a high frequency eddy current (HFEC) inspection for cracking of the keyway, in accordance with the Accomplishment Instructions of the service bulletin.

(i) If no cracking is found during the HFEC inspection, before further flight, modify the profile of the keyway of the fuel tank access door cutout, in accordance with the

Accomplishment Instructions of the service bulletin.

(ii) If any cracking is found and the crack is 0.030 inch or less in length, before further flight repair the keyway, in accordance with the Accomplishment Instructions of the service bulletin.

(iii) If any cracking is found and the crack is greater than 0.030 inch in length, before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (h) of this AD

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 917–6440; fax (425) 917–6590. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Request@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on July 30, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–19695 Filed 8–9–10; 8:45 am]

BILLING CODE 4910–13–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4062 and 4063

RIN 1212–AB20

Liability for Termination of Single-Employer Plans; Treatment of Substantial Cessation of Operations

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed rule.

SUMMARY: ERISA section 4062(e) provides for reporting of and liability for certain substantial cessations of operations by employers that maintain single-employer plans. PBGC proposes to amend its current regulation on Liability for Termination of Single-Employer Plans to provide guidance on the applicability and enforcement of ERISA section 4062(e).

DATES: Comments must be submitted on or before October 12, 2010.

ADDRESSES: Comments, identified by Regulation Identifier Number (RIN) 1212–AB20, may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *E-mail: reg.comments@pbgc.gov.*
- *Fax:* 202–326–4224.
- *Mail or Hand Delivery:* Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026.

All submissions must include the Regulation Identifier Number for this rulemaking (RIN 1212–AB20). Comments received, including personal information provided, will be posted to *http://www.pbgc.gov.* Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, or Deborah C. Murphy, Attorney, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Introduction

Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Under ERISA section 4002(b)(3), PBGC has authority to adopt, amend, and repeal regulations to carry out the purposes of title IV.

Background of Proposed Rule

ERISA section 4062(e) provides that "[i]f an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of [ERISA sections] 4063, 4064, and 4065 shall apply."

ERISA section 4063(a) requires the plan administrator of a multiple employer plan (that is, a single-employer plan with at least two contributing sponsors that are not under common control) to notify PBGC within 60 days after a substantial employer withdraws from the plan, and section 4063(b) and (c) makes the withdrawn employer liable to provide a bond or escrow in a specified amount for five years from the date of withdrawal, to be applied—if the plan terminates within that period—against the plan's underfunding. Section 4063(e) allows PBGC to waive this liability if there is an appropriate indemnity agreement among contributing sponsors of the plan, and ERISA section 4067 authorizes PBGC to make alternative arrangements for satisfaction of liability under sections 4062 and 4063. (ERISA sections 4064 and 4065 deal with plan termination liability and annual reports by plan administrators.)

The method described in section 4063(b) for computing the amount of liability focuses on relative amounts of contributions by more than one employer and is thus impracticable for calculating liability triggered by an event involving a plan of a single employer under section 4062(e). However, section 4063(b) provides that PBGC "may also determine the liability on any other equitable basis prescribed by [PBGC] in regulations." Pursuant to that authority, on June 16, 2006 (at 71 FR 34819), PBGC published a final rule providing a formula for computing liability under section 4063(b) when there is an event described in section 4062(e). The formula provided by the 2006 rule apportions to an employer affected by an event under section 4062(e) a fraction of plan termination liability based on the number of participants affected by the event. Over the next three-and-a-half years, PBGC resolved 37 cases under section 4062(e) through negotiated settlements valued at nearly $600 million, providing protection to over 65,000 participants.

Overview of Proposed Regulation

The proposed rule would create a new subpart B of PBGC's regulation on Liability for Termination of Single-Employer Plans (29 CFR part 4062) that would focus on section 4062(e). The liability computation rules that were added to part 4062 by PBGC's 2006 final rule (now in § 4062.8) would be moved to this new subpart B. The purpose and scope section of part 4062 and the cross-references section of part 4063 (Withdrawal Liability; Plans Under Multiple Controlled Groups) would be revised to reflect the proposed regulation, and the references to the applicability date of part 4062 (now over 20 years in the past) would be removed.

Proposed subpart B addresses two general topics: The applicability and enforcement of section 4062(e). The provisions on applicability provide guidance on the kinds of events section 4062(e) applies to (*i.e.*, on what a "section 4062(e) event" is). The enforcement provisions describe PBGC's section 4062(e) investigatory program, provide rules for notifying PBGC of section 4062(e) events, explain how section 4062(e) liability is calculated and how it is to be satisfied, and require the preservation of records about events that may be section 4062(e) events. Subpart B would also provide for waivers in appropriate circumstances.

Adoption of the regulatory provisions in this proposed rule will reduce uncertainty about PBGC's interpretation of the statute, thereby permitting more rapid resolution of cases. Clearer rules, together with specific, detailed reporting provisions, should encourage self-reporting of events that PBGC now learns of only through its own investigations and may enable PBGC to process section 4062(e) cases more quickly, thereby protecting more participants.

Further clarification of section 4062(e) is also warranted by requests from the public. Although PBGC's 2006 rule on section 4062(e) was limited to the issue of the liability formula, several commenters asked for additional guidance to clarify the meaning of statutory terms used to describe when an event covered by section 4062(e) occurs. PBGC also regularly receives requests from pension professionals for interpretive guidance on section 4062(e). This proposed rule provides such guidance.

Applicability of Section 4062(e)

PBGC proposes to provide guidance on whether and when a "section 4062(e) event" occurs by explaining each of the key terms that appear in the statute and in the proposed regulation: "operation," "facility," "cease," "separate," and "result." The term "active participant base" would be introduced to describe the baseline number of active participants against which the statutorily required decline in active participants would be measured and to serve as the denominator of the apportionment fraction used in calculating liability for a section 4062(e) event. Discussions of the subpart B explanations of these terms follow.

"Section 4062(e) Event"

New subpart B would use the term "section 4062(e) event" to refer to an event to which section 4062(e) applies.

The proposed regulation would apply only to events involving single-employer plans that are not multiple employer plans. ERISA section 4062(e) provides that if a section 4062(e) event occurs, the affected employer "shall be treated with respect to [the affected] plan as if he were a substantial employer under a plan under which more than one employer makes contributions." The phrase "as if" implies that section 4062(e) does not itself apply to events involving plans under which more than one employer makes contributions. From the context and language of section 4062(e), therefore, PBGC concludes that the term "plan" in section 4062(e) means a single-employer plan that is not a multiple employer plan. Furthermore, the liability formula adopted by PBGC in 2006 would produce anomalous results if applied to an event involving a multiple employer plan.

The proposed regulation would require only that a plan be maintained by an employer—not both established and maintained—to come within the provisions of section 4062(e). In *Rose* v. *Long Island R.R. Pension Plan*, 828 F.2d 910 (2nd Cir. 1987), the Second Circuit reasoned that a plan whose sponsorship has changed may be considered "established" (or "re-established") by the new sponsor, notwithstanding that it has not first been formally "terminated." In addition, in PBGC Opinion Letter 90–6, PBGC noted that it had "declined to interpret the conjunction of the terms 'established and maintained' strictly in the context of the exemption from Title IV coverage for governmental plans [under] ERISA section 4021(b)(2) * * * because doing so would frustrate the intent of Congress in providing the exemption." The opinion letter quoted from the *Rose* case, sanctioning that approach on the basis that "the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions than does the status of the entity which established the plan." [1] The opinion letter applied the same principle to the exemption for substantial owner plans under ERISA section 4021(b)(9).

PBGC believes that similar reasoning applies to ERISA section 4062(e), which also uses the phrase "established and maintained." PBGC believes the textual analysis in the Rose case would be appropriate in interpreting this phrase in ERISA section 4062(e). In addition, Congress's goal in enacting section 4062(e) would appear to be frustrated, rather than promoted, by excluding from the ambit of that provision any case involving a plan established by a different employer from the employer maintaining the plan when the event occurred. Indeed, such an interpretation would seem to open a formalistic loophole that could be exploited where, by chance or foresight, a plan's sponsorship changed.

The proposed regulation would provide explicitly that evaluation of risk is not an element in deciding whether a section 4062(e) event has occurred. Sections 4062(e) and 4063 call for self-reporting by plan administrators. Each section describes a class of events that is to be reported. Neither section provides or even suggests that a plan administrator is to make a risk assessment and report an event to PBGC only if it creates risk for the plan or its participants or for PBGC. PBGC believes that section 4062(e) reflects a judgment that as a class, events described therein are indicative of increased risk of underfunded plan termination within five years—whether or not any particular risk factors appear to be present in particular cases. PBGC's experience bears out this view. For example, in a recent section 4062(e) case, an employer opposed the assessment of liability under section 4062(e) on the ground that its financial resources eliminated any risk to the termination insurance program. But shortly after reaching accord with PBGC, the employer entered bankruptcy with its plan underfunded because of an economic downturn in the industry.

Thus PBGC believes that risk is not relevant in deciding whether a section 4062(e) event has occurred, and the proposed regulation would provide that such decisions be made without regard to whether there might in a particular

[1] A contrary case is *Hightower* v. *Texas Hospital Association*, 65 F.3d 443 (5th Cir. 1995). The *Hightower* case does not discuss the actions an employer assuming sponsorship of an existing plan might take to be treated as having "established" (or "re-established") the plan.

case be (or appear to be) no risk to the plan, participants, or PBGC. However, as discussed below under *Liability for section 4062(e) events,* in making arrangements for the satisfaction of liability arising from section 4062(e) events, PBGC may take account of such circumstances as employer financial strength.

The proposed regulation would also note that if an employer has two or more plans, section 4062(e) is applied separately to each plan, not on an aggregate basis. This principle is clear from section 4062(e)'s references to "a plan" and "that plan."

"*Operation*"

The proposed regulation uses the term "operation" (singular rather than plural) to refer to a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. PBGC proposes that section 4062(e) apply to cessation of an operation in this sense. This approach is consistent with PBGC's practice and experience in its current enforcement activities under section 4062(e). The regulation would also suggest some criteria that might be considered in identifying a set of activities as an operation, such as whether it is so treated by the employer or its employees or customers, by the public, or within the relevant industry.

"*Facility*"

Section 4062(e) applies to cessation of an operation "at a facility in any location." PBGC thinks that section 4062(e) should be read as applying to an employer's cessation of an operation at a "facility in any location," even if the employer continues or resumes the operation at another "facility in any location." Accordingly, under the proposed rule, the facility (or facility in any location) associated with an operation would simply be the place or places where the operation is performed. This would typically be a building or buildings, but could be or include any one or more enclosed or open areas or structures where one or more employees were engaged in the performance of the operation.

PBGC's view of "operation" and "facility" means that a facility (a building, for example) may be the site of more than one operation. Under the proposed regulation, therefore, section 4062(e) might apply where some but not all activity at a facility ceased, if the activity that ceased constituted an operation distinct from other activities in the facility.[2]

"*Cessation*"

PBGC proposes that where an employer discontinues activity that constitutes an operation at a facility, deciding whether a cessation has occurred for purposes of section 4062(e) should involve assessment of whether the discontinuance represents a mere cutback or contraction, or is so thorough that the employer's conduct of the operation at the facility can no longer be considered on-going. The proposed regulation would address this issue for both voluntary and involuntary discontinuances.

PBGC believes that whether an employer's conduct of an operation at a facility ceases or remains on-going (though perhaps curtailed) depends on the degree to which the purpose of the operation continues to be fulfilled by the employer's activity at the facility. PBGC thus proposes that an employer's cessation of an operation at a facility be considered to occur only if the employer discontinues all significant activity at the facility in furtherance of the purpose of the operation.

Thus, an employer might cease an operation at a facility even though insignificant activity at the facility in furtherance of the purpose of the operation continued. For example, while continued processing of materials on hand would typically constitute significant activity in furtherance of the purpose of an operation, desultory sales of left-over inventory would typically not. Continuing activity that does not further an operation's purpose would be disregarded. For example, although maintenance and security activities may be important to a manufacturing operation, they do not further the purpose of the operation. Thus, a cessation of such an operation could occur even though there was a continuance of maintenance and guard services.

While this approach is apt for "voluntary" discontinuances pursuant to employer decision,[3] it is less suitable for "involuntary" discontinuances caused by events outside the employer's control. Where a discontinuance of activity is thrust upon an employer, rather than stemming from the employer's will, PBGC believes that the employer should have an opportunity to react—to resume or to decide not to resume the activity—before the discontinuance is characterized as a cessation under section 4062(e).

PBGC proposes to provide two rules for involuntary discontinuances. In each situation, cessation would occur not when all significant activity stopped, but at a later date—unless the employer in the meantime resumed the operation at the facility (in which case there would be no cessation) or decided not to resume it (in which case the cessation would occur when the decision was made). One situation would be where the discontinuance of activity was caused by employee action, such as a strike or sickout. In this case, the cessation date would be put off until the employee action ended (and the employer would have a week in which to resume activity). The other situation would be where the discontinuance was caused by a sudden and unanticipated event (other than an employee action) such as a natural disaster. In this case, the cessation date would be deferred for 30 days—time enough to resume work if the event causing the discontinuance left the operation viable.

As indicated in the discussion of "facility" above, PBGC believes that section 4062(e) may apply to an employer's cessation of an operation at one facility even if the employer continues or resumes the operation at another facility. For example, where an employer has been performing manufacturing, shipping, and administrative functions under a single roof, section 4062(e) could apply where the employer moves the manufacturing operation outside the United States and has manufactured goods shipped in bulk to the original U.S. facility for distribution using the employer's own existing shipping operation.

Similarly, PBGC believes that section 4062(e) applies to an employer's cessation of an operation at a facility even if the operation is continued or resumed by another employer at the same or another facility. One example of this would be the not uncommon situation where one employer sells the assets used in an operation to another employer that continues or resumes the operation.

[2] For example, an employer might conduct a manufacturing operation under the same roof with shipping and administrative functions—or with another, distinct manufacturing operation. If the employer ceased the manufacturing operation (or one of the two manufacturing operations) at the facility, the cessation might come within the scope of section 4062(e), even though the employer continued its other activity at the facility.

[3] "Voluntary" as used here does not connote something desirable or preferable, but merely refers to a discontinuance of activity that is not involuntary as described below. Thus, for example, a discontinuance of activity in response to an economic downturn is considered "voluntary" because it does not fall within the description of an involuntary discontinuance.

The proposed regulation would thus provide that continuance or resumption of an operation at another facility or by another employer is to be disregarded in deciding whether a cessation has occurred.

The proposed regulation would also reflect PBGC's view that it is irrelevant whether an employer begins a new operation contemporaneously with its discontinuance of an existing operation, either at the same or another facility. A section 4062(e) event concerns itself with the cessation of one operation and the effect of that cessation on the employment of participants in the affected plan. Undertaking a second operation does not nullify the discontinuance of the first or the impact of that discontinuance on those participants. Of course, if enough of those participants were retained by the employer in connection with the new operation to avoid a drop of more than 20 percent in the active participant-count, there would be no section 4062(e) event.

Under the proposed regulation, any hope or expectation the employer may have that the discontinued work will be resumed would be irrelevant to whether the discontinuance is a cessation. A cessation does not ripen into a section 4062(e) event unless it results in a decline of more than 20 percent in the number of active participants in the affected plan. Where such a decline occurs because an employer discontinues activities constituting an operation at a facility, PBGC believes that the event should not fail to be covered by section 4062(e) because the activity may resume.

The proposed regulation would use the term "cessation date" for the date when a cessation occurs as discussed above. Since an employer's cessation of an operation at a facility is only part of what constitutes a section 4062(e) event (the other part being a resultant drop of more than 20 percent in the active participant-count), the date of a section 4062(e) event might be later than the associated cessation date.[4]

"Separation"

The fact that an employer ceases an operation at a facility does not in itself constitute a section 4062(e) event. Under section 4062(e), it must also be true that "as a result of such cessation of operations, more than 20 percent of the total number of [the employer's] employees who are participants under [the affected plan] are separated from employment." PBGC believes that "separation" as used here logically and naturally refers to separation from employment with the employer, rather than separation from employment in the operation.

Thus, PBGC believes that the requirement of separation is not satisfied if an employee is merely transferred within the employer's organization—for example, from work in the ceasing operation to work outside it—even if the transfer takes the employee out of the category of employees covered by the plan.[5] By the same token, PBGC believes that if an employer ceases an operation, but the operation is continued or resumed by a new employer, the fact that a person previously employed by the original employer continues to work in the operation as an employee of the new employer does not mean that the person has not separated from employment (with the original employer). Accordingly, the proposed regulation's discussion of separation would be couched in terms of the employment relationship between the employer and the employee.

The 60-day period within which notice of a section 4062(e) event must be given does not begin to run until a section 4062(e) event has occurred—that is, until there has been both a cessation by an employer of an operation at a facility and a separation from employment of more than 20 percent of the active participants in the affected plan. To know the reporting deadline, therefore, it is as important for the plan administrator to fix promptly the dates when participants separate from employment as it is to fix the cessation date promptly. In some cases (e.g., discharges and quits), fixing the separation date is relatively straightforward. Other cases (e.g., layoffs) may raise doubt about whether or when a separation has occurred. It is important to avoid having doubt of this kind delay decisions about whether the 20-percent threshold has been exceeded and a section 4062(e) event has thus occurred.

The proposed regulation would provide that an employee separates from employment when the employee discontinues the active performance, pursuant to the employee's employment relationship with the employer, of activities in furtherance of any of the employer's operations, unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work within 30 days—for example, after a two-week holiday shutdown. This standard would allow a plan administrator to decide immediately whether a separation occurred when an employee discontinued active work. If, however, the 30 days pass without the employee's having returned, the employee would be considered to have separated from employment when active work stopped. The focus on active performance of activities pursuant to the employment relationship would mean that continued provision of benefits to an employee, such as the continued granting of credited service for pension purposes, would be disregarded in deciding whether a separation from employment occurred.

The proposed regulation would also include a special rule under which an employee's separation before a cessation was complete would be ignored if, by the cessation date, (1) the employee was rehired or a replacement was hired, and (2) the rehired or replacement employee was a participant in the plan.

"Result"

The proposed regulation would provide that a separation from employment results from the cessation of an operation if the separation would not have occurred when it did had the cessation not occurred. Thus, for example, if an employee had been planning to retire in a year or two but chose to retire sooner upon learning of a shutdown that would eliminate her job, the separation would be the result of the shutdown; whereas if (before learning of the shutdown) she had been planning to retire immediately and retired as planned after she learned of the shutdown, the separation would not be a result of the shutdown.

The proposed regulation would provide that whether a separation occurs before, on, or after the cessation date is not considered decisive of whether the separation is the result of the cessation. An operation may not cease instantaneously, and some employees may leave before the cessation date because the operation in which they are employed is in the process of shutting down, although significant activity in furtherance of the purpose of the operation is still ongoing. Yet other employees may continue to work after the cessation date—for

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[4] For example, assume that the workers in an operation represent 21 percent of active participants in a plan and that when all activity in furtherance of the purpose of the operation stops, 19 percent (out of the 21 percent) lose their jobs but the remaining 2 percent keep working until the machinery used in the operation has been crated for disposal. A section 4062(e) event would not occur on the cessation date, but only when the over-20-percent active participant reduction requirement was satisfied.

[5] In general, such a transfer would not terminate the transferred employee's participation in the plan, although it would typically mean that the employee would accrue no further benefits under the plan.

example, disassembling machinery and guarding the premises until the plant and equipment can be sold—before they finally leave.

The proposed regulation would also provide that an employee's separation may result from the cessation of an operation at a facility even if the employee's employment has been in another operation or even at another facility. Ceasing one operation can have an impact on other operations, whether or not they also cease. For example, an employer might have one operation to assemble widgets from pre-fabricated parts, and another operation to fabricate widget parts for use in the employer's own widget manufactory or for sale to other widget manufacturers. If the employer shut down the widget assembly operation, there would be reduced demand for widget parts, the fabrication operation would cut back, and some fabrication employees would lose their jobs—as a result of the shutdown of the widget assembly operation. And if there was reduced demand for widget parts in the industry generally, the shutdown of the employer's widget assembly operation might even cause the shutdown of its fabrication operation, and thus all of the fabrication employees might be separated as a result of the shutdown of the assembly operation.

To supplement the general rule on when separation from employment results from an employer's cessation of an operation at a facility, PBGC is proposing four presumptions based on the relationship between the timing of a separation and the timing of events involved in a cessation.

The first presumption (applicable to a voluntary cessation) would be that if an employee is employed in an operation at a facility and involuntarily separates from employment on or after the date when the employer decides to cease the operation at the facility, the employee has separated from employment as a result of the cessation.

The second presumption (also applicable to a voluntary cessation) would be that if an employee in an operation at a facility voluntarily separates from employment after the employer decision to cease the operation at the facility becomes known (to the employee, to employees generally, or to the public), the separation results from the cessation.

The third presumption would be that if a cessation is involuntary, and an employee in the operation voluntarily or involuntarily separates from employment on or after the date of the event that caused the cessation, the separation results from the cessation.

The fourth presumption would be that if an employee employed in an operation becomes employed by a new employer that continues or resumes the operation, the employee has separated from employment with the original employer as a result of the cessation.

PBGC believes that these four presumptions reflect reasonable inferences and will simplify application of the proposed regulation; nonetheless, any of the presumptions could be rebutted by appropriate evidence.

"Active Participant Base"

A section 4062(e) event occurs only if "as a result of [a] cessation of operations, more than 20 percent of the total number of [the employer's] employees who are participants under [the affected plan] are separated from employment." To apply the 20-percent test, one must know the base number against which the 20 percent is measured. The statute provides that this base number is "the total number of [the employer's] employees who are participants under [the affected plan]," but it does not say as of what point in time the number is to be fixed, although one may infer that it is to be a pre-cessation number.

The formula for calculating liability for a section 4062(e) event that PBGC added to the termination liability regulation in 2006 also refers to a base number—the denominator of a fraction that is applied to total termination liability to find the liability for a section 4062(e) event. Section 4062.8(a)(2) of the current regulation describes this base number as "the total number of the employer's current employees, as determined immediately before the cessation of operations, who are participants under the plan." This description is consistent with the description of a base number in section 4062(e), and administrative convenience is clearly served by using the same number for the statutory 20-percent threshold test and for the apportionment fraction in the regulatory formula for liability.

However, the existing regulatory language—"immediately before the cessation"—does not provide as much specificity about timing as PBGC thinks desirable. PBGC thus proposes to prescribe rules that are consistent with, but more specific than, the existing statutory and regulatory language, describing when to count active participants for purposes of fixing a single base number for both the 20-percent test and the liability formula. PBGC proposes to call this number the "active participant base."

The key to PBGC's proposal is to identify when a cessation begins, and employment starts to be affected by the cessation process, so that active participants can be counted just before then. For a voluntary cessation, carried out pursuant to an employer decision, that decision marks the beginning of the cessation process, and the active participant base would be measured immediately before that decision. For an involuntary cessation, the active participant base would be measured immediately before the event that causes the cessation (strike, natural disaster, etc.).

In counting active participants, the proposed regulation would use the same formulation for describing active employment as in the provision on separation from employment: Active performance, pursuant to the employment relationship with the employer, of activities in furtherance of the employer's operations (or reasonable certainty of resuming such active work within 30 days, with a "reality check" if 30 days have passed). Thus, the active participant base would be measured on a basis consistent with the rules about measuring the number of participants who separate from employment.

In response to a public comment, PBGC's 2006 final rule prescribing the section 4062(e) liability computation formula clarified that, in calculating the denominator of the fraction in the formula (the number of employee participants immediately before the cessation), only current employees are included. The proposed formulation of the active participant base would make this point more clearly.

The proposal would also clarify that an employee need not be accruing benefits under a plan to be a participant in the plan.[6] Freezing a plan should not make the employer immune from section 4062(e).

Enforcement of Section 4062(e)

Proposed subpart B would describe two processes for PBGC to learn about section 4062(e) events: PBGC investigations and reports to PBGC by plan administrators. It would also describe the liability that arises when a section 4062(e) event occurs and how the liability is satisfied and would prescribe recordkeeping requirements. Provision would also be made for waivers in appropriate circumstances.

PBGC Investigations

Under ERISA section 4003(a), PBGC has authority to make such investigations as it deems necessary to

[6] *See* the definition of "active participant" in § 4043.23 of PBGC's regulation on Reportable Events and Certain Other Notification Requirements (29 CFR part 4043).

enforce title IV and regulations thereunder (such as the regulation under section 4062(e) that PBGC is here proposing). PBGC's section 4062(e) enforcement has been strongly supported by investigations, and PBGC expects its section 4062(e) investigatory activity to continue, notwithstanding the inclusion in the proposed regulation of detailed reporting requirements.

The investigation provision in proposed subpart B would include a deadline for responding to PBGC information requests, and failure to respond by the deadline could result in the assessment of penalties under ERISA section 4071 (*see Late filing penalties* below). There would also be a requirement to correct or update information submitted to PBGC that was or became materially wrong or outdated.

Notice Requirement

Under ERISA section 4063(a), the plan administrator of a multiple employer plan must report the withdrawal of a substantial employer from the plan to PBGC within 60 days after the withdrawal. Since section 4062(e) refers to section 4063 for the procedures to be followed for section 4062(e) events, the proposed rule would provide, consistent with the statute, that notice of a section 4062(e) event must be filed with PBGC by the plan administrator of the affected plan within 60 days. The 60 days would run from the later of the cessation date or the date when the number of active participant separations resulting from the cessation exceeds 20 percent of the active participant base.

Filing forms and instructions, including filing methods, filing addresses, required data, etc., would be posted on PBGC's Web site.[7] The proposed regulation would also provide cross-references to filing rules in PBGC's regulation on Filing, Issuance, Computation of Time, and Record Retention (29 CFR part 4000). PBGC could require submission of supplementary information, ordinarily with a 45-day response period, which could be shortened if necessary to avoid prejudice to PBGC, the plan, or participants. The affected employer would be required to furnish necessary information to the plan administrator of the affected plan. Any filed information that a filer discovered to be materially wrong or outdated would have to be promptly corrected. Thus, for example, if more employees separated from employment as a result of a cessation after the cessation had been reported to PBGC, and the number of additional separations would materially affect liability, the additional separations would have to be reported to PBGC.

To simplify section 4062(e) reporting, PBGC proposes to permit a plan administrator to disregard affected participants who were not employed at the facility where the affected operation was carried out. PBGC's experience suggests that effective and efficient enforcement of section 4062(e) is not usually best served by focusing the administrative resources of PBGC and plan administrators on tracing the effects of a cessation on employment at facilities beyond the one associated with the ceased operation. Accordingly, the proposed regulation would permit a plan administrator to ignore separations at other facilities in deciding whether a section 4062(e) event had occurred, when to file notice of an event, and how many affected participants to report in the notice. Only if PBGC specifically requested information about separations at other facilities would they need to be reported. In that case, however, or if identified in a PBGC investigation, separations at other facilities that were caused by a cessation would be counted in both the 20-percent threshold test and the liability calculation for the cessation.

Information submitted to PBGC under the proposed regulation would be protected from disclosure to the extent provided in the Freedom of Information Act and 18 U.S.C. 1905 (dealing with commercial and financial information).

Late Filing Penalties

ERISA section 4071 authorizes PBGC to assess a penalty against any person that fails to timely provide any notice or other material information required under section 4062(e) or 4063 or regulations thereunder (which would include the proposed regulation).[8] Under section 4071 and the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, the maximum penalty is currently $1,100 per day. *See* PBGC's regulation on Penalties for Failure To Provide Certain Notices or Other Material Information (29 CFR part 4071).

On July 18, 1995 (at 60 FR 36837), PBGC issued a statement of policy on penalties for failure to provide required information in a timely manner. The statement said that PBGC would—

> consider the facts and circumstances of each case to assure that the penalty fits the violation. Among the factors the PBGC will consider are the importance and time-sensitivity of the required information, the extent of the omission of information, the willfulness of the failure to provide the required information, the length of delay in providing the information, and the size of the plan.

In general, the policy statement said that PBGC would assess penalties much lower than $1,100 per day—$25 per day for the first 90 days of delinquency and $50 per day thereafter, with limitations based on plan size. However, it also said that PBGC may assess larger penalties if circumstances warrant, such as "if the harm to participants or the PBGC resulting from a failure to timely provide material information is substantial." Such "larger penalties" would of course be subject to the $1,100-per-day limitation. (The policy statement noted in particular that penalties for violations under subparts C and D of PBGC's reportable events regulation would generally be at the $1,100-per-day level.) PBGC believes similarly that violations of the notice requirement under sections 4062(e) and 4063 may well result in substantial harm to participants and PBGC, especially because of the five-year limitation on maintaining a bond or escrow under ERISA section 4063(c)(2). Thus, such violations may well warrant section 4071 penalties larger than the "general" ($25/$50-per-day) penalty, subject to the $1,100-per-day limitation.

Liability for Section 4062(e) Events

The liability formula for section 4062(e) events that PBGC added to the termination liability regulation in 2006 would be preserved under this proposed rule,[9] with clarification about how the calculation is done and some editorial changes (including rewording for consistency with terminology used in the rest of subpart B).

The proposed clarification relates to the provision (in both the existing and proposed regulation) that liability for a section 4062(e) event is based on a computation of termination liability performed as if the plan had been terminated by PBGC immediately after the cessation date. PBGC believes that termination liability for this purpose should be fixed and determinable as of

[7] The absence heretofore of a section 4062(e) event reporting form made it possible to combine a section 4062(e) event notice with a reportable event notice under §4043.23 of PBGC's reportable events regulation. PBGC's proposal to require the use of prescribed forms to file notice of section 4062(e) events would make this unworkable. However, information already submitted to PBGC in a reportable event notice would not need to be resubmitted in a section 4062(e) event notice.

[8] Section 4071 penalties are not the only applicable enforcement mechanism.

[9] In particular, no change would be made to the requirement to measure termination liability (on which section 4062(e) liability is based) as of the cessation date rather than as of the section 4062(e) event date.

the cessation date and should not take account of changes in assets or liabilities after the cessation date, such as from the receipt of contributions or the accrual of additional benefits. Ignoring post-cessation-date changes will promote simplicity and avoid the possibility that the liability calculation might differ depending on how long after the cessation date it was actually performed. This provision reflects PBGC's current practice.

PBGC proposes to remove the example in the current regulation that illustrates the computation of the fraction that is applied to termination liability to arrive at the liability that arises from a section 4062(e) event. The example was intended to make clear that the number of pre-event active participants does not include participants who are not currently working for the employer when the pre-event participant-count is measured. PBGC believes that its proposed formulation of the active participant base makes this point clear without the need for an example.

In general, PBGC proposes that it would prescribe one of the statutory methods (described in ERISA section 4063(b) and (c)(1)) for satisfying liability arising from a section 4062(e) event. However, the proposed regulation would permit the continuation of PBGC's practice, as authorized by ERISA section 4067, of negotiating with affected employers in appropriate cases on the manner in which the liability is to be satisfied, with a view to accommodating employer interests to the extent consistent with protecting the plan, participants, and PBGC as contemplated by the statute. For example, in some cases section 4062(e) liability might be satisfied through additional plan funding contributions that would not be added to the plan's prefunding balance. Or, in appropriate cases, where a new, financially sound employer continues or resumes an operation, and the original employer's workers are employed by the new employer, the proposed regulation would enable PBGC to consider the original employer's liability satisfied through the new employer's adoption of the original employer's plan (or the portion of the plan covering the affected operation).

Recordkeeping and Waivers

PBGC proposes to require that employers and plan administrators preserve records about potential section 4062(e) events that tend to show whether a section 4062(e) event in fact occurred and if so how much the resultant liability is. The recordkeeping provision would also permit PBGC to proceed on the basis of reasonable assumptions if employer or plan records were insufficient. The proposed record retention period would be five years, which matches the period for which the security provided by an employer with respect to a section 4062(e) event can be held—and thus PBGC's window for enforcing section 4062(e).

New subpart B would also include a provision explicitly authorizing PBGC to grant waivers where warranted by the circumstances. PBGC's experience with section 4062(e) enforcement suggests that PBGC may encounter situations it does not now foresee, and this waiver provision is meant to provide a measure of flexibility in interpreting and applying the law.

Provisions Not in the Rule

The proposal does not include an exemption for small plans. Such an exemption was suggested by a commenter on PBGC's 2006 rulemaking that codified the section 4062(e) liability formula. PBGC believes that the protection afforded by section 4062(e) is appropriate for small plans (and their participants) as well as for large plans. Furthermore, to the extent that small plans present less underfunding potential than large plans (and thus less potential exposure for the pension insurance system), the liability under section 4062(e) will also be less, and thus the burden of satisfying it should not be disproportionate. Finally, PBGC believes that the guidance in this proposed rule should make compliance relatively easy for small and large plans alike. These considerations militate against an exemption for small plans.

The proposal also includes no exemption for well-funded plans. As noted above for small plans, the better a plan is funded, the lower (other things being equal) would be its liability for a section 4062(e) event under the formula provided in the regulation. If a plan were so well funded that it had no termination liability under ERISA section 4062, its liability for a section 4062(e) event would be zero. But termination liability computations are complex, and PBGC would not expect plans to make such computations simply to claim exemption from the section 4062(e) event reporting requirement.

The fact that a plan is undergoing a standard termination would likewise be ignored under the proposed rule. Until distributions pursuant to a standard termination are complete, there is the possibility that plan assets will be found insufficient to complete the standard termination process and that the plan will remain ongoing. However, PBGC might forbear to pursue section 4062(e) liability where a standard termination was in process. And if distributions under a standard termination are complete by the deadline for giving notice of a section 4062(e) event, PBGC generally would not enforce the notice requirement.

Effect on Prior Opinions

PBGC has in the past issued a number of opinion letters dealing with ERISA section 4062(e).[10] While this proposed regulation does not explicitly address all details relating to section 4062(e), PBGC's intent in issuing the regulation is to set forth all of its current section 4062(e) guidance, supported by the discussion in this preamble. Accordingly, the regulation would displace and supersede all of PBGC's prior opinion letter pronouncements addressing section 4062(e).

Applicability

PBGC proposes that the amendments made by this rule apply to section 4062(e) events with cessation dates on or after the effective date of the amendments.

Compliance With Rulemaking Guidelines

E.O. 12866

The PBGC has determined, in consultation with the Office of Management and Budget, that this proposed rule is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed this proposed rule under E.O. 12866.

Regulatory Flexibility Act

PBGC certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the amendments in this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply. This certification is based on the fact that the proposed regulatory amendments require only the filing of notices and that the economic impact of filing is not significant. Furthermore, section 4062(e) is generally not relevant for small employers. Small employers tend not to have multiple operations. For a small employer with a defined benefit pension plan, the cessation of an operation almost always would be

[10] *See* for example PBGC Opinion Letters 76–8, 76–52, 77–123, 77–134, 77–147, 78–29, 82–29, 85–8, and 86–13.

accompanied by plan termination. Section 4062(e) protection is only relevant when the plan is ongoing after the cessation of operations. Since publication of PBGC's 2006 final rule on calculation of liability under section 4062(e), only a handful of the potential section 4062(e) cases reviewed by PBGC involved plans with 100 or fewer participants.

Paperwork Reduction Act

PBGC is submitting the information requirements under this proposed rule to the Office of Management and Budget for review and approval under the Paperwork Reduction Act. Copies of PBGC's request may be obtained free of charge by contacting the Disclosure Division of the Office of the General Counsel of PBGC, 1200 K Street, NW., Washington, DC 20005, 202–326–4040. The proposed information collection will also be available on PBGC's Web site.

PBGC is proposing to require that notices of section 4062(e) events be filed using a PBGC form and include the following information:

• Identifying and contact information for the affected plan, the plan administrator, other plans covering affected participants, the contributing sponsor, and members of the contributing sponsor's controlled group.

• A description of current and proposed plan provisions dealing with lump sum options, shutdowns, and early retirement benefits.

• A description of any current or proposed plan termination proceedings, plan mergers, or changes in contributing sponsor or controlled group.

• A description of the affected operation and associated facility.

• A general description of the section 4062(e) event, including whether the affected operation is to be continued or resumed by the affected employer or a new employer at the same or another facility.

• The date used to calculate the active participant base, the date of any employer decision to cease the affected operation, the date (and nature) of any event that caused the cessation (other than an employer decision), the cessation date, and the date when the number of affected participants exceeded 20 percent of the active participant base.

• A copy of any press release or other announcement of the employer's cessation decision (including any notice issued pursuant to the Worker Adjustment and Retraining Notification (WARN) Act) and the date when it was issued.

• A description of any severance or retirement incentives offered since the date one year before the date of the employer decision to cease the operation.

• The active participant base.

• The number of affected participants as of the date when the filing was prepared.

• The number of participants in the affected plan who have not separated from employment as of the date when the filing was prepared but who the employer believes will separate from employment as a result of the section 4062(e) event.

• The number of active participants in the affected plan who had separated from employment as of the date when the filing was prepared but who were not counted as affected participants.

• The name and address of each union representing affected participants.

• A copy of each collective bargaining agreement covering affected participants.

• The affected plan's most recent adjusted funding target attainment percentage (AFTAP) certification and most recent actuarial valuation report, including or supplemented by all of the information described in § 4010.8(a)(11) of PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010).

• A summary of plan amendments, significant changes in plan population, changes in plan assumptions, and amounts and dates of lump sums paid that are not reflected in the most recent actuarial valuation report.

• The market value of plan assets as of, or as close as possible to, the cessation date.

PBGC needs this information to calculate the liability arising from a section 4062(e) event and decide how that liability should be satisfied. PBGC estimates that it will receive filings from about 200 respondents each year and that the total annual burden of the collection of information will be about 1,000 hours and $350,000.

Comments on the paperwork provisions under this proposed rule should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. Although comments may be submitted through October 12, 2010, the Office of Management and Budget requests that comments be received on or before September 9, 2010 to ensure their consideration. Comments may address (among other things)—

• Whether the proposed collection of information is needed for the proper performance of PBGC's functions and will have practical utility;

• The accuracy of PBGC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhancement of the quality, utility, and clarity of the information to be collected; and

• Minimizing 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.

List of Subjects

29 CFR Part 4062

Employee benefit plans, Pension insurance, Reporting and recordkeeping requirements.

29 CFR Part 4063

Employee benefit plans, Pension insurance.

For the reasons given above, PBGC proposes to amend 29 CFR parts 4062 and 4063 as follows.

PART 4062—LIABILITY FOR TERMINATION OF SINGLE-EMPLOYER PLANS

1. The authority citation for part 4062 is revised to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1303(a), 1362–1364, 1367, 1368.

2. Section 4062.1 is revised to read as follows:

§ 4062.1 Purpose and scope.

Subpart A of this part sets forth rules for calculation and payment of the liability incurred, under section 4062(b) of ERISA, upon termination of any single-employer plan and, to the extent appropriate, calculation of the liability incurred with respect to multiple employer plans under sections 4063 and 4064 of ERISA. Subpart B of this part sets forth rules under section 4062(e) of ERISA, including rules for reporting section 4062(e) events and for calculating and satisfying liability arising from such events.

§ 4062.3 [Amended]

3. In § 4062.3, paragraph (b) is amended by removing the reference "§ 4062.9(c)" and adding in its place the reference "§ 4062.8(c)"; and by removing the reference "§ 4062.9(b)" and adding in its place the reference "§ 4062.8(b)".

§ 4062.7 [Amended]

4. In § 4062.7, paragraph (a) is amended by removing the reference "§ 4062.9" and adding in its place the reference "§ 4062.8".

§ 4062.8 [Removed]

5. Section 4062.8 is removed.

§§ 4062.9, 4062.10, and 4062.11 [Redesignated as §§ 4062.8, 4062.9, and 4062.10]

6. Sections 4062.9, 4062.10, and 4062.11 are redesignated as §§ 4062.8, 4062.9, and 4062.10 respectively.

§ 4062.1 through § 4062.10 [Designated]

7. Newly redesignated §§ 4062.1 through 4062.10 are designated as subpart A with the heading "Subpart A— General Termination Liability Rules".

8. A new subpart B is added to read as follows:

Subpart B—Treatment of Substantial Cessation of Operations

Sec.

Subpart B—Treatment of Substantial Cessation of Operations

§ 4062.21 Purpose and scope.

This subpart B provides guidance about the applicability and enforcement of ERISA section 4062(e).

§ 4062.22 Definitions.

For purposes of this subpart B:

Active participant base has the meaning described in § 4062.29.

Affected employer means an employer that ceases an operation at a facility.

Affected operation means the operation that an affected employer ceases.

Affected participant means an employee of an affected employer who is a participant in an affected plan and who separates from employment with the affected employer as a result of the affected employer's ceasing the affected operation.

Affected plan means a single-employer plan that is maintained by an affected employer, that is not a multiple employer plan, and that includes as participants employees of the affected employer who separate from employment as a result of the affected employer's ceasing the affected operation.

Cease and cessation have the meaning described in § 4062.26.

Cessation date means the date when an employer ceases an operation at a facility as described in § 4062.26.

Employer has the meaning described in § 4001.2 of this chapter.

Facility and *facility in any location* have the meaning described in § 4062.25.

Operation has the meaning described in § 4062.24.

Result has the meaning described in § 4062.28.

Section 4062(e) event has the meaning described in § 4062.23.

Separate and *separation* have the meaning described in § 4062.27.

§ 4062.23 "Section 4062(e) event."

(a) *In general.* A section 4062(e) event occurs if—

(1) An employer maintains a single-employer plan that is not a multiple employer plan;

(2) The employer ceases an operation at a facility in any location;

(3) As a result of the cessation, one or more persons who are employees of the employer and participants in the plan are separated from employment; and

(4) The number of such persons who are so separated is more than 20 percent of the active participant base associated with the cessation.

(b) *Risk disregarded.* Whether a section 4062(e) event has occurred is decided without regard to the existence or non-existence, when the event occurs or when the decision is made, of risk or apparent risk to a plan, its participants, or PBGC. However, PBGC may assess risk in making arrangements for satisfaction of liability for a section 4062(e) event.

(c) *Plan-by-plan application.* This subpart B applies separately to each plan of an affected employer.

§ 4062.24 "Operation."

An operation is a set of activities that constitutes an organizationally, operationally, or functionally distinct unit of an employer. Whether a set of activities is an operation may depend on whether it is (or similar sets of activities are) so considered or treated in the relevant industry, in the employer's organizational structure or accounts, in relevant collective bargaining agreements, by the employer's employees or customers, or by the public.

§ 4062.25 "Facility" or "facility in any location."

The facility (or facility in any location) associated with an operation is the place or places where the operation is performed. A facility is typically a building or buildings. However, a facility may be or include any one or more enclosed or open areas or structures. The same facility may be associated with more than one operation.

§ 4062.26 "Cease" and "cessation."

(a) *Voluntary cessation.* Unless paragraph (b) of this section applies, an employer is considered to cease an operation at a facility when the employer discontinues all significant activity at the facility in furtherance of the purpose of the operation.

(b) *Involuntary cessation.*

(1) *Cessation caused by employee action.* If a discontinuance of activity described in paragraph (a) of this section is caused by employee action such as a strike or sickout, then the employer is considered to cease the operation at the facility on the earlier of—

(i) The date when the employee action ends, unless within one week after that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation, or

(ii) The date when the employer decides not to resume significant activity at the facility in furtherance of the purpose of the operation.

(2) *Other involuntary cessation.* If a discontinuance of activity described in paragraph (a) of this section is caused by a sudden and unanticipated event (other than an employee action) such as a natural disaster, then the employer is considered to cease the operation at the facility on the earlier of—

(i) The date that is 30 days after the discontinuance, unless on that date the employer has resumed significant activity at the facility in furtherance of the purpose of the operation, or

(ii) The date when the employer decides not to resume significant activity at the facility in furtherance of the purpose of the operation.

(c) *Follow-on operations disregarded.* Whether an employer ceases an operation at a facility is decided without regard to whether—

(1) The operation is continued or resumed—

(i) At another facility, or

(ii) By another employer; or

(2) When the operation is discontinued, a different operation is undertaken.

§ 4062.27 "Separate" and "separation."

(a) *In general.* An employee of an employer separates from employment when the employee discontinues the active performance, pursuant to the employee's employment relationship with the employer, of activities in furtherance of any of the employer's operations, unless, when the discontinuance occurs, it is reasonably certain that the employee will resume such active work for the employer within 30 days. However, if the 30-day period passes and the employee has not resumed active work for the employer, the employee will be considered to have separated from employment when the discontinuance occurred.

(b) *Employees rehired or replaced.* If an employer ceases an operation at a facility, the separation from employment of an employee who is a participant in the affected plan is disregarded in computing the number of affected participants if the separation is before the cessation date and, as of the cessation date, either—

(1) The employee has been rehired and is an employee of the employer and a participant in the affected plan, or

(2) The employee has been replaced and the replacement is an employee of the employer and a participant in the affected plan.

§ 4062.28 "Result."

(a) *In general.* An employee separates from employment as a result of an employer's cessation of an operation at a facility if—

(1) The employee separates from employment with the employer, and

(2) The separation would not have occurred when it did if the employer's cessation of the operation at the facility had not occurred.

(b) *Circumstances not decisive.* An employee's separation from employment may result from an employer's cessation of an operation at a facility—

(1) Whether separation occurs before, on, or after the cessation date,

(2) Whether or not the employee is employed in the operation that ceases, and

(3) Whether or not the employee is employed at the facility associated with the operation that ceases.

(c) *Presumption: voluntary cessation; involuntary separation.* An employee's separation from employment with an employer is presumed to be a result of the employer's cessation of an operation at a facility if—

(1) The employee is employed by the employer in the operation,

(2) The cessation is described in § 4062.26(a) and not in § 4062.26(b), and

(3) The employee involuntarily separates from employment with the employer on or after the date of the employer decision pursuant to which the cessation occurred.

(d) *Presumption; voluntary cessation; voluntary separation.* An employee's separation from employment with an employer is presumed to be a result of the employer's cessation of an operation at a facility if—

(1) The employee is employed by the employer in the operation,

(2) The cessation is described in § 4062.26(a) and not in § 4062.26(b), and

(3) The employee voluntarily separates from employment with the employer on or after the earliest date when the employer decision pursuant to which the cessation occurred becomes known to the employee, to employees generally, or to the public.

(e) *Presumption; involuntary cessation.* An employee's separation from employment with an employer is presumed to be a result of the employer's cessation of an operation at a facility if—

(1) The employee is employed by the employer in the operation,

(2) The cessation is described in § 4062.26(b), and

(3) The employee voluntarily or involuntarily separates from employment with the employer on or after the date of the event that causes the cessation.

(f) *Presumption; employment by new employer.* An employee's separation from employment with an employer is presumed to be a result of the employer's cessation of an operation at a facility if—

(1) The employee is employed by the employer in the operation,

(2) Another employer (the "new employer") continues or resumes the operation at the same or another facility, and

(3) The employee becomes employed by the new employer.

§ 4062.29 "Active participant base."

(a) *In general.* The active participant base associated with a cessation is the total number of persons who, immediately before the applicable date in paragraph (b) of this section, were—

(1) Participants in the affected plan, and

(2) Employees of the affected employer either—

(i) Engaged in the active performance, pursuant to their employment relationship with the employer, of activities in furtherance of the employer's operations, or

(ii) Reasonably certain to resume such active work for the employer within 30 days, but a person is not counted in the active participant base under this paragraph (a)(2)(ii) if the 30-day period passes and the employee has not resumed active work for the employer.

(b) *Applicable date.* For purposes of paragraph (a) of this section, the applicable date is—

(1) For a cessation described in § 4062.26(a) and not in § 4062.26(b), the date of the employer decision pursuant to which the cessation occurred, and

(2) For a cessation described in § 4062.26(b), the date of the event that caused the cessation.

(c) "*Participant.*" For purposes of this subpart B, whether an individual is a participant in a plan at a particular time is decided without regard to whether the individual is accruing benefits under the plan at that time.

§ 4062.30 PBGC investigations.

(a) *In general.* PBGC may make such investigations as it considers necessary to enforce section 4062(e) and this subpart B and in particular to discover whether section 4062(e) events have occurred and whether notices required under § 4062.31 have been timely filed.

(b) *PBGC information requests.* If PBGC requests from any person information about any event that may be a section 4062(e) event, the person must file the requested information within 45 days after PBGC's request or within a different time specified in the request. PBGC may specify a shorter time where it finds that the interests of PBGC, participants, or the pension insurance system may be prejudiced by a delay in the receipt of the information (for example, where timely enforcement of section 4062(e) of ERISA may be jeopardized).

(c) *Duty to update or correct.* If a person that has filed information with PBGC pursuant to a request under paragraph (b) of this section discovers that any information so filed (including the number of affected participants) is materially erroneous or has become materially outdated, the person must promptly file with PBGC the correct or updated information.

(d) *PBGC determinations.* On the basis of information gleaned from an investigation or otherwise obtained, PBGC may determine that a section 4062(e) event has occurred and determine the amount of liability arising from the event.

§ 4062.31 Reporting requirement.

(a) *Notice required; who must file.* If a section 4062(e) event occurs, the plan administrator of the affected plan must file a notice of the event with PBGC. The filing of the notice constitutes a request that PBGC determine the liability with respect to the event.

(b) *When to file.*

(1) *In general.* Notice of a section 4062(e) event must be filed with PBGC within 60 days after the later of—

(i) The cessation date, or

(ii) The date when the number of affected participants is more than 20 percent of the active participant base.

(2) *Filing date; computation of time.* See subparts C and D of part 4000 of this chapter for information on ascertaining filing dates and computing periods of time.

(c) *How to file.* See §§ 4000.3 and 4000.4 of this chapter for information on how and where to file. Notice of a section 4062(e) event must be filed in accordance with PBGC's instructions for filing section 4062(e) event notices, posted on PBGC's Web site (*http://www.pbgc.gov*).

(d) *Additional information.* If PBGC requests additional information from the plan administrator of an affected plan about a section 4062(e) event of which the plan administrator has given notice, the plan administrator must file the requested information within 45 days after PBGC's request or within a different time specified in the request. PBGC may specify a shorter time where it finds that the interests of PBGC, participants, or the pension insurance system may be prejudiced by a delay in the receipt of the information (for example, where timely enforcement of section 4062(e) of ERISA may be jeopardized).

(e) *Requirement for employer to provide information.* An employer that may be an affected employer must timely provide to the plan administrator of any plan that may be an affected plan any information that the plan administrator needs—

(1) To decide whether and when a section 4062(e) event has occurred, and

(2) To file under this section.

(f) *Duty to update or correct.* If the plan administrator of an affected plan discovers or is notified by the affected employer that any information filed with PBGC under this section (including the number of affected participants) is materially erroneous or has become materially outdated, the plan administrator must promptly file with PBGC the correct or updated information.

(g) *Disregarding certain affected participants for notice purposes.* In deciding whether notice of a section 4062(e) event is required, the due date of the notice, and the number of affected participants to be reported in the notice (and any update or correction of the notice under paragraph (f) of this section), a plan administrator may disregard affected participants who were not employed at the facility associated with the affected operation. This provision does not apply to—

(1) PBGC investigations under § 4062.30, or

(2) A request under paragraph (d) of this section for information about affected participants who were not employed at the facility associated with the affected operation (or any update or correction under paragraph (f) of this section of information provided in response to such a request).

§ 4062.32 Amount of liability.

(a) *Determination of liability.* PBGC will determine the amount of liability with respect to a section 4062(e) event in accordance with this section.

(b) *Amount of liability.* The amount of liability for a section 4062(e) event is the amount that PBGC determines to be the amount described in section 4062 of ERISA for the entire affected plan, computed as if the plan had been terminated by PBGC immediately after the cessation date, multiplied by a fraction—

(1) The numerator of which is the number of affected participants, and

(2) The denominator of which is the active participant base.

(c) *Post-cessation changes disregarded.* For purposes of paragraph (b) of this section, the amount described in section 4062 of ERISA for the entire affected plan is calculated without regard to any change in the affected plan's assets or benefit liabilities after the cessation date, such as an increase in assets due to receipt of contributions after the cessation date or an increase in liabilities due to accruals after that date.

§ 4062.33 Manner of satisfying liability.

(a) *In general.* PBGC will decide in accordance with ERISA how the liability for a section 4062(e) event is to be satisfied. In general, PBGC will require that liability for a section 4062(e) event be satisfied either—

(1) By paying the amount of the liability to PBGC to be held in escrow under section 4063(b) of ERISA, or

(2) By furnishing a bond in an amount not exceeding 150 percent of the amount of the liability under section 4063(c)(1) of ERISA.

(b) *Other arrangements.* PBGC may make arrangements for satisfaction of liability for a section 4062(e) event other than those in paragraph (a) of this section. For example, in appropriate cases:

(1) PBGC may permit liability for a section 4062(e) event to be satisfied through one or more additional plan funding contributions that would not be added to the plan's prefunding balance.

(2) If an affected operation is continued or resumed by another employer (the "new employer"), and the new employer employs in the operation persons who were employed by the affected employer in the operation, PBGC may permit the liability for the section 4062(e) event to be satisfied by the new employer's adoption or maintenance of the affected plan or of a plan that holds substantially all of the liabilities and assets of the affected plan attributable to employees employed in the affected operation.

§ 4062.34 Recordkeeping.

(a) Each employer that maintains a single-employer plan that is not a multiple employer plan, and the plan administrator of each such plan, must keep for five years, with respect to any discontinuance of all significant activity in furtherance of the purpose of an operation of the employer at a facility, all records that bear on whether there was a section 4062(e) event and on the calculation of liability with respect to the event.

(b) If PBGC finds that an employer or plan administrator referred to in paragraph (a) of this section has failed to keep records sufficient to determine whether a section 4062(e) event has occurred or the amount of liability arising from such an event, PBGC may make such determination on the basis of reasonable assumptions not inconsistent with information that PBGC knows of and considers reliable.

§ 4062.35 Waivers.

PBGC may waive any provision of this subpart B to accommodate the facts and circumstances of particular cases and promote the equitable and rational interpretation and application of title IV.

PART 4063—WITHDRAWAL LIABILITY; PLANS UNDER MULTIPLE CONTROLLED GROUPS

9. The authority citation for part 4063 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3).

10. In section 4063.1, paragraph (a) is amended by revising the second sentence to read as follows:

§ 4063.1 Cross references.

(a) * * * Part 4062 also sets forth rules under section 4062(e) of ERISA, including rules for reporting section 4062(e) events and for calculating and satisfying liability arising from such events.

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Issued in Washington, DC, August 4, 2010.

Joshua Gotbaum,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2010–19627 Filed 8–9–10; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0049]
[MO-92210-0-0008-B2]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to List *Arctostaphylos franciscana* as Endangered with Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to list *Arctostaphylos franciscana* (Franciscan manzanita or San Francisco manzanita) as endangered under the Endangered Species Act of 1973, as amended, (Act) and to designate critical habitat. Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing this species may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the species is warranted. To ensure that the status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12–month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before October 12, 2010. Please note that if you are using the *Federal eRulemaking Portal* (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Daylight Savings Time on this date.

After October 12, 2010, you must submit information directly to the Field Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is -[FWS-R8-ES-2010-0049]. Check the box that reads "Open for Comment/Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct rulemaking before submitting your comment.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: [FWS-R8-ES-2010-0049]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information we receive on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Request for Information** section below for more details).

FOR FURTHER INFORMATION CONTACT: Karen Leyse, Listing Coordinator, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825; by telephone 916-414-6600; or by facsimile 916-414-6712. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on *Arctostaphylos franciscana* from governmental agencies, Native American tribes, the scientific community, industry, and any other interested parties. We seek information on:

(1) The species' biology, range, and population trends, including;

(a) Requirements for reproduction, nutrition, and habitat;

(b) Genetics and taxonomy;

(c) Historical and current range including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(3) The potential effects of climate change on this species and its habitat.

If, after the status review, we determine that listing *Arctostaphylos franciscana* is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by *A. franciscana*, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species";

(2) Where these features are currently found; and

(3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on "specific areas outside the geographical area occupied by the species" that are "essential to the conservation of the species." Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available."

You may submit your information by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://*

www.regulations.gov, your entire submission—including any personal identifying information—will be posted on the website. If you submit a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Information and supporting documentation that we received and used in preparing this finding is available for you to review at *http://www.regulations.gov*, or you may make an appointment during normal business hours at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that a petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make the finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90–day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly conduct a species status review, which we will subsequently summarize in our 12–month finding.

In considering what factors might constitute threats, we must look beyond the exposure of the species to the factor to evaluate whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure and the species responds negatively, the factor may be a threat, and we then attempt to determine how significant a threat it is. The threat is significant if it drives or contributes to the risk of extinction of the species such that the species may warrant listing as threatened or endangered as those terms are defined by the Act. The identification of factors that could impact a species negatively may not be sufficient to compel a finding that listing may be warranted. The information shall contain evidence sufficient to suggest that these factors may be operative threats that act on the species to the point that the species may meet the definition of threatened or endangered under the Act.

Petition History

On December 23, 2009, we received a petition dated December 14, 2009, from the Wild Equity Institute, the Center for Biological Diversity, and the California Native Plant Society requesting that *Arctostaphylos franciscana* be listed as endangered on an emergency basis, and that critical habitat be designated under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a). In a January 26, 2010, letter to the petitioners, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species as per section 4(b)(7) of the Act was not warranted. We also indicated that we would make an initial finding in Fiscal Year 2010 regarding whether the petition presents substantial information to indicate that listing may be warranted. This finding addresses the petition.

Previous Federal Actions

Arctostaphylos franciscana was originally proposed for listing as an endangered species under the Act in 1976 (41 FR 24524, June 16, 1976). It was included in the list of Category 1 candidates for listing in 1980, as one of the taxa retaining a high priority for addition to the list subject to confirmation of extant populations. At the time the species was thought to be extinct in the wild although known to be extant in cultivation (U45 FR 82480, December 15, 1980). It is included as a "species of concern" in the Recovery Plan for Coastal Plants of the Northern San Francisco Peninsula (USFWS 2003, p. 95). In late 2009, 62 years after the loss of the last known wild plants, one individual *A. franciscana* plant was located in the wild on the Presidio of San Francisco (the Presidio), a unit of the National Park Service's system, on the San Francisco peninsula.

Upon discovery of the plant, several Federal and State agencies, and private organizations established a conservation plan (referred to herein as Chasse *et al.* 2009) and a memorandum of agreement (MOA) (referred to herein as California Department of Transportation *et al.* 2009) to conserve the species in the wild. The Federal agencies participating in these efforts were the National Park Service and the Service. The State of California was represented by the California Department of Transportation and the California Department of Fish and Game. The Presidio Trust, a wholly-owned government corporation that manages the Presidio (71 FR 10608, March 2, 2006; NPS 2006), also participated.

Species Information

Arctostaphylos franciscana is a low, spreading to ascending evergreen shrub in the heath family (Ericaceae) that may reach 2 or 3 feet in height when mature (USFWS 2003, p. 95; Chasse *et al.* 2009, p. 5). Its leaves are about 1.5 to 2 centimeters (cm) (0.59 to 0.79 inches (in)) long, are isofacial (have the same type of surface on both sides), and are oblanceolate (longer than they are wide and wider towards the tip) (USFWS 2003, p. 57; Chasse *et al.* 2009, p. 39). Its mahogany brown fruits are about 6 to 8 millimeters (mm) (0.24 to 0.32 in) wide, while its urn-shaped flowers measure about 5 to 7 mm (0.2 to 0.28 in) long (Wallace 1993, p. 552; USFWS 2003, p. 57). A closely related species, *A. montana ravenii* (Raven's manzanita), looks similar but has a more prostrate growth habit, more rounded leaves, smaller and less reddish fruits, and smaller and more spherical flowers (USFWS 2003, pp. 55, 57). Another somewhat similar appearing species, though not as closely related, is *A. uva-ursi* (bearberry), which can be distinguished by its lack of isofacial leaves (Chasse *et al.* 2009, p. 39).

Arctostaphylos franciscana is endemic (native and restricted) to the San Francisco peninsula, California, and historically occurred in areas with serpentine soils and bedrock outcrops, typically growing in mixed populations with *A. montana ravenii* (USFWS 2003, pp. 95, 96). At one point the two plants, along with *A. montana* (Mount Tamalpais manzanita), were considered to be subspecies of *A. hookeri* (Hooker's manzanita). However, recent taxonomic revisions have established *A. montana* and *A. franciscana* as separate species, and have assigned *A. montana ravenii* as a subspecies of *A. montana*. These revisions have been based primarily on genetic comparisons, including the fact that *A. franciscana* is diploid (with 13 pairs of chromosomes) while *A. montana ravenii* is tetraploid (with 26 chromosome pairs) (USFWS 2003, p. 95; Parker *et al.* 2007, pp. 149, 150; Chasse *et al.* 2009, p. 6).

Prior to October, 2009, *Arctostaphylos franciscana* had not been seen in the wild since 1947 (Chasse *et al.* 2009, pp. 3, 7). It was originally known from three locations: the Masonic and Laurel Hill Cemeteries in San Francisco's Richmond district, and Mount Davidson in the south-central part of San Francisco (USFWS 2003, pp. 16, 62, 95; Chasse *et al.* 2009, p. 4). Unconfirmed sightings were also noted at a possible fourth location near Laguna and Haight Streets. The Masonic and Laurel Hill Cemetery sites had been converted to urban development by 1947 (Chasse *et al.* 2009, p. 7). The Mount Davidson and possibly the Laguna and Haight Streets locations were presumably lost to urbanization as well.

Prior to the loss of the wild plants, botanists collected cuttings and rooted specimens of wild *Arctostaphylos franciscana*, representing at least three genetically distinct individuals, and propagated them in botanical gardens (USFWS 2003, p. 96; Chasse *et al.* 2009, p. 7). Modern botanical collections of this plant include some of the original specimens from Laurel Hill, as well as specimens propagated vegetatively since the species was throught to have been extinct in the wild (Chasse *et al.* 2009, pp. 6-8). The specimens (both those originally from Laurel Hill and those propagated thereafter) have been successfully planted on a wide variety of soils despite the fact that historic sites in the wild are primarily underlain by serpentine outcrops (USFWS 2003, pp. 6, 96; Chasse *et al.* 2009, p. 6). Serpentine soil restricts the growth of many plants due to its high nickel and magnesium concentrations, and thus tends to support unique plant communities (Brooks 1987, pp. 19, 53; USFWS 2003, p. 16).

In October 2009, an ecologist identified a plant growing in a concrete-bound median strip along Doyle Drive in the Presidio as *Arctostaphylos franciscana* (Associated Press 2009, p. 1; Chasse *et al.* 2009 pp. 3, 4). The plant's location was directly in the footprint of a roadway improvement project designed to upgrade the seismic and structural integrity of the south access to the Golden Gate Bridge (California Department of Transportation *et al.* 2009, p. 1; Chasse *et al.* 2009, p. 10). The identification of the plant as *A. franciscana* has since been confirmed with 95 percent confidence based on morphological characteristics (Parker *et al.* 2007, p. 1; Chasse *et al.* 2009 pp. 3, 4; Vasey and Parker 2010, pp. 1, 5). Additional tests of ploidy level indicate that the plant is diploid, consistent with *A. franciscana* (Vasey and Parker 2010, p. 6). Preliminary results from molecular genetic data also increase the confidence that the plant belongs to *A. franciscana*, although genetic analysis shows evidence that the plant is a descendant of a distant hybridization event, a situation that is thought to be quite common in the genus (Vasey and Parker 2010, pp. 1, 7). Based on the best available scientific information we consider the species to be *A. franciscana*.

Several agencies, including the Service, established an MOA and conservation plan for the species (see **Previous Federal Actions** section above). The conservation partners concluded it was not feasible to leave the plant undisturbed at its original site, due to impacts on public safety and to cultural resources related to a potential curtailment or redesign of the roadway improvement project (Chasse *et al.* 2009, pp. 9, 10).

The conservation plan recommended that the plant be moved to a new site within the Presidio. The plan included measures to take cuttings from the plant, both from non-rooted stems and from layering stems (stems which have rooted at their leaf nodes), for vegetative propagation (Chasse *et al.* 2009, pp. 10-16, 40-42). The plan also called for collection and eventual propagation of seeds (including seeds in the soil around the plant's original location), and for genetic testing of resulting plants (since seeds fertilized in the wild would likely produce hybrids). Additionally, because the roots of most *Arctostaphylos* individuals establish a mutually beneficial association with species of mycorrhyzal fungus living in the soil, the conservation plan established means by which the soil for propagating cuttings and seeds should be inoculated with spores from such fungi. The plan also evaluated potential translocation sites, established procedures for preparation of the new site and for the translocation itself, and called for management and monitoring (both short- and long-term) of the translocated plant and all newly propagated plants, with the goal of eventually establishing self-sustaining populations of the species in the wild (Chasse *et al.* 2009, pp. 23-27, 29-30).

The translocation of the *Arctostaphylos franciscana* plant to an active native plant management area of the Presidio was accomplished, apparently successfully and according to plan, on January 23, 2010 (Chasse *et al.* 2009, pp. 20, 23-25; Chronicle 2010, p. 1). Subsequent monitoring reports indicate the plant continues to do well at its new location (Yam 2010b, pp. 1, 3-14).

Evaluation of Information for this Finding

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this 90–day finding, we evaluated whether information regarding threats to *Arctostaphylos franciscana*, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petitioned action may be warranted. Our evaluation of this information is presented below.

A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range.

Information Provided in the Petition

The petition asserts that *Arctostaphylos franciscana* is within the footprint of, and threatened by, the Doyle Drive project, a multiyear road design project at the south access to the Golden Gate Bridge (Plater 2009, p. 4).

Evaluation of Information Provided in the Petition and Available in Service Files

Chasse *et al.* (2009, p. 3, 4) note that prior to discovery of *Arctostaphylos franciscana* at Doyle Drive, the overstory shrubs and trees that sheltered the plant had been removed in preparation for the road construction project, thereby uncovering the plant and exposing it to new environmental conditions. Planned road construction activities at the site were scheduled to result in the imminent loss of the plant's existing habitat, due to the plant's location directly in the footprint of the planned northbound roadway and associated abutment wall (Chasse *et al.* 2009, pp. 9, 10). Analysis of protection options for the species found that project and location constraints precluded protection of the plant *in situ*

(Chasse *et al.* 2009, p. 10). Therefore, shortly prior to the expected destruction of the plant's habitat, the plant was translocated to a preselected site on the Presidio (Chasse *et al.* 2009, pp. 9, 10; Yam 2010a, p. 1).

Additionally, the species has been reduced to the single remaining wild plant because of loss of its original habitat at all other known locations (Chasse *et al.* 2009, p. 7). Therefore, we have determined that the petition and information in our files present substantial information to indicate listing *A. franciscana* may be warranted due to destruction or modification of the species habitat.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.

Information Provided in the Petition

The petition asserts that during the last 60 years a robust nursery trade has been established for the species, and that "unregulated propagation and trade of the species in the commercial market may have a detrimental impact on reintroduction and conservation efforts by undermining the genetic stock of the species." This assertion will be addressed under Factor E below. The petition does not contain any assertions regarding overutilization of the species for commercial, recreational, scientific, or educational purposes.

Evaluation of Information Provided in the Petition and Available in Service Files

Neither the petition nor information in our files presents information indicating that overutilization of *Arctostaphylos franciscana* for commercial, recreational, scientific, or educational purposes is a threat. Therefore, we find that the petition does not present substantial information to indicate that overutilization for commercial, recreational, scientific, or educational purposes may present a threat to *A. franciscana.* However, we intend to assess this factor more thoroughly during the status review for the species.

C. Disease or Predation.

Information Provided in the Petition

The petition asserts that the single wild specimen of *Arctostaphylos franciscana* may become more susceptible to various plant diseases due to the stress of translocation. No information was presented regarding a potential threat of predation on the species.

Evaluation of Information Provided in the Petition and Available in Service Files

Chasse *et al.* (2009, pp. 26-29) acknowledge that stress and disease are threats to the plant, and established monitoring and management protocols to help address them. The disease specifically mentioned in the conservation plan is crown rot, which is a common disease of manzanita and is discussed specifically in the context of outplanting the *A. fransiscana* progeny (rooted seedlings and cuttings, and layered plants) to wild locations (Chasse *et al.* 2009, p. 17), although an implication is that transplantation itself may cause a manzanita to be more susceptible to crown rot if it is planted so deeply that the crown receives too much moisture. A fungal infection called twig blight is also a potential concern, particularly during wet years (USFWS 2003, p. 69). The authors of the conservation plan did not specifically link the stress of translocation to an increased susceptibility to disease. However, we consider this to be a reasonable concern due to general knowledge of plant physiology, which indicates that plants subject to environmental stressors may become more susceptible to disease organisms (Ohio State University Extension 1998, p. 1). Therefore, we have determined the petition and information in our files presents substantial information to indicate increased susceptibility to disease due to translocation may be a threat to *Arctostaphylos franciscana.*

D. The Inadequacy of Existing Regulatory Mechanisms.

Information Provided in the Petition

The petition asserts that there are currently no regulatory mechanisms protecting *Arctostaphylos franciscana.*

Evaluation of Information Provided in the Petition and Available in Service Files

No existing regulatory mechanisms establish legal consequences for harming the last known wild specimen of the species or its habitat, or for harming any other such wild specimens that may be established or found to exist. The species is not listed under the California Endangered Species Act or the Native Plant Protection Act as rare, threatened, or endangered (California Fish and Game Code, sections 1904, 2074.2 and 2075.5; California Department of Fish and Game 2010, pp. 1–2). The conservation plan and MOA are not regulatory in nature and are not legally enforceable by third parties (California Department of Transportation 2009, p. 8; Chasse *et al.* 2009, p. 3). While the last wild specimen is relatively safe in its new location on National Park Service land from additional roadway improvement projects or urban development, we are not aware of any regulatory mechanisms prohibiting damage to the specimen at the site, or requiring that the welfare of the specimen be taken into account should the land on which it is located ever be transferred to a new owner. The National Environmental Policy Act of 1969, as amended (NEPA), requires all Federal agencies to formally document, consider, and publicly disclose the environmental impacts of major Federal actions and management decisions significantly affecting the human environment. However, NEPA does not require mitigation for impacts.

We have determined the petition and information in our files presents substantial information to indicate the lack of regulatory mechanisms that would control other threats such as intentional or unintentional harm of the species may be a threat to *Arctostaphylos franciscana.*

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence.

Information Provided in the Petition

The petition asserts under Factor A that the species is threatened by the translocation of the single remaining wild plant from its original location. The petition also asserts under Factor B that propagation and trade of the species in the commercial market may undermine the genetic stock of the species. Finally, the petition asserts that potential threats to the species exist due to climate change, unregulated off-leash dog walking, trampling or disturbance by people attending special events in the Presidio, and stochastic (chance) events.

Evaluation of Information Provided in the Petition and Available in Service Files

The authors of the conservation plan acknowledge that cultivars of *Arctostaphylos franciscana* likely descended from some of the last wild *A. franciscana* plants known to exist in the 1940s, are available in commercial trade, and are "popular with home gardeners" (Chasse *et al.* 2009, p. 8). Since hybridization between diploid species of manzanita (such as *A. franciscana)* is well recognized (Chasse *et al.* 2009, p. 5), there is a good chance that many of these commercially available specimens result from hybridization. Accordingly, any propagation or reintroduction programs for *A. franciscana* must account for the threat of cross pollination from hybrids or other species, and subsequent genetic contamination and swamping of the *A. franciscana* gene pool (Allendorf *et al.* 2001, pp. 613, 618-621). The conservation plan does take this into account by recommending that future outplantings of nursery-raised plants avoid areas that could facilitate cross pollination (Chasse *et al.* 2009, p. 31), but additional plans will be needed to work out the details.

We agree that climate change may cause presently suitable habitat to become unsuitable for endemic California plants in general, due to projected changes in temperature and rainfall (Loarie *et al.* 2008, pp. 1-2). The ability of *Arctostaphylos franciscana* to track future climate changes by establishing new plants in new habitat may be limited because of its historic association with serpentine and greenstone bedrock outcrops (USFWS 2003, pp. 95, 96). However, the current ability of modeling to predict specific changes in climate at a scale that is meaningful to the species is extremely limited. The petition did not provide substantial information, nor did we have information in our files, to indicate climate change is a threat to the species.

We agree that trampling by dogs or people could impact the species if the wild specimen, or any herbarium-raised future specimens, were to be placed in areas subject to regular foot or dog traffic, but neither the petition nor any information in our files provides substantial information to indicate that this has occurred or is likely to occur. The petition asserts that special events can draw tens of thousands of people to the Presidio, but does not provide substantial information to indicate that any such events are likely to occur near the translocated wild plant or near any herbarium-grown plants that may be translocated to the Presidio in the future.

Despite the fact that the translocation has already been accomplished (Chronicle 2010, p. 1; Yam 2010b, pp. 1, 4), we still do not know whether the plant will persist over time and reproduce. Chasse *et al.* (2009) acknowledge that translocation of the mature plant is "very risky" (Chasse *et al. 2009*, p. 15), and that the translocated plant will require careful monitoring and management by an experienced manzanita horticulturist to increase its chance of survival (Chasse *et al. 2009*, p. 26). The translocated wild plant has been planted in an active native plant management area and is protected from public access by a cable and post fence (Chasse *et al.* 2009, p. 20). It was also monitored every day for the first 10 days at its new location (Yam 2010b, pp. 4-13), and is scheduled to be monitored weekly until November 1, 2010, and monthly thereafter for the following 2 years (Chasse *et al.* 2009, pp. 27, 28).

We agree that stochastic events may constitute a threat to the species. Because the known population of *Arctostaphylos franciscana* in the wild is currently limited to a single plant, the population may be considerably vulnerable to stochastic events, normal but randomly occurring environmental perturbations and catastrophes such as droughts, floods, and fires, from which large, wide ranging populations can generally recover, but which extirpate small isolated populations (Gilpin and Soule 1986, pp. 25-31). Therefore, we have determined that the petition and information in our files do present substantial information regarding threats from translocation of the species, from cross pollination with other *Arctostaphylos* species, and from stochastic events to indicate that listing may be warranted.

Finding

On the basis of our evaluation of the information presented under section 4(b)(3)(A) of the Act, we have determined that the petition presents substantial scientific or commercial information indicating that listing *Arctostaphylos franciscana* throughout its entire range may be warranted. This finding is based on information provided under factors A, C, D, and E.

Because we have found that the petition presents substantial information indicating that *Arctostaphylos franciscana* may be at risk of extinction now or in the foreseeable future and, therefore, listing under the Act may be warranted, we are initiating a status review to determine whether listing *A. franciscana* under the Act is warranted.

The "substantial information" standard for a 90–day finding differs from the Act's "best scientific and commercial data" standard that applies to a status review to determine whether a petitioned action is warranted. A 90–day finding does not constitute a status review under the Act. In a 12–month finding, we will determine whether a petitioned action is warranted after we have completed a thorough status review of the species, which is conducted following a substantial 90–day finding. Because the Act's standards for 90–day and 12–month findings are different, as described above, a substantial 90–day finding does not mean that the 12–month finding will result in a warranted finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this document are staff members of the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 27, 2010

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2010–19429 Filed 8–9–10; 8:45 am]

BILLING CODE S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 680

[Docket No. 0910051335–0171–01]

RIN 0648–AY28

Groundfish Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea/Aleutian Islands Crab Rationalization Program; Recordkeeping and Reporting

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed action removes the Crab Rationalization Program requirements for catcher/processors to weigh all offloaded crab on a state-approved scale that produces a printed record and to report this information at the time of offload to NMFS on a catcher/processor offload report. NMFS has determined that these requirements are no longer necessary. This proposed action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable laws.

DATES: Comments must be received no later than August 25, 2010.

ADDRESSES: You may submit comments, identified by RIN 0648–AY28, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*
- Fax: 907–586–7557, Attn: Ellen Sebastian.
- Mail: P.O. Box 21668, Juneau, AK 99802.
- Hand Delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Electronic copies of this rule, the Regulatory Impact Review (RIR), and the categorical exclusion memorandum may be obtained from the Alaska Region website at *http://alaskafisheries.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS Alaska, Sustainable Fisheries Division, e-mailed to *David_Rostker@omb.eop.gov*, or faxed to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Patsy A. Bearden, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. crab fisheries under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP). The FMP was prepared by the North Pacific Fishery Management Council under the Magnuson-Stevens Act. Regulations implementing the FMP appear at 50 CFR parts 679 and 680. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

Background

The Crab Rationalization (CR) Program is a limited-access system that allocates crab managed under the FMP among harvesters, processors, and coastal communities. Currently, NMFS requires that all crab individual fishing quota (IFQ) harvested and processed by catcher/processors be weighed at sea prior to processing and that crab weights be reported to NMFS on an IFQ crab landings report (see § 679.5(e)(8)). The weights reported on the IFQ crab landings report are used to debit crab IFQ from a quota holder's account. In addition, catcher/processors are required to weigh the crab again when it is offloaded from the vessel and report this weight to NMFS on a catcher/processor offload report (see § 680.5(e)).

The original purpose of the offload report was to provide information so that NMFS could audit the IFQ crab landing reports. Completing this report requires a crab catcher/processor to offload all crab-processed product shoreside at a designated port and weigh that product on a scale approved by the state in which the crab is removed from the vessel. The offload report must be completed when crab are offloaded from the vessel and a scale printout showing gross product offload weight must be attached to the offload report. The weight reported on the offload report includes not only the weight of crab but also the weight of packaging, pallets, and glaze. While deductions for these items can be made, the deductions create variance in the total weight of crab landed shoreside. For this reason, NMFS has found it difficult to use the weights from the offload report to audit the weight obtained from the at-sea hopper scales as originally intended.

Advancements in at-sea reporting of crab catch (eLandings) and the improved reliability of the at-sea motion-compensated hopper scales have changed the need for CR catcher/processors to report offloads. Catcher/processors use eLandings to report total harvest of crab to NMFS weekly while at sea, which provides NMFS with up-to-date accounting of total crab harvested. Motion-compensated hopper scales provide reliable, independent estimates of the total catch by quota sector for all crab harvested.

Removal of the regulatory requirements for CR catcher/processors to weigh offloaded crab product and submit offload reports does not diminish NMFS' ability to verify reported CR crab catch weight. NMFS still requires that all crab be weighed at sea and scale weights of crab be submitted to NMFS on eLandings weekly reports. Alaska Department of Fish and Game (ADF&G) observers are onboard crab vessels and have the opportunity to observe hopper scale activities for consistency with the regulatory requirement that vessels weigh all landed CR crab. NOAA Fisheries Office for Law Enforcement (OLE) uses eLandings weekly reports, the printouts from the hopper scales showing the total weight of crab harvested, and additional auditing methods to verify CR quota accounting instead of using the catcher/processor offload reports. Further, even without the requirement to weigh and report the gross weight of offloaded product, the OLE will still have the authority and ability to conduct a full audit of offload weights to verify reported crab catch weight.

Specifically, this proposed rule would remove the requirement at § 680.5(e) for the owner or operator of a catcher/processor to complete and submit to NMFS–at the time of offload of CR crab–a catcher/processor offload report with its attached scale printout showing gross product offload weight. It also would remove § 680.5(a)(2)(i)(H) because it only serves as a cross-reference to § 680.5(e), which would be removed. This rule also would remove the requirement at § 680.23(b)(4) for catcher/processors to weigh all offloaded CR Program crab on a state-approved scale.

Classification

Pursuant to the Magnuson-Stevens Act, the NMFS Assistant Administrator for Fisheries has determined that this proposed rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This rule would relieve restrictions by removing weighing and reporting requirements under the CR Program that NMFS has determined are no longer necessary for management and monitoring of the crab fisheries. Adequate information about the weight of crab harvested by catcher/processors under the CR Program is available under regulations that govern the weighing and reporting of crab catch on the IFQ landing report. The reports to be removed by this action were first implemented at the inception of the CR fisheries and were intended to be used primarily for purposes of auditing IFQ landing reports. However, with more experience managing those fisheries and advances in electronic reporting, NMFS has determined that these requirements are no longer necessary. Removing these requirements would relieve restrictions on the industry and would reduce costs to both the industry and NMFS.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the

Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

Factual Basis for Certification

Estimate of Economic Impact on Small Entities by Entity Size and Industry

The impacts of this action have been evaluated in the accompanying Regulatory Impact Review (RIR). The proposed regulatory changes would remove reporting requirements for directly regulated entities. The estimated costs of the current requirement imposed on directly regulated entities are small (on the order of $25 per report and the fleet of four to six vessels submits a total of about 18 such reports, annually). Thus, because the action would remove a regulatory requirement and decrease compliance costs for directly regulated entities, this proposed action is not expected to have a significant adverse economic impact on any directly regulated small entities.

Description and Estimate of the Number of Small Entities to Which the Rule Applies

The number of active crab catcher/processors changes annually. As noted above, from four to six vessels have submitted these reports in recent years. In 2009, there were five crab catcher/processors. An analysis of operation gross revenues from all Alaskan sources indicates that only one of these is a small entity under RFA criteria (total gross revenues from all sources less than $4 million). While this vessel would be affected by this action, one vessel would not constitute a substantial number of small entities.

Criteria Used to Evaluate Whether the Rule Would Impose "Significant Economic impacts"

The two criteria recommended to determine the significant economic impact of the action are disproportionality and profitability. The proposed action would not place a substantial number of small entities at a disadvantage, relative to large entities. The proposed action would not have disproportionate impacts on small entities.

The proposed action would not adversely affect the profitability of any small entity. Indeed, the proposed action would "remove" a reporting burden and, as such, would "reduce" economic costs imposed upon directly regulated small entities.

Criteria Used to Evaluate Whether the Rule Would Impose Impacts on "a Substantial Number" of Small Entities

NMFS' Guidelines for Economic Review of National Marine Fisheries Service Regulatory Actions (*https://reefshark.nmfs.noaa.gov/f/pds/publicsite/documents/procedures/0111105.pdf*) explain that the term "substantial number" has no specific statutory definition and the criterion does not lend itself to objective standards applicable across all regulatory actions. Rather, "substantial number" depends upon the context of the action, the problem to be addressed, and the structure of the regulated industry. The Small Business Administration casts "substantial" within the context of "more than just a few" or *de minimis* ("too few to care about" criteria).

Description of and Basis for Assumptions Used

The proposed rule would not impose adverse economic impacts on any of these entities. The economic analysis contained in the RIR further describes the potential size, distribution, and magnitude of the economic impacts that this action may have on small entities. Based upon that analysis and the foregoing, NMFS finds that the proposed action would not have a significant economic impact on the small entities participating in these fisheries. As a result, an initial regulatory flexibility analysis is not required, and none has been prepared.

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

Collection-of-information Requirements

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by the Office for Management and Budget (OMB) under OMB Control No. 0648–0570.

Public reporting burden per response is estimated to average 20 minutes for a catcher/processor crab offload report. This proposed rule would remove this offload report and the associated reporting burden.

These estimates of public reporting burden include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

Send comments regarding this burden estimate or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES); e-mail to *David_Rostker@omb.eop.gov* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 680

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: August 4, 2010.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 680 is proposed to be amended as follows:

PART 680—SHELLFISH FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

1. The authority citation for part 680 continues to read as follows:

Authority: 16 U.S.C. 1862; Pub. L. 109–241; Pub. L. 109–479.

§ 680.5 [Amended]

2. In § 680.5, remove and reserve paragraph (a)(2)(i)(H) and paragraph (e).

3. In § 680.23, revise paragraph (b)(4) to read as follows:

§ 680.23 Equipment and operational requirements.

* * * * *

(b) * * *

(4) Offload all CR crab product processed onboard at a shoreside location in the United States accessible by road or regularly scheduled air service; and

* * * * *

§ 680.23 [Amended]

4. At each of the locations shown in the "Location" column, remove the phrase indicated in the "Remove" column and replace it with the phrase indicated in the "Add" column for the number of times indicated in the "Frequency" column.

Location	Remove	Add	Frequency
§ 680.23(f)(3)(i)	delivery or offload are	delivery are	1
§ 680.23(f)(3)(ii)	CR crab or an offload of CR crab product must	CR crab must	1

[FR Doc. 2010–19728 Filed 8–9–10; 8:45 am]
BILLING CODE 3510–22–S

Notices

Federal Register

Vol. 75, No. 153

Tuesday, August 10, 2010

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

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0071]

Notice of Request for Extension of Approval of an Information Collection; Credit Account Approval for Reimbursable Services

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with credit account approval for reimbursable services.

DATES: We will consider all comments that we receive on or before October 12, 2010.

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

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0071*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2010-0071, 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-2010-0071.

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: For information on credit account approval for reimbursable services, contact Mrs. Kris Caraher, User Fees Section Head, Financial Management Division, MRBBS, APHIS, 4700 River Road Unit 55, Riverdale MD 20737; (301) 734-5743. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION: *Title:* Credit Account Approval for Reimbursable Services.

OMB Number: 0579-0055.

Type of Request: Extension of approval of an information collection.

Abstract: The services of a Federal inspector to clear imported and exported agricultural commodities for animal and plant health purposes are paid for by user fees during regular working hours. If an importer wishes to have shipments cleared at other hours, such services will usually be provided on a reimbursable overtime basis, unless already covered by a user fee. Exporters wishing cargo to be certified during nonworking hours may also utilize this procedure.

Many importers and exporters who require inspection services are repeat customers who request that we bill them. We need to collect certain information to conduct a credit check on prospective applicants to ensure creditworthiness prior to extending credit services and to prepare billings. Also, the Debt Collection Improvement Act of 1996, as amended (31 U.S.C. 3332), requires that agencies collect tax identification numbers from all persons doing business with the Government for purposes of collecting delinquent debts. APHIS Form 192 is used to collect this information and must be completed before credit is extended.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(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 our 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.25 hours per response.

Respondents: Importers, exporters, or brokers who wish to set up an account for billing of inspection services provided during nonworking hours.

Estimated annual number of respondents: 132.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 132.

Estimated total annual burden on respondents: 33 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.)

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.

Done in Washington, DC, this 4th day of August 2010.

Gregory Parham

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–19692 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0072]

Notice of Request for Extension of Approval of an Information Collection; Veterinary Services; Customer Service Survey

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request extension of approval of an information collection to evaluate service delivery by Veterinary Services to the public.

DATES: We will consider all comments that we receive on or before October 12, 2010.

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

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0072*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2010-0072, 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-2010-0072.

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: For information on the Veterinary Services customer service survey, contact Ms. Pam Hart, Management Analyst, Veterinary Services, 920 Main Campus Drive, Suite 200, Raleigh NC 27606; (919) 855-7250; or email (*pamela.j.hart@aphis.usda.gov*). For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION: *Title:* Veterinary Services; Customer Service Survey.

OMB Number: 0579-0334.

Type of Request: Extension of approval of an information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture, among other things, regulates, and provides services related to, the importation, interstate movement, and exportation of animals, animal products, and other articles to prevent the spread of pests and diseases of livestock. Veterinary Services (VS), APHIS, is the program unit that carries out these activities to protect animal health.

In an effort to evaluate service delivery, VS conducts a survey to evaluate its customer service to the public. The survey is in the form of a short questionnaire that VS presents to individuals who use its services. Completion of the questionnaire is voluntary, and responses do not identify the individual respondent. Respondents are asked to identify the type of customer they are (e.g., animal/animal product producer, animal importer/exporter), and then to rate the services received in terms of courtesy, timeliness, helpfulness, etc., as well as the overall experience. The questionnaire also allows respondents to provide comments.

The information collected is used to identify areas in which VS can improve service delivery to the public and more efficiently meet the needs and expectations of customers.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

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

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

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.0458 hours per response.

Respondents: Members of the public who receive services from Veterinary Services.

Estimated annual number of respondents: 5,000.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 5,000.

Estimated total annual burden on respondents: 229 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.)

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.

Done in Washington, DC, this 4th day of August 2010.

Gregory Parham

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–19693 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0067]

Notice of Request for Extension of Approval of an Information Collection; U.S. Origin Health Certificate

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request extension of approval of an information collection associated with the export of animals and animal products from the United States.

DATES: We will consider all comments that we receive on or before October 12, 2010.

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

• Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0067*) to submit or view comments and to view supporting and related materials available electronically.

• Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2010-0067, 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-2010-0067.

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: For information on the export of animals and animal products from the United States, contact Dr. Antonio Ramirez, Senior Staff Veterinarian, Technical Trade Services Team - Animals, NCIE, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 734-8364. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION:

Title: U.S. Origin Health Certificate.

OMB Number: 0579-0020.

Type of Request: Extension of approval of an information collection.

Abstract: The export of agricultural commodities, including animals and animal products, is a major business in the United States and contributes to a favorable balance of trade. The U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Veterinary Services (VS) maintains information regarding the import health requirements of other countries for animals and animal products exported from the United States, as most countries require a certification that our animals are free from specific diseases and show no clinical evidence of disease. This certification must carry the USDA seal and be endorsed by an APHIS, APHIS accredited, or State veterinarian. VS Forms 17-140/17-140A, U.S. Origin Health Certificate/Continuation Sheet, and VS Form 17-145, U.S. Origin Health Certificate for the Export of Horses from the United Sates to Canada, are used to meet the certification requirements of other countries. In addition, other information collection activities used for the export of animals and animal products may include: Environmental certification for export facilities; notarized statements; documentation of undue hardship for animals departing from a specific export location; requests regarding approval or withdrawal of approval of export facilities; and recordkeeping for modification of rail stanchions on vessels.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

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

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

(4) Minimize the burden of the information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.4999639 hours per response.

Respondents: Accredited veterinarians; sheep, goat, and horse owners/facility operators; exporters; and owners of ocean vessels used to export livestock from the United States.

Estimated annual number of respondents: 2,056.

Estimated annual number of responses per respondent: 13.5.

Estimated annual number of responses: 27,756.

Estimated total annual burden on respondents: 13,877 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.)

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.

Done in Washington, DC, this 4th day of August 2010.

Gregory Parham

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–19685 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0070]

Notice of Request for Revision and Extension of Approval of an Information Collection; Importation of Live Swine, Pork, and Pork Products from Certain Regions Free of Classical Swine Fever in Chile and Mexico

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to revise an information collection associated with regulations for the importation of live swine, pork, and pork products from certain regions free of classical swine fever in Chile and Mexico and to request extension of approval of the information collection.

DATES: We will consider all comments that we receive on or before October 12, 2010.

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

• Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0070*) to submit or view comments and to view supporting and related materials available electronically.

• Postal Mail/Commercial Delivery: Please send one copy of your comment to Docket No. APHIS-2010-0070, 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-2010-0070.

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: For information on regulations for the importation of live swine, pork, and pork products from regions free of classical swine fever in Chile and Mexico, contact Dr. Magde Elshafie, Staff Veterinarian, Technical Trade Services Team—Products, NCIE, VS, APHIS, 4700 River Road Unit 40, Riverdale MD 20737; (301) 734-5259. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851-2908.

SUPPLEMENTARY INFORMATION: *Title:* Importation of Live Swine, Pork, and Pork Products from Certain Regions Free of Classical Swine Fever in Chile and Mexico.

OMB Number: 0579-0230.

Type of Request: Revision and extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. The regulations are contained in title 9, parts 92 through 98, of the Code of Federal Regulations.

Part 94 allows the importation, subject to certain conditions, of live swine, pork, and pork products from certain regions that are free of classical swine fever (CSF) in Chile and Mexico to prevent the introduction of CSF into the United States. These conditions involve information collection activities, including certificates, cooperative agreements, and cooperative service agreements.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities for an additional 3 years.

This information collection includes information collection requirements approved under OMB control numbers 0579-0230, Importation of Live Swine, Pork, and Pork Products From Eight Mexican States; 0579-0235, Classical Swine Fever Status of Chile; and 0579-0333, Importation of Pork and Pork Products. After OMB approves and combines the burden for the three collections under a single collection, Importation of Live Swine, Pork, and Pork Products from Certain Regions Free of Classical Swine Fever in Chile and Mexico (0579-0230), the Department will retire numbers 0579-0235 and 0579-0333.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(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 our 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Federal animal health officials of the Governments of Chile and Mexico.

Estimated annual number of respondents: 11

Estimated annual number of responses per respondent: 7.82

Estimated annual number of responses: 86.

Estimated total annual burden on respondents: 86 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.)

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.

Done in Washington, DC, this 4th day of August 2010.

Gregory Parham

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–19689 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–34–S

DEPARTMENT OF AGRICULTURE

Forest Service

Kaibab National Forest; Arizona; Uranium Exploratory Drilling Project

AGENCY: Forest Service, USDA.

ACTION: Notice; correction.

SUMMARY: This is a correction to a notice of intent to prepare an Environmental Impact Statement for the Uranium Exploratory Drilling Project, posted in the **Federal Register** Vol. 73, No. 198 on October 10, 2008 to give notice that preparation of the Environmental Impact Statement has been put on hold, as VANE Minerals, Inc. has withdrawn their Plan of Operation (PoO).

DATES: Further work on the analysis will be suspended until VANE Minerals, Inc. resubmits their PoO, which is expected to occur in the summer of 2011.

ADDRESSES: Questions on this notice may be mailed or hand-delivered to Kaibab National Forest, Attn: VANE Minerals Uranium Exploratory Drilling Project, 800 S. 6th St., Williams, AZ 86046. Questions may also be submitted by facsimile to (928) 635–8208 and by electronic mail (e-mail) to: *comments-southwestern-kaibab@fs.fed.us*. E-mail and facsimile comments must include the words "VANE Minerals Uranium Exploratory Drilling Project."

FOR FURTHER INFORMATION CONTACT: For further information on the VANE Minerals Uranium Exploratory Drilling Project (Project), please contact Tom Mutz, Lands and Minerals Staff Officer, in writing at Williams and Tusayan Ranger Districts, 742 S. Clover Rd., Williams, AZ 86046 or by telephone at (928) 635–5600. Questions regarding the Forest Service NEPA process may be directed to Alvin Brown, Forest NEPA Coordinator, at 800 S. 6th St., Williams, AZ 86046 and telephone (928) 635–8200.

Dated: August 2, 2010.

Michael R. Williams,

Forest Supervisor, Kaibab National Forest.

[FR Doc. 2010–19545 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

San Juan National Forest Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The San Juan National Forest Resource Advisory Council (RAC) will meet in Durango, Colorado. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purpose of the meeting is to gather the newly appointed Committee members together to elect a Chair, determine operating principles and organize to review project proposals and recommend allocations of Title II funds within Archuleta, Dolores, La Plata, and Montezuma counties, Colorado.

DATES: The meeting will be held Wednesday, September 8, 2010, 9 a.m.–4 p.m.

ADDRESSES: The meeting will be held at the San Juan Public Lands Center, 15 Burnett Court, Durango, Colorado in the Sonoran Meeting Room. Written comments should be sent to *Attn:* San Juan National Forest RAC, 15 Burnett Court, Durango, CO 81301. Comments may also be sent via e-mail to *abond@fs.fed.us* or via facsimile to Attn: Ann Bond, RAC Coordinator at 970.385.1219.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at *http://www.fs.fed.us/r2/sanjuan.*

FOR FURTHER INFORMATION CONTACT: Ann Bond, San Juan National Forest RAC Coordinator, 970.385.1219 or *e-mail: abond@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public, with legal notices published in local papers of records for the involved counties, along with public announcements. The following business will be conducted: The newly appointed Committee members will gather together and meet for the first time, address questions about the roles of members, support of the committee and other pertinent information, elect a chairperson, determine operating principles for the RAC and organize to review project proposals and recommend allocation of Title II funds within Archuleta, Dolores, La Plata and Montezuma counties, Colorado.

Persons who wish to bring related matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. A public comment period will be provided from 2–3 p.m.

Dated: August 3, 2010.

Bill Dunkelberger,

Deputy Forest Supervisor/San Juan Public Lands, San Juan National Forest RAC DFO.

[FR Doc. 2010–19697 Filed 8–9–10; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: NOAA Constituent Engagement Survey.

OMB Control Number: None.

Form Number(s): NA.

Type of Request: Regular submission (new information collection).

Number of Respondents: 650.

Average Hours per Response: 20 minutes.

Burden Hours: 217.

Needs and Uses: On August 9, 2007, President Bush signed legislation into law the America COMPETES (*America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education and Science Act,* Pub. L. 110–69), which seeks to strengthen education and research related to science and technology ("America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act"). This legislation is significant for NOAA, granting the agency a mandate to engage in agency-wide education and outreach efforts to all stakeholders. Because NOAA's information, products and services are important to both the nation as a whole and to the daily lives of U.S. citizens, NOAA's Science Advisory Board (SAB) has identified a need for more effective two-way communication between its programs and the customers and clients it serves. To achieve this goal, NOAA has also developed a survey instrument to collect responses from core groups of NOAA constituents. The survey instrument will assess NOAA's accessibility, responsiveness and respect for partners. One objective of the survey is to collect responses to provide NOAA with information and feedback from its constituents that will lead to greater emphasis placed on the needs of NOAA partners, techniques to improve NOAA's products and services, and general improvement in the accessibility and responsiveness of NOAA to constituents. A longer term objective for this survey is to become a standard NOAA tool accessing engagement with constituents.

Affected Public: Business or other for-profit organizations; not-for-profit institutions; state, local or tribal government; Federal Government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov.*

Dated: August 4, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–19598 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–KA–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (FHWAR) Cell Phone and Debit Card Test

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information

collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before October 12, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Deborah Kinnaman at the U.S. Census Bureau, 4600 Silver Hill Road, Room 7H113, Washington, DC 20233–8400 (or via the Internet at *deborah.a.kinnaman@census.gov*.)

SUPPLEMENTARY INFORMATION

I. Abstract

The U.S. Fish and Wildlife Service (FWS) and the U.S. Census Bureau plan to conduct (covered under separate OMB clearance number 1018–0088) the 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (FHWAR). The FHWAR data assist Federal and State agencies in administering the Sport Fish and Wildlife Restoration grant programs and provide up-to-date information on the uses and demands for wildlife-related recreation resources, trends in uses of those resources, and a basis for developing and evaluating programs and projects to meet existing and future needs.

In 2011, the majority (about 90%) of FHWAR cases will be conducted by Computer-Assisted Telephone Interviewing (CATI) in the Census Bureau's decentralized telephone centers. The remaining cases (about 10%) will be conducted by Computer-Assisted Personal Interviewing (CAPI) in the Census Bureau's regional offices. Because the FHWAR is an address-based sample, we predict we will be able to obtain a phone number for approximately 50% of the addresses through address-telephone match vendors and through research conducted by the telephone centers. We will not be able to obtain telephone numbers for approximately 34,064 cases in sample; these cases will be eligible for a CAPI interview. Unfortunately, the budget for the 2011 FHWAR is significantly limiting the number of CAPI interviews that we can conduct. Therefore, we will subsample and pre-identify approximately 5,200 cases (out of the 34,064 cases without phone numbers) for the CAPI sample.

All households will be mailed an advance letter prior to interviewing explaining the survey and requesting that a household member call one of the Census Bureau telephone centers to conduct an interview. In addition to the CATI cases, the pre-identified 5,200 CAPI cases will be available for CATI interviewing in the telephone centers with the expectation that some respondents in these households will call the telephone centers to conduct an interview in CATI. The CATI operation will begin on April 1, 2011. One month later, the cases that were pre-selected for CAPI that have not been conducted in CATI will be transferred to field representatives for personal visits in the CAPI operation.

As part of the 2011 FHWAR, we plan to research alternative methods to improve response rates and coverage and to maximize the CATI operation since budget restrictions have significantly reduced, and will continue to reduce, our CAPI sample adding variance to the data. The CAPI component is particularly important because we know that households with available phone numbers may differ in characteristics from those without telephones and those with unlisted phone numbers.

In an effort to reach households in which a phone number is unobtainable, we plan to conduct a test in the first wave of interviewing (the FHWAR is conducted in three waves) that includes three panels of 500 households each. These panels will be subsampled from the 34,064 cases without attainable phone numbers. (The remaining 27,364 cases of the 34,064 eligible for CAPI will not be selected for the 2011 FHWAR.) These 1,500 cases will remain in the CATI sample; they will not be transferred to the CAPI operation.

The first panel will receive an advance letter with a prepaid cell phone. The advance letter will request that a household member call the telephone center and complete an interview using the cell phone. Census Bureau interviewers also will attempt to call these households using the cell phone number during the production period.

The second panel will receive an advance letter and a $25.00 debit card. The advance letter will request that a household member call the telephone center to complete an interview and accept the debit card as a "thank you" for participating.

The third panel will receive only an advance letter that requests a household member call the telephone center to complete an interview.

Note: The data from these three test panels will be analyzed separately for research purposes, and therefore will be excluded from the final 2011 FHWAR survey data.

We plan to have two additional panels of all the households from our FHWAR survey sample for quality comparison. The first additional panel (Panel 4) will be cases that are sent to CAPI in the FHWAR survey. The second additional panel (Panel 5) will be the cases from our CATI sample. Both of these panels will receive an advance letter requesting that a household member call the telephone center to complete an interview. The table below outlines the panel sample sizes.

2011 FHWAR Research Panels

Panel	Sample Size
1. Advance Letter and Cell Phone	500
2. Advance Letter and Incentive	500
3. Advance Letter Only	500
4. Advance Letter with Personal Visit Follow-up (CAPI)*	5,200
5. Advance Letter with Telephone Follow-up (CATI)	47,891

*Note: Panels 4 and 5 are FHWAR production sample which will be used for comparison.

The five panels will help us determine whether there are viable alternatives to collecting data through a personal visit when we only have an address. First, we would like to decide if any of these alternatives are feasible. If the operation of collecting the data works, (*i.e.*, test respondents call the telephone centers and/or contact is made via the cell phone), we want to determine which alternative works best in terms of response rates and cost.

First, we will look at the response rates of the five panels. We will consider Panel 4 (Advance Letter with Personal Visit—the current method) as the base line for our study. We will compare the response rate from this panel to the response rates of Panels 1, 2, and 3. These comparisons will help us determine if any of the alternative procedures produce response rates equal to or greater than the current method for cases without phone numbers. Within the three alternative methods, we will consider Panel 3 as a base line and compare its response rate to the response rates of Panels 1 and 2. This test will determine which of the three alternatives produces the highest response rate. In another analysis, we will compare the response rate of the cases with no available phone number to the response rate of the cases with a phone number (Panel 4 versus Panel 5). This will help to determine whether conducting a CATI interview differs from conducting a CAPI interview in terms of response rates.

We also will analyze the cost and data quality to decide whether sending the household a cell phone or monetary incentive are possible options in the survey data collection process. We will analyze the cost to determine if we can obtain any savings by introducing either of these methods, even if the response rates differ across panels. If this study proves successful, it will provide an option for future FHWAR surveys and other Census surveys by helping to identify the difference between telephone- and no-telephone-available households. This may allow us to minimize CAPI interviewing and maximize CATI interviewing.

II. Method of Collection

Data is collected either by CATI or by CAPI. CATI interviewing is scheduled to begin April 1, 2011 and end on June 5, 2011. CAPI interviewing is scheduled to begin May 5, 2011 and end on June 5, 2011.

III. Data

OMB Control Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Households or Individuals.

Estimated Number of Respondents: 1,500.

Estimated Time Per Response:

Screener—7 minutes;

Hunting and Fishing—1st Interview—14 minutes;

Wildlife Watching—1st interview—11 minutes.

Estimated Total Annual Burden Hours:

Activity	Number of household respondents	Number of participant respondents	Completion time per response (minutes)	Annual burden hours
Screener	1,500		7	175
Hunting and Fishing		246	14	57
Wildlife Observer		121	11	22
Totals*	1,500	367		254

*Note: The burden hours for Panels 4 and 5 are covered in a separate OMB clearance for the FHWAR survey.

Estimated Total Annual Cost: No cost to the respondent.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C. Section 8(b).

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–19679 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Proposed Information Collection; Comment Request; State Broadband Data and Development Grant Program Progress Report

AGENCY: National Telecommunications and Information Administration.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before October 12, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Anne Neville, Department of Commerce, Room ____, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via Internet at *ANeville@ntia.doc.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

Section 6001(l) of the American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–5 (2009), requires the Assistant Secretary of Commerce for Information and Communications (Assistant Secretary) to develop and maintain a comprehensive, interactive, and searchable nationwide inventory map of existing broadband service capability and availability in the United States that depicts the geographic extent to which broadband service capability is deployed and available from a commercial or public provider throughout each state. Recovery Act section 6001(l), 123 Stat. at 516. The statute further provides that the Assistant Secretary will make the national broadband map accessible by the public on a National Telecommunications and Information Administration (NTIA) Web site no later than February 17, 2011.

On July 8, 2009, NTIA issued the Notice of Funds Availability and Solicitation of Applications for the State Broadband Data and Development (SBDD) Grant Program (NOFA, 74 FR

32545, July 8, 2009), a competitive, merit-based matching grant program funding projects that collect comprehensive and accurate State-level broadband mapping data, develop State-level broadband maps, aid in the development and maintenance of a national broadband map, and fund statewide initiatives directed at broadband planning. setting forth the requirements for this competitive grant program.

The NOFA requires Awardees to submit regular reports to NTIA. Specifically, it states:

> All awardees under this Program will provide quarterly reports on: (a) Achievement of project goals, objectives, and milestones (*e.g.*, collection of a "substantially complete data set"; completion of data review or quality control process) as set forth by the applicant in their application timeline; i. expenditure of grant funds and how much of the award remains; ii. amount of non-federal cash or in-kind investment that is being added to complete the project; and iii. whether the awardee is on schedule to provide broadband-related data in accordance with the mapping project timeline. *See* 74 FR 32556 (July, 8, 2009).

NTIA requires these quarterly performance reports in order to gauge the progress of Awardees in meeting their project goals. Without such formal reporting, NTIA will be unable to effectively monitor the expenditure of these Recovery Act funds. While Awardees are also required to submit Recovery Act reports, these reports do not include vital details that NTIA in order to provide proper oversight of activities.

II. Method of Collection

NTIA will request awardees to submit their reports via email. Awardees will provide the quarterly reports using word processing and spreadsheet software such as Microsoft Word and Excel.

III. Data

OMB Control Number: 0660–0034.

Form Number(s): Not applicable.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 56.

Estimated Time per Response: 4 hours.

Estimated Total Annual Burden Hours: 896.

Estimated Total Annual Cost to Public: 0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public rec

Dated: August 4, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–19621 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–908]

First Antidumping Duty Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Extension of Time Limit for the Final Results

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0413.

SUPPLEMENTARY INFORMATION:

Background

On April 15, 2010, the Department of Commerce ("Department") published in the **Federal Register** the Preliminary Results of the first administrative review of sodium hexametaphosphate ("sodium hex") from the People's Republic of China ("PRC"), covering the period September 14, 2007 February 28, 2009. *See First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review*, 75 FR 19613 (April 15, 2010) ("Preliminary Results"). The final results of this administrative review are currently due on August 13, 2010.

Extension of Time Limit for the Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to issue the final results of an administrative review within 120 days after the date on which the *Preliminary Results* have been published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend this deadline to a maximum of 180 days.

The Department determines that completion of the final results of this review within the statutory time period is not practicable, given the extraordinarily complicated nature of the proceeding. The Department requires more time to analyze a significant amount of information pertaining to the respondent's corporate structure and ownership, sales practices and manufacturing methods. Therefore, given the number and complexity of issues in this case, and in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the final results of review until October 5, 2010.

This notice is published pursuant to sections 751(1)(3)(A) and 777(i)(1) of the Act and 19 CFR § 351.213(h)(2).

Dated: July 30, 2010.

Edward Yang,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–19726 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XY06

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The Caribbean Fishery Management Council (Council) and its Administrative Committee will hold meetings.

DATES: The meetings will be held on September 7–8, 2010. The Council will convene on Tuesday, September 7, 2010, from 9 a.m. to 5 p.m., and the Administrative Committee will meet from 5:15 p.m. to 6 p.m. The Council will reconvene on Wednesday, September 8, 2010, from 9 a.m. to 5 p.m.

ADDRESSES: The meetings will be held at the Carambola Beach Resort and Spa, Estate Davis, Kingshill,St. Croix, USVI.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920; telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The Council will hold its 135th regular Council Meeting to discuss the items contained in the following agenda:

September 7, 2010

9 a.m. to 5 p.m.

•Call to Order
•Adoption of Agenda
•Consideration of the 134th Council Meeting Verbatim Transcription
•Executive Director's Report

11 a.m. - 12 noon - Public Comment Period on Amendment 2 to the Fishery Management Plan for the Queen Conch Fishery of Puerto Rico and the U.S. Virgin Islands and Amendment 5 to the Reeffish Fishery Management Plan of Puerto Rico and the US Virgin Islands.

•Advisory Panel Meeting Report
•Final Action on Amendment 2 to the Fishery Management Plan for the Queen Conch Fishery of Puerto Rico and the U.S. Virgin Islands and Amendment 5 to the Reeffish Fishery Management Plan of Puerto Rico and the U.S. Virgin Islands.
•Next Step for the Second ACLs Amendment - Staff Discussion

5:15 p.m. - 6 p.m.

•Administrative Committee Meeting
-AP/SSC/HAP Membership
-Budget
-FY 2009 and FY 2010
-Other Business

September 8, 2010

9 a.m. - 10 a.m. - Public Comment Period on Queen Conch Amendment

Continuation of Council Meeting

•Queen Conch Amendment Final Action
•Report on Status of Setting a Federal Permit Program - Carolyn Sramek
•Trap Reduction Program - Anthony Iarocci
•Administrative Committee Recommendations
•Meetings Attended by Council Members and Staff
•PUBLIC COMMENT PERIOD (5-MINUTES PRESENTATIONS)
•Other Business
•Next Council Meeting

The established times for addressing items on the agenda may be adjusted as necessary to accommodate the timely completion of discussion relevant to the agenda items. To further accommodate discussion and completion of all items on the agenda, the meeting may be extended from, or completed prior to the date established in this notice.

The meetings are open to the public, and will be conducted in English. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be subjects for formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice, and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolon, Executive Director, Caribbean Fishery Management Council, 268 Munoz Rivera Avenue, Suite 1108, San Juan, Puerto Rico 00918–1920; telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: August 4, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–19600 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–811]

Purified Carboxymethylcellulose From the Netherlands; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from petitioner Aqualon Company (Aqualon), a division of Hercules Incorporated and a U.S. manufacturer of purified carboxymethylcellulose (CMC), Akzo Nobel Functional Chemicals B.V. (ANFC) and its U.S. affiliate, Akzo Nobel Functional Chemicals LLC (AN–US), and CP Kelco B.V. (CP Kelco) and its U.S. affiliates, CP Kelco U.S. Inc. (CP Kelco US) and J.M. Huber Corporation, the Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on purified CMC from the Netherlands. This administrative review covers imports of subject merchandise produced and exported by ANFC and CP Kelco during the period of review (POR) beginning July 1, 2008, through June 30, 2009.

We preliminarily determine that ANFC is the successor-in-interest to Akzo Nobel Surface Chemistry B.V. and that sales of subject merchandise by ANFC and CP Kelco were made at less than normal value during the POR. If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on appropriate entries based on the difference between the export price and normal value or the constructed-export-price (CEP) and normal value. All interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* August 10, 2010.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Olga Carter, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–3931 or (202) 482–8221, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 11, 2005, the Department published the antidumping duty order on purified CMC from the Netherlands. *See Notice of Antidumping Duty Orders: Purified Carboxymethylcellulose from Finland, Mexico, the Netherlands, and Sweden,* 70 FR 39734 (July 11, 2005) (*CMC Order*). On July 1, 2009, the Department published an opportunity to request an administrative review of this order for the period July 1, 2008, through June 30, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 74 FR 31406 (July 1, 2009).

Pursuant to 19 CFR 351.213(b)(1), Aqualon filed a July 20, 2009, request that the Department conduct an administrative review of the sales of subject merchandise made by ANFC and

CP Kelco during the POR. On July 29, 2009, CP Kelco and its U.S. affiliates, CP Kelco US and J.M. Huber Corporation, requested a review of CP Kelco's sales of subject merchandise and, on July 31, 2009, ANFC and its U.S. affiliate, AN–US, similarly requested a review of ANFC's sales of subject merchandise made during the POR.

On August 25, 2009, the Department published a notice of initiation of this administrative review, covering sales, entries and/or shipments of purified CMC from ANFC and CP Kelco, in the **Federal Register**. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 42873 (August 25, 2009).

The Department issued its antidumping duty questionnaire to the respondent parties on September 4, 2009. ANFC responded to the questionnaire on October 13, 2009 (response to section A), and on October 27, 2009 (sections B and C responses). CP Kelco filed its questionnaire responses on September 28, 2009 (section A) and October 26, 2009 (sections B–D).[1]

On November 12, 2009, Aqualon filed comments on CP Kelco's questionnaire responses, as well as a request for a sales-below-cost investigation of ANFC, in which the petitioner alleged that ANFC had made home-market sales of purified CMC at prices below the cost of production (COP) during the POR. After reviewing the allegation, the Department initiated a cost investigation of ANFC on January 8, 2010, and requested that the company respond to section D of the questionnaire. ANFC filed its section D response on February 19, 2010. Aqualon submitted comments to this response on March 3, 2010, and, in response to these comments and to clarify portions of ANFC's section D response, the Department issued supplemental questionnaires, to which ANFC responded on June 1, 2010, June 23, 2010, and July 15, 2010.

In the meanwhile, ANFC responded to supplemental questionnaires concerning sections A–C on March 11, 2010, and April 29, 2010. Aqualon provided additional comments on CP Kelco's section D response on March 18, 2010, and CP Kelco filed responses to supplemental questionnaires concerning sections A–D on the following dates: February 17, 2010; March 15, 2010; April 26, 2010; May 5, 2010; July 2, 2010; and July 21, 2010. On July 1, 2010, Aqualon provided comments on ANFC's June 23, 2010 response to the Section D supplemental questionnaire.

On March 22, 2010, the Department extended the deadline for the preliminary results of review from April 2, 2010, until August 2, 2010. *See Certain Purified Carboxymethylcellulose from the Netherlands; Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 15678 (March 30, 2010).

As described in the "Verification" section below, we conducted sales verifications of ANFC's questionnaire responses at the company's production and sales facility in the Netherlands from May 17, 2010, through May 21, 2010, and at its U.S. affiliate's CMC sales office from June 22, 2010, through June 24, 2010. As a result of minor corrections and findings at the verifications, ANFC submitted revised databases for sections B and C on July 6, 2010 per the Department's request.[2]

Period of Review

The POR is July 1, 2008, through June 30, 2009.

Scope of the Order

The merchandise covered by this order is all purified CMC, sometimes also referred to as purified sodium CMC, polyanionic cellulose, or cellulose gum, which is a white to off-white, non-toxic, odorless, biodegradable powder, comprising sodium CMC that has been refined and purified to a minimum assay of 90 percent. Purified CMC does not include unpurified or crude CMC, CMC Fluidized Polymer Suspensions, and CMC that is cross-linked through heat treatment. Purified CMC is CMC that has undergone one or more purification operations, which, at a minimum, reduce the remaining salt and other by-product portion of the product to less than ten percent. The merchandise subject to this order is currently classified in the Harmonized Tariff Schedule of the United States at subheading 3912.31.00. This tariff classification is provided for convenience and Customs purposes; however, the written description of the scope of this order is dispositive.

Verification

As provided in section 782(i) of the Act, and 19 CFR 351.307, we conducted a sales verification of the questionnaire responses provided by ANFC from May 17, 2010, through May 21, 2010, in the Netherlands. We further verified ANFC's U.S. affiliates' sales information from June 22, 2010, through June 24, 2010 at AN–US' sales office located in Brewster, New York. We used standard verification procedures, including on-site inspection of ANFC's production facility in the Netherlands. Because there was insufficient time to complete the verification memoranda for the preliminary results of review, these memoranda will be forthcoming. However, ANFC submitted sales data on July 6, 2010, based on revisions discussed at the verifications and we have used this data in our margin calculations for ANFC. Interested parties will have an opportunity to comment on the verification memoranda in their case briefs (*see* "Disclosure and Public Comment" section below).

Successor-in-Interest

In this review, ANFC requests to be treated as the successor-in-interest to Akzo Nobel Surface Chemistry B.V. (ANSC), a company for which the Department calculated an antidumping duty margin in the less-than-fair-value investigation of the order on purified CMC from the Netherlands. *See Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose from the Netherlands,* 70 FR 28275 (May 17, 2005). We have not completed a review of sales of subject merchandise of an Akzo Nobel group company since the investigation.

As ANFC explained in its submissions, all CMC activities are embedded in the sub-business unit Cellulosic Specialties (CS), which, until November 1, 2005, was part of the business unit Akzo Nobel Surface Chemistry—a business unit that was associated with ANSC within the Netherlands.[3] *See* ANFC's section A questionnaire response, date-stamped October 13, 2009 (ANFC's section A response), at 7; ANFC's supplemental questionnaire response, dated-stamped March 11, 2010, at 4–5. In November 2005, the CS sub-business unit was moved from the ANSC business unit to the ANFC business unit. *See* ANFC's section A response at 7. Thus, activities of the CS sub-business unit became

[1] As discussed in the "Cost of Production Analysis" section below, we requested that CP Kelco provide a response to section D of the questionnaire, pursuant to section 773(b)(2)(A)(ii) of the Tariff Act of 1930, as amended (the Act).

[2] *See* Memorandum to The File through Angelica L. Mendoza, Program Manager, AD/CVD Operations, Office 7, "Submission of Revised Sales Databases" dated July 6, 2010.

[3] Business units and sub-business units in the Akzo Nobel group represent purely organizational structures that have no legal status and exist across national boundaries. Hence, the CS sub-business unit, which is part of the ANFC business unit, utilizes the legal Dutch entity of Akzo Nobel Functional Chemicals B.V. to accomplish its activities within the Netherlands. Both the ANFC business unit and CS sub-business unit have associations with other ANFC legal entities throughout the world as necessitated by their unit activities.

associated through its new business unit with the ANFC legal entity. This portfolio realignment was part of a global restructuring of Akzo Nobel N.V., the parent of ANFC and ANSC. *See* ANFC's supplemental questionnaire response at 5. As an additional part of the restructuring, the Netherlands branch of ANSC was legally merged into ANFC in the Netherlands in December 2005. *Id.* at 4–5. ANFC provided a copy of the merger documents in exhibit 7 of its March 11, 2010, supplemental response. It also stated that the realignment of the CS sub-business unit had not resulted in any changes to CMC production facilities, sales services, or the customer base for CMC sales. *See* ANFC's section A response at 7; ANFC's supplemental response at 5.

Thus, the Department is conducting a successor-in-interest analysis to determine whether ANFC is the successor-in-interest to ANSC for purposes of treatment under the antidumping law. In making such a determination, the Department examines a number of factors including, but not limited to, changes in: (1) Management, (2) production facilities, (3) suppliers, and (4) customer base. *See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Preliminary Results of Antidumping Duty Administrative Review,* 74 FR 39047, 39051 (August 5, 2009), unchanged in final, *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review,* 74 FR 65518 (December 10, 2009). While examining these factors alone will not necessarily provide a dispositive indication of succession, the Department will generally consider one company to have succeeded another if that company's operations are not materially dissimilar to the predecessor's operations. *See Stainless Steel Bar from France: Preliminary Results of Antidumping Duty Administrative Review,* 70 FR 17411 (April 6, 2005) (unchanged in final, *Stainless Steel Bar from France: Final Results of Antidumping Duty Administrative Review,* 70 FR 46492 (August 10, 2005)). Thus, if the evidence demonstrates, with respect to the production and sale of the subject merchandise, that the new company is essentially the same business operation as the former company, the Department will assign the new company the cash deposit rate of its predecessor.

The record shows that the sub-business unit responsible for the production and sales of CMC in the Netherlands remains unchanged as a result of the corporate restructuring. It was moved from an organizational standpoint, as it is now aligned under a different business unit. However, the physical attributes and operations of the CS sub-business unit remain the same—it continues to produce purified CMC at its facility in Arnhem, the Netherlands, and to sell the subject merchandise through its U.S. affiliate located in Brewster, New York. *See* ANFC's section A response at 10. Furthermore, ANFC has stated that there were no changes to CMC production facilities, its sales services, or its customer base as a result of the re-alignment. It clarified that there had been no changes to the production capacity or product lines of CMC due to the re-alignment and that, administratively, the sub-business unit performed the same services at the same facilities as before the merger of ANSC with ANFC. *See* ANFC's March 11, 2010, supplemental response at 5.

In light of these findings, we conclude that, from an operational standpoint, there have been no changes to the CS sub-business unit as a result of the corporate restructuring. Hence, we preliminarily find that ANFC's operations are not materially dissimilar from ANSC's operations and that, for purposes of this review and the antidumping duty proceeding, we find that ANFC is the successor-in-interest to ANSC.

Date of Sale

For its home-market sales, ANFC reported its date of sale to be the invoice date, which coincided with the loading and shipment date of the merchandise. It stated that, until the time that the merchandise is loaded, changes can occur in the material terms of sale. *See* ANFC's section B questionnaire response, date-stamped October 27, 2010 (ANFC's section B response), at 11. Similarly, for its warehouse sales in the United States, ANFC reported the date of sale to be the invoice date, which is the date that merchandise is loaded for shipment from the warehouse and, because material changes can take place prior to loading, the invoice date is the date on which the terms of sale are set. *See* ANFC's section C questionnaire response, date-stamped October 27, 2010 (ANFC's section C response), at 11. However, for sales in which the product was shipped directly from the Netherlands to the United States, ANFC reported the date of shipment as the date of sale as this date preceded the invoice date. *See* ANFC's section C response at 11–12. In its description of the sales process for these sales, ANFC stated that material terms, such as the quantity or price of the merchandise, could change prior to invoicing. *See* ANFC's section A response, at 29. But the description further shows that the unaffiliated customer is not invoiced by AN–US until the customer receives the merchandise from the Netherlands.

CP Kelco reported the date of invoice as the date of sale for its comparison-market and U.S. sales. It explained that, in most instances, invoicing occurred on the "post goods issue" date, *i.e.*, the date on which the merchandise was removed from the finished-goods inventory, its removal was posted in the SAP accounting system, and the goods were prepared for shipment. *See* CP Kelco's section B questionnaire response, dated October 26, 2009 (section B response), at 15–16; its section C questionnaire response, dated October 26, 2009 (section C response), at 16–17. It reported the "post goods issue" date as the shipment date for all sales and explained that, because invoicing should have been triggered within SAP by this date, the invoice date should have been the same as the shipment date except in instances of manual override of the SAP system. *Id.* at 16. In a later response, CP Kelco acknowledged that, for one sale, the date of shipment preceded the reported sale date because the merchandise had been shipped prior to a holiday weekend and the warehouse did not post the "goods issue" until after the weekend. *See* CP Kelco's February 17, 2010, supplemental questionnaire response, at 5–6.

Normally, the Department considers invoice date as the date of sale in accordance with 19 CFR 351.401(i). However, it is the Department's practice to use shipment date as the date of sale when shipment date precedes invoice date. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 63 FR 13170, 13172–73 (March 18, 1998); *see also Stainless Steel Sheet and Strip in Coils from the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part,* 72 FR 4486 (January 31, 2007), and the accompanying Issues and Decision Memorandum at Comments 4 and 5.

Although ANFC asserts that material terms of sale for its direct sales may change between the time of shipment of the goods from the Netherlands and the issuance of an invoice by AN–US, we find that the quantity and price for these sales are established at the time the merchandise was shipped from the Netherlands. *See* ANFC's section C response, at 11. Therefore, we preliminarily determine that the shipment date is the appropriate date of sale for these sales and that, for all other ANFC sales, the invoice date is the appropriate date of sale.

For CP Kelco, we preliminarily determine that it is appropriate to use invoice date as the date of sale except in instances where the shipment date precedes the invoice date. In those instances, we will use the shipment date as the date of sale, in keeping with our past practice.

Fair Value Comparisons

To determine whether sales of purified CMC from the Netherlands to the United States were made at less than fair value, we compared the export price or CEP of each sale to the normal value, as described in the "Export Price and Constructed Export Price" and "Normal Value" sections of this notice below. In accordance with section 777A(d)(2) of the Act, we compared the export prices and the CEPs of individual U.S. transactions to monthly weighted-average normal values.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all purified CMC, that fit the description in the "Scope of the Order" section above and that was either produced and sold by ANFC in the Netherlands during the POR or produced by CP Kelco in the Netherlands and sold by that company in the comparison market of Taiwan during the POR, to be foreign like product for the purpose of determining appropriate product comparisons to purified CMC sold by respondents in the United States. For our discussion of market viability and the selection of comparison markets, *see* the "Normal Value" section of this notice below. We compared the U.S. sales with the sales of the foreign like products in the appropriate comparison markets.

Specifically, in making our comparisons, we used the following methodology. If sales of an identical comparison-market model were reported, we compared the export prices or CEPs of the U.S. sales to the weighted-average, comparison-market prices of all sales that passed the COP test of the identical product during the relevant or contemporary month. *See* sections 771(16) and (35) of the Act; *see also* 773(b)(1) of the Act. If there were no contemporaneous sales of an identical model, we identified sales of the most similar comparison-market model. *See* section 771(16) of the Act. To determine the most similar model, we matched the physical characteristics of the foreign like products, as reported by the respondents, to the characteristics of the subject merchandise in the following order of importance: (1) Grade, (2) viscosity, (3) degree of substitution, (4) particle size, and (5) solution characteristics. Where there were no sales of identical or similar foreign like product in the ordinary course of trade with which to compare to a U.S. sale, we made product comparisons using constructed value.

CP Kelco reported that it sold material which was suitable for pharmaceutical grade applications and for other regulated applications as well (*i.e.*, food, cosmetic, personal care). *See* CP Kelco's section B response at 9–10; *see also* CP Kelco's section A Response at exhibit A–31. In its responses to sections B, C, and D of our antidumping duty questionnaire, CP Kelco reported these sales as sales of grade "2" material, "regulated-other (food)." However, CP Kelco clarified in a supplemental questionnaire response that all of the purified CMC products it produced met the standards of the U.S. Pharmacopeia and that, therefore, any of the products that can be used in food, personal care, or cosmetic applications can also be used in pharmaceutical applications, and *vice versa*. *See* CP Kelco's Supplemental Questionnaire Response, dated February 17, 2010, at 4–5. In other words, all of the company's products are manufactured to meet grade "1" requirements.

It has been the Department's past practice to consider a product, which meets multiple specifications, to be identified according to the strictest requirements of subject merchandise. In this case, all of the relevant commercial products were manufactured to be suitable both for the strictest specifications, that of regulated pharmaceutical-grade CMC, and for a less-strict specification, that of regulated-other (food) grade CMC. In accordance with our past practice, we treated these sales as sales of products which met the strictest specification to which the material was manufactured: regulated pharmaceutical grade material.[4] *See* Memorandum to the File, through Angelica Mendoza, Program Manager, Office 7, regarding "CP Kelco B.V.—Analysis Memorandum for the Preliminary Results of the 2008/2009 Antidumping Duty Administrative Review of Purified Carboxymethylcellulose from the Netherlands" (CP Kelco's Preliminary Analysis Memorandum), dated August 2, 2010, at 2–3.

Export Price and Constructed Export Price

In accordance with section 772 of the Act, we calculate either an export price or a CEP, depending on the nature of each sale. Section 772(a) of the Act defines export price as the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the foreign producer or exporter to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States. Section 772(b) of the Act defines CEP as the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

ANFC classified all of its sales to the United States as sales made through its U.S. affiliate, AN–US, to end-users and distributors (*i.e.*, CEP sales). CP Kelco classified its sales to the United States as: (1) Direct sales to end-users and distributors (*i.e.*, export-price sales); and (2) sales via its U.S. affiliate, CP Kelco US, to end-users and distributors (*i.e.*, CEP sales). For purposes of these preliminary results, we have accepted these classifications.

We calculated export price based on prices charged to the first unaffiliated U.S. customer. As described in the "Date of Sale" section above, we used invoice date as the date of sale for export-price sales except where CP Kelco reported a date of shipment that preceded the invoice date. We based export price on the packed, delivered prices to unaffiliated purchasers in the United States, making adjustments where necessary for billing adjustments. *See* 19 CFR 351.401(c). We made deductions for movement expenses in accordance

[4] *See, e.g., Rautaruukki Oy* v. *United States*, 23 C.I.T. 257 (CT. Int'l Trade 1998), in which the court found that the Department should have considered all steel plate products graded as "A" under different national classification standards to be identical merchandise in the absence of a showing of any significant physical distinction between the products. *See also, Certain Cut-to-Length Carbon Steel Plate From Finland; Notice of Amended Final Results of Administrative Review in Accordance With Final Court Decision*, 64 FR 68669 (December 8, 1999). Further, it is the Department's practice to consider the strictest requirements of subject merchandise which has multiple specifications (*i.e.*, the strictest specifications). *See, e.g., Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 FR 7237 (February 11, 2005) and the accompanying Issues and Decision Memorandum at Comment 13, where the Department states: "To establish the most appropriate match for the triple-certified pipe in the comparison market, we looked for products that met most closely the strictest requirements of the subject merchandise with multiple specifications."

with section 772(c)(2)(A) of the Act, which included deductions for foreign inland freight, international freight, marine insurance, brokerage and handling expenses incurred in the United States, U.S. inland freight (offset by reported freight revenue), and U.S. customs duties.

In accordance with our practice, we capped the amount of freight revenue permitted to offset gross unit price at no greater than the amount of corresponding inland freight expenses incurred by CP Kelco and its U.S. affiliate. *See Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review*, 74 FR 40167 (Aug. 11, 2009), and accompanying Issues and Decision Memorandum at Comment 3; *Certain Orange Juice From Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46584 (Aug. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 7; *Polyethylene Retail Carrier Bags From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 6857 (February 11, 2009), and the accompanying Issues and Decision Memorandum at Comment 6.

We did not adjust export price for certain "factoring" expenses that CP Kelco reported to have incurred on U.S. sales. Although we have accepted this adjustment in prior reviews, we found it inappropriate to include this adjustment in this review because CP Kelco could not provide us with sufficient evidence that its factoring activity, which involves affiliated parties, was of an arm's-length nature.[5] For a detailed discussion of this matter, *see* CP Kelco's Preliminary Analysis Memorandum at 6–7.

We calculated CEP based on prices charged to the first unaffiliated U.S. customer after importation. As discussed in the "Date of Sale" section above, we used invoice date as the date of sale for CEP sales, except in instances where the date of shipment preceded the invoice date. We based CEP on the gross unit price to the first unaffiliated U.S. customer, making adjustments where necessary for billing adjustments and rebates. *See* 19 CFR 351.401(c). Where applicable, and pursuant to sections 772(c)(2)(A) and (d)(1) of the Act, the Department made deductions for movement expenses, including deductions for domestic foreign inland freight and warehousing expenses, domestic insurance, domestic brokerage and handling expenses, international freight, marine insurance, U.S. insurance, brokerage and handling expenses incurred in the United States, U.S. warehousing expenses, U.S. inland freight (offset by reported freight revenue), and U.S. customs duties.

In accordance with section 772(d)(1) of the Act, we also deducted, where applicable, U.S. direct selling expenses (including credit expenses) and indirect selling expenses and inventory carrying costs incurred in the Netherlands and the United States and associated with economic activities in the United States. As noted for the calculation of export price above, we did not made an adjustment to CEP for factoring expenses that CP Kelco reported to have incurred on U.S. sales, since we could not establish the arm's-length nature of the affiliated factoring transactions.

We deducted an amount for CEP profit in accordance with section 772(d)(3) of the Act.

Normal Value

A. Home Market Viability and Comparison Market Selection

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating normal value (*i.e.*, whether the aggregate volume of home-market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared respondent's volume of home-market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Section 773(a)(1)(C)(ii) of the Act provides that the Department may determine that home-market sales are inappropriate as a basis for determining normal value if the Department determines that the aggregate quantity of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States. When sales in the home market are not viable, section 773(a)(1)(B)(ii) of the Act provides that sales to a particular third-country market may be utilized if: (1) The prices in such market are representative; (2) the aggregate quantity of the foreign like product sold by the producer or exporter in that third-country market is five percent or more of the aggregate quantity of the subject merchandise sold in or to the United States; and (3) the Department does not determine that a particular market situation in the third-country market prevents a proper comparison with the U.S. price.

A review of the record shows that ANFC's home-market sales were viable, for purposes of comparing them to U.S. sales. *See* ANFC's Section A response at 4. Thus, we based normal value on this company's home-market sales made in the usual commercial quantities and in the ordinary course of trade.

CP Kelco reported, and we have preliminary determined, that its aggregate volume of home-market sales of the foreign like product was not greater than five percent of the aggregate volume of U.S. sales of subject merchandise and, thus, its home-market sales did not provide a viable basis for calculating normal value. *See* CP Kelco's section A response at A2–A3. Accordingly, CP Kelco reported the POR sales of foreign like product to its three largest third-country markets—Taiwan, Germany, and South Africa. *Id.* In reviewing this information of these three markets, the Department found that exports of the foreign like product to Taiwan were similar to those exported to the United States, that the aggregate quantity of the exports of the foreign like product to Taiwan was five percent or more of the subject merchandise sold in the United States, and that there was no evidence of a particular market situation in Taiwan that prevented a proper comparison between sales prices in that market and the U.S. price. For a detailed discussion of these findings, *see* CP Kelco's Preliminary Analysis Memorandum at 7–8. Therefore, based on our findings and pursuant to section 773(a)(1)(B)(ii) of the Act, we selected Taiwan as the appropriate third-country market on which to base our calculation of normal value for CP Kelco in these preliminary results.

We also used constructed value as the basis for calculating normal value, in accordance with section 773(a)(4) of the Act, for U.S. sales by CP Kelco that did not have identical or similar product matches where appropriate.

B. Cost of Production Analysis

Based on Aqualon's cost allegation, the Department had reasonable grounds to believe or suspect that ANFC had made below-cost sales of foreign like product. *See* Section 773(b)(2)(A)(i) of the Act. Therefore, the Department initiated a cost investigation of ANFC on January 8, 2010, and requested that ANFC file a response to section D of the antidumping duty questionnaire on that date. Also, pursuant to section

[5] *See Purified Carboxymethylcellulose from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 24823 (May 26, 2009) at 24827, where we stated our intent to re-examine the appropriateness of including the factoring expenses, arising from affiliated transactions, in our margin calculations in subsequent reviews of this proceeding.

773(b)(2)(A)(ii) of the Act, we had reasonable grounds to believe or suspect that CP Kelco sold the foreign like product below the COP in this review because, in the most recently completed review of the company, we had disregarded sales found to be made below the cost of production. *See Purified Carboxymethylcellulose From the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 74 FR at 24823 (May 26, 2009) (unchanged in final, *Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 74 FR 52742 (Oct. 14, 2009)). Thus, the Department also requested that CP Kelco respond to section D of the questionnaire.

C. Calculation of Cost of Production

We have preliminarily relied upon the COP information provided by ANFC and CP Kelco in their section D submissions, except as noted below. In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP for each foreign like product based on the sum of the respondents' material and fabrication costs for the product, plus amounts for selling, general, and administrative (SG&A) expenses, as well as packing costs. For ANFC, we relied on the COP data provided in its June 22, 2010, submission, except for the following instances:

a. We subtracted the reported research and development (R&D) expenses from fixed overhead and we reclassified them as general and administrative (G&A).

b. We added amortization of intangible assets, certain non-operating expenses, and certain R&D expenses net of the technical service component reported as an indirect selling expense to the general and administrative (G&A) expense calculation in accordance with the Department's practice of including non-operating accounts which relate to the general operations of the company as a whole. *See Magnesium Metal From the Russian Federation: Notice of Final Determination at Less than Fair Value*, 70 FR 9041 (February 24, 2005), and accompanying I&D Memo at Comment 10.

c. We subtracted net exchange losses from ANFC's reported G&A expense calculation. Exchange gains and losses (G&L) are included by the Department as part of financial expense, which is calculated at the parent level.

For further discussion of these adjustments, *see* the memorandum from Frederick W. Mines, Accountant, to Neal M. Halper, Director, Office of Accounting, regarding "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Akzo Nobel Functional Chemicals B.V.," dated August 2, 2010.

For CP Kelco, we relied on the COP data provided in its July 27, 2010 submission, except for two changes. First, we made a downward adjustment to the cost of manufacturing to reflect an adjustment made by the auditor to CP Kelco's books for the 2008 fiscal year. The auditor found that certain incentive plan wages had been overstated and, because these wages were paid to CMC plant personnel, we found that they directly related to the cost of manufacturing and we thus applied an adjustment, reflecting overstated costs for the POR, to this cost. For a discussion and calculation of this adjustment, *see* CP Kelco's Preliminary Analysis Memorandum at 15–16. Second, we included certain factoring expenses in CP Kelco's financial expense calculation, since we did not adjust the third-country market or U.S. sales prices for these expenses. For a more detailed discussion of this matter, *see* CP Kelco's Preliminary Analysis Memorandum at 6–7.

D. Test of Comparison Market Prices

As required under section 773(b) of the Act, we compared the respondents' weighted-average COP figures to their comparison-market sales prices (net of billing adjustments, any applicable movement expenses, direct and indirect selling expenses, and packing) of the foreign like product in order to determine whether sales in the comparison market had been made at prices below COP. In determining whether to disregard such sales, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether such sales were made within an extended period of time in substantial quantities and whether the sales were made at prices which would not permit the recovery of all costs within a reasonable period of time.

E. Results of Cost Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of the sales of a given product were at prices less than the COP, we did not disregard any of the below-cost sales of that product because they were not made in substantial quantities. However, where 20 percent or more of the respondents' comparison-market sales of a model were made at prices below the COP, we disregarded these sales because they were made: (1) In substantial quantities within the POR (*i.e.*, within an extended period of time), in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. We used the remaining comparison-market sales, if such sales existed and were made in the ordinary course of trade, as the basis for determining normal value, in accordance with section 773(b)(1) of the Act.

In the current review, we found sales by ANFC made below the COP for 20 percent or more of certain models and, therefore, we disregarded these below-cost sales from our margin calculations. *See* ANFC's Preliminary Analysis Memorandum at 8.

F. Price-to-Price Comparisons

We calculated normal value based on prices to unaffiliated customers in the comparison markets. In these markets, we used invoice date as the date of sale. *See* 19 CFR 351.401(i). We increased or decreased price, as appropriate, for certain billing adjustments and rebates. We made deductions, where appropriate, for foreign inland freight and international freight pursuant to section 773(a)(6)(B) of the Act. We did not deduct certain factoring expenses from normal value that CP Kelco reported to have incurred on third-country sales, as we found did not find sufficient evidence of the arm's-length nature of the affiliated factoring transactions. *See* CP Kelco's Preliminary Analysis Memorandum at 6–7. In addition, when comparing sales of similar merchandise to U.S. sales, we made adjustments in normal value for differences in cost attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411, as well as for differences in circumstances of sale, as appropriate (*i.e.*, commissions and credit), in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. We also made an adjustment, where appropriate, for a CEP offset, in accordance with section 773(a)(7)(B) of the Act. *See* the "Level of Trade" section below. Finally, we deducted comparison-market packing costs and added U.S. packing costs to normal value, in accordance with sections 773(a)(6)(A) and (B) of the Act.

G. Price-to-Constructed-Value Comparisons

Section 773(a)(4) of the Act provides that, if we are unable to find a contemporaneous comparison-market match of identical or similar merchandise for a U.S. sale, then we base normal value on constructed value. Section 773(e) of the Act provides that constructed value shall be based on the sum of the cost of materials and fabrication employed in producing the merchandise, SG&A expenses, and profit. We calculated the cost of materials and fabrication based on the methodology described above in the "Calculation of Cost of Production" section. 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 CP Kelco in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the foreign country (*i.e.*, Taiwan). *See* 19 CFR 351.405(b)(1).

Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine normal value based on sales in the comparison market at the same level of trade as the export price or CEP transaction. The level of trade in the comparison market is the level of trade of the starting-price sales in the comparison market or, when normal value is based on constructed value, the level of trade of the sales from which we derive SG&A expenses and profit. *See* 19 CFR 351.412(c). With respect to U.S. price for export-price transactions, the level of trade is also that of the starting-price sale, which is usually from the exporter to the importer. *Id.* For CEP, the level of trade is that of the constructed sale from the exporter to the importer. *Id.*

To determine whether comparison market sales are at a different level of trade from U.S. 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 different levels of trade, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which normal value is based and comparison market sales at the level of trade of the export transaction, the Department makes a level-of-trade adjustment in accordance with section 773(a)(7)(A) of the Act. For CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the customer. We analyze whether different selling activities are performed, and whether any price differences (other than those for which other allowances are made under the Act) are shown to be wholly or partly due to a difference in level of trade between the CEP and normal value. *See* 773(a)(7)(A) of the Act.

Under section 773(a)(7)(A) of the Act, we make an upward or downward adjustment to normal value for level of trade if the difference in level of trade involves the performance of different selling activities and is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined. Finally, if the normal-value level of trade is at a more advanced stage of distribution than the level of trade of the CEP, but the data available do not provide an appropriate basis to determine a level-of-trade adjustment, we reduce normal value by the amount of indirect selling expenses incurred in the comparison market on sales of the foreign like product, but by no more than the amount of the indirect selling expenses incurred for CEP sales. *See* section 773(a)(7)(B) of the Act (the CEP-offset provision).

In analyzing differences in selling functions, we determine whether the levels of trade identified by the respondent are meaningful. *See Antidumping Duties: Countervailing Duties*, 62 FR 27296, 27371 (May 19, 1997). If the claimed levels of trade are the same, we expect that the functions and activities of the seller should be similar. Conversely, if a party claims that levels of trade are different for different groups of sales, the functions and activities of the seller should be dissimilar. *See Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review*, 65 FR 30068 (May 10, 2000), and accompanying Issues and Decision Memorandum at Comment 6.

In the present review, both ANFC and CP Kelco claimed that a CEP offset was required because the CEP level of trade was less advanced than levels of trade in the comparison markets. *See* ANFC's section C questionnaire response at 52 and CP Kelco's section A questionnaire response at 33–34. In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the "chain of distribution"),[6] including selling functions, class of customer (customer category), and the level of selling functions for each type of sale.

ANFC reported one level of trade in the home market, the Netherlands, with one channel of distribution to two classes of customers: (1) Direct sales from the warehouse located near the ANFC manufacturing plant to end users, and (2) direct sales from the warehouse located near the ANFC manufacturing plant to distributors. *See* ANFC's section B questionnaire response at 10.

ANFC reported one level of trade in the home market, the Netherlands, with one channel of distribution to two classes of customers: (1) Direct sales from the warehouse located near the ANFC manufacturing plant to end users, and (2) direct sales from the warehouse located near the ANFC manufacturing plant to distributors. *See* ANFC's section B questionnaire response at 10.

Based on our review of evidence on the record, we find that the home-market sales to both customer categories through the one channel of distribution were substantially similar with respect to selling functions and stages of marketing. ANFC performed the same selling functions for sales in a single home-market channel of distribution, including sales forecasting, strategic planning, advertising, distributor training, packing, warehousing, inventory management, order processing, direct sales crew, market research, providing guarantees, after sales services, freight and delivery, and invoicing. *See* ANFC's section A questionnaire response at 17–25. Each of these selling functions was identical in the intensity of their provision or only differed minimally, the exception being that ANFC provided competitive discounts and technical assistance to a different degree of involvement to different customers' types. *See* ANFC's section A questionnaire response at exhibit 8. *See also* Preliminary Analysis Memorandum—ANFC at 4. Thus, after considering all of the above, we preliminarily find that ANFC had only one LOT for its home market sales.

ANFC reported one CEP LOT, with two separate channels of distribution in the United States. CEP Channel 1 sales were made to two classes of customers, *i.e.*, end users and distributors, either from inventory or made to order and CEP Channel 2 sales were also made to two classes of customers, *i.e.*, end users and distributors from inventory. For CEP Channel 1 sales, the U.S. customer orders merchandise from AN–US and the merchandise is shipped directly to the U.S. customer from ANFC's warehouse. These sales are classified as CEP Channel 1 sales because the agreement to sell occurred in the United

[6] The marketing process in the United States and comparison markets begins with the producers and extends to the sale to the final user or customer. The chain of distribution involved in the two markets may have many or few links, and the respondents' sales occur somewhere along this chain. In performing this evaluation, we considered the respondents' narrative responses to properly determine where in the chain of distribution the sale occurs.

States, the sale contract was executed in the United States, and the title passed directly from the AN–US to the unaffiliated customer in the United States. For the CEP Channel 2 sales, the U.S. customer orders merchandise from AN–US, which is shipped out of stock of materials maintained at AN–US's unaffiliated warehouses. Upon examining ANFC's questionnaire responses, we preliminarily find that it has two channels of distribution for its CEP sales in the United States. *See* ANFC's supplemental questionnaire response, dated March 11, 2010 at 22 through 26. *See also* ANFC's section C questionnaire response at 10 through 11.

For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. *See Micron Tech. Inc.* v. *United States,* 243 F.3d 1301, 1314–15 (Fed. Cir. 2001). We reviewed the selling functions and services performed by ANFC on CEP sales as described in its questionnaire responses, after these deductions. We found that selling functions performed by ANFC to its U.S. affiliate in support of the CEP sales were almost identical regardless of class of customers or channel of trade. ANFC reported that the only services it provided for the CEP Channel 1 sales, to a different degree of performance comparatively to a degree of performance provided for Channel 2 sales, were logistics for freight and delivery, warehousing, and inventory management. *See* ANFC's section A questionnaire response at exhibit 8. Therefore, we found that selling functions performed by ANFC for both channels are at the same level.

Next, we compared the stages in the marketing process and selling functions along the chain of distribution for home-market and CEP sales. ANFC's home-market and CEP sales were both made to end users and distributors. We found that ANFC performs an additional layer of selling functions at a greater degree of involvement in the home market than it provided on CEP Channel 1 and Channel 2 sales (*e.g.,* sales forecasting, advertising, distributor training, market research, sales and marketing support and competitive discounts). *See* ANFC supplemental questionnaire response at 10 through 16. Because these additional selling functions are significant, we find that ANFC's CEP sales are at a different level of trade than its home-market sales.

According to section 773(a)(7)(B) of the Act, a CEP offset is appropriate when the level of trade in the home market is at a more advanced stage than the level of trade of the CEP sales and there is no basis for determining whether the difference in levels of trade between normal value and CEP affects price comparability. ANFC reported that it provided minimal selling functions and services for the CEP level of trade and that, therefore, the home-market level of trade is more advanced than the CEP level of trade. Based on our analysis of the channels of distribution and selling functions performed by ANFC for sales in the home market and CEP sales in the U.S. market (*i.e.,* sales support and activities provided by ANFC for sales to its U.S. affiliate), we preliminarily find that the home market level of trade is at a more advanced stage when compared to CEP sales because ANFC provides many selling functions in the home market at a different level of service (*i.e.,* sales forecasting, advertising, distributor training, market research, sales and marketing support and competitive discounts, *etc.*) as compared to selling functions performed for its CEP sales (*i.e.,* ANFC reported that the only services it provided for the CEP sales were logistics for freight and delivery, packing, warehousing, limited strategic planning, inventory maintenance and technical assistance). *See* ANFC's supplemental questionnaire response, dated March 11, 2010 at 10–18 and its second supplemental questionnaire response, dated April 29, 2010 at 3. Thus, we find that ANFC's home-market sales are at a more advanced level of trade than its CEP sales. As there was only one level of trade in the home market, there were no data available to determine the existence of a pattern of price differences, and we do not have any other information that provides an appropriate basis for determining a level-of-trade adjustment; therefore, we applied a CEP offset to normal value for CEP comparisons.

CP Kelco reported sales through two channels of distribution in the third-country market, identified as: (1) Channel 1—sales to an unaffiliated end user; and (2) Channel 2—sales to an unaffiliated distributor. A review of the record shows that CP Kelco continues to perform substantially similar selling functions and activities for the two channels of distribution and customer categories. Specifically, it performed activities relating to customer service, logistics, inventory maintenance, packing, freight/delivery, sales promotion, and guarantees to the same degree for each channel. *See* CP Kelco's section A response at A18–A30; CP Kelco's supplemental questionnaire response, dated April 23, 2010, at exhibit A–51. The company also provided, to slightly differing degrees, sales negotiations, credit risk management, direct sales personnel and technical support functions in both channels. *Id.* Consequently, we conclude that, as in prior reviews, CP Kelco only made sales at one level of trade in the Taiwanese market.

In the U.S. market, CP Kelco reported two channels of distribution, identified as: (1) Channel 1—CEP sales to unaffiliated end users and distributors; and (2) Channel 2—EP sales to unaffiliated end users and distributors. Turning to a review of the selling functions the company performed for U.S. sales, we considered only those reflected in the price after the deduction of expenses and CEP profit under section 772(d) of the Act. For its CEP sales, we found that CP Kelco performed functions related to logistics, inventory maintenance, packing, and freight/ delivery to a high degree. *See* supplemental questionnaire response, dated April 26, 2010, at exhibit A–51. For its EP sales, we found that it performed logistics, packing and freight/ delivery functions to a high degree but also assisted the U.S. affiliate with customer service, inventory maintenance, sales promotion, direct sales personnel and guarantees activities to lesser degrees. *Id.* Because of the significant differences in selling functions performed for the two types of sales, we concluded that CP Kelco's EP sales were made at a different level of trade than its CEP sales.

We next examined the third-country sales compared to the EP sales. CP Kelco's Taiwanese sales and EP sales were both made to end users and distributors and the selling functions performed by CP Kelco for these two groups of sales were almost identical. It performed functions relating to sales negotiations, credit-risk management, inventory maintenance, packing, freight/delivery, collection, sales promotion, direct sales personnel, technical support, and guarantees to nearly the same degrees in both markets. *Id.* Because the selling functions and channels of distribution were substantially similar, we preliminarily determined that the Taiwanese sales were made at the same level of trade as the EP sales in the U.S. market. Therefore, it was not necessary to make a level-of-trade adjustment for the EP sales.

According to section 773(a)(7)(B) of the Act, a CEP offset is appropriate when the level of trade in the home- or third-country market is at a more advanced stage than the level of trade of the CEP sales and there is no basis for determining whether the difference in these levels effects price comparability.

CP Kelco reported that it provided few selling functions and activities for the CEP level of trade; consequently, the Taiwanese level of trade is more advanced than the CEP level of trade. Furthermore, because there was only one level of trade in the third-country market and no data were available to determine the existence of a pattern of price differences within that market, and because we do not have any other information that provides an appropriate basis for determining a level-of-trade adjustment, we applied a CEP offset to normal value for CEP comparisons pursuant to section 773(a)(7)(B) of the Act.

To calculate a CEP offset for ANFC and CP Kelco, we deducted the comparison-market indirect selling expenses from normal value for sales that were compared to U.S. CEP sales. We limited the deduction by the amount of the indirect selling expenses deducted in calculating the CEP under section 772(d)(1)(D) of the Act. *See* section 773(a)(7)(B) of the Act.

Currency Conversion

We made foreign-currency conversions into U.S. dollars in accordance with section 773A(a) of the Act and 19 CFR 351.415 based on exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank. *See* Import Administration Web site at: *http://ia.ita.doc.gov/exchange/index.html.*

Preliminary Results of Review

We preliminarily determine that, for the period July 1, 2008, through June 30, 2009, the following dumping margins exist:

Manufacturer/exporter	Weighted-average margin (percent)
Akzo Nobel Functional Chemicals B.V	13.71
CP Kelco B.V	2.77

Disclosure and Public Comment

Pursuant to 19 CFR 351.224(b) of the Department's regulations, the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of publication of this notice. Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit written comments in response to these preliminary results. As stated in the "Verification" section above, the Department will release the sales verification memoranda to parties for comment after the publication of these preliminary results in the **Federal Register**. Therefore, interested parties may submit case briefs to the Department no later than 30 days after the publication of the preliminary results of review or, if later, seven days after the date of the issuance of the last verification report in this proceeding. *See* 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within five days from the deadline date for the submission of case briefs. *See* 19 CFR 351.309(d)(1) and (2).

Parties who submit arguments in this proceeding are requested to submit with the argument: (1) A statement of the issues; (2) a brief summary of the argument; and (3) a table of authorities. *See* 19 CFR 351.309(c)(2). Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Executive summaries should be limited to five pages total, including footnotes. Furthermore, we request that parties, when submitting briefs and rebuttal briefs, provide the Department with a copy of the public versions of the briefs on diskette.

Within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments raised in the case and rebuttal briefs, pursuant to 19 CFR 351.310(c). Unless the Department specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs. *See* 19 CFR 351.310(d)(1). Parties will be notified of the time and location of the hearing.

The Department will publish the final results of the administrative review, including the results of its analysis of issues addressed in any case or rebuttal brief, no later than 120 days after publication of the preliminary results, unless extended. *See* section 751(a)(3)(A) of the Act; 19 CFR 351.213(h).

Assessment Rates

The Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer (or customer)-specific assessment rate or value for merchandise subject to this review as described below.

With respect to export-price sales, for these preliminary results, we divided the total dumping margins (calculated as the difference between normal value and export price) for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per-unit dollar amount against each unit of merchandise in each of that importer's/customer's POR entries.

For CEP sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct CBP to assess the resulting percentage margin against the entered customs values for the subject merchandise on each of that importer's POR entries. *See* 19 CFR 351.212(b).

The Department clarified its "automatic assessment" regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the POR produced by companies in these preliminary results of review for which the reviewed companies did not know 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).

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash-deposit requirements will be effective upon publication of the final results of this administrative review 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)(2)(C) of the Act: (1) The cash deposit rate for the companies covered by this review will be the rate established in the final results of review; (2) for previously reviewed or investigated 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 or in the investigation but the manufacturer is, the cash-deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash-deposit rate for all other manufacturers or exporters will continue to be the all-others rate of 14.57 percent, which is the all-others rate established in the investigation. *See CMC Order,* 70 FR at 39735. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department'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: August 2, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–19730 Filed 8–9–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before September 9, 2010.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: August 5, 2010.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Extension.

Title of Collection: NCES Cognitive, Pilot, and Field Test Studies System Clearance.

OMB #: 1850–0803.

Agency Form Number(s): N/A.

Frequency of Responses: Once.

Affected Public: Individuals or household; Not-for-profit institutions; State, Local, or Tribal Gov't, State Educational Agencies (SEAs) or Local Educational Agencies (LEAs).

Estimated Number of Annual Responses: 45,000.

Estimated Annual Burden Hours: 9,000.

Abstract: This is a request for a 3-year renewal of the generic clearance for the National Center for Education Statistics (NCES) that will allow it to continue to develop, test, and improve its survey and assessment instruments and methodologies. The procedures utilized to this effect include but, are not limited to, experiments with levels of incentives for various types of survey operations, focus groups, cognitive laboratory activities, pilot testing, exploratory interviews, experiments with questionnaire design, and usability testing of electronic data collection instruments.

Requests for copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 4319. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title and OMB Control Number of the information collection when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–19733 Filed 8–9–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests; Comment Request

AGENCY: Department of Education.

ACTION: Correction notice.

SUMMARY: On August 5, 2010, the Department of Education published a comment period notice in the **Federal Register** (Page 47282, Column 3) for the information collection, "Application for Grants under the Talent Search Program." This notice hereby corrects the 60-day notice to a 30-day notice.

The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, hereby issues a correction notice as required by the Paperwork Reduction Act of 1995.

Dated: August 5, 2010.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

[FR Doc. 2010–19732 Filed 8–9–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Ultra-Deepwater Advisory Committee

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Ultra-Deepwater Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, September 8, 2010, 8 a.m.–5 p.m. (CDT).

ADDRESSES: Sugar Land Marriott Town Square, 16090 City Walk, Sugar Land, Texas 77479–6539.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. *Phone:* 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Ultra-Deepwater Advisory Committee is to provide advice on development and implementation of programs related to ultra-deepwater architecture and technology to the Secretary of Energy and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

September 8, 2010

7:30 a.m.—8 a.m. Registration.

8 a.m.–noon Call to Order, Welcome, Introductions, Opening Remarks, Overview of the Section 999 Research Portfolio (Ultra-Deepwater and NETL Complementary Research).

1 p.m.—4:45 p.m. Overview of *Draft 2011 Annual Plan.*

4:45 p.m.–5 p.m. Public Comment.

5 p.m. Adjourn.

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the address or telephone number listed above. You must make your request for an oral statement at least two business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 5 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, 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 4, 2010.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2010–19710 Filed 8–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Petroleum Council

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the National Petroleum Council. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Tuesday, September 14, 2010, 9 a.m.–11 a.m.

ADDRESSES: The Willard Hotel, 1401 Pennsylvania Avenue, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Nancy Johnson, U.S. Department of Energy, Office of Oil and Natural Gas (FE–30), Washington, DC 20585. Phone: 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: To provide advice, information, and recommendations to the Secretary of Energy on matters relating to oil and natural gas, or the oil and natural gas industry.

Tentative Agenda

- Call to Order and Introductory Remarks
- Remarks by the Honorable Daniel B. Poneman, Deputy Secretary of Energy
- Progress Report of the NPC Committee on Future Transportation Fuels
- Progress Report of the NPC Committee on Prudent Development of North America Resources
- Administrative Matters
- Discussion of Any Other Business Properly Brought Before the Council
- Adjournment

Public Participation: The meeting is open to the public. The Chairman of the Council will conduct the meeting to facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement to the Council will be permitted to do so, either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Nancy Johnson at the address or telephone number listed above. Request must be received at least five days prior to the meeting and reasonable provisions will be made to include the presentation on the agenda.

Transcripts: Available for public review and copying at the Public Reading Room, Room 1G–033, 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 4, 2010.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2010–19711 Filed 8–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Unconventional Resources Technology Advisory Committee

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Unconventional Resources Technology Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, September 9, 2010, 8 a.m.—5 p.m. (CDT).

ADDRESSES: Sugar Land Marriott Town Square, 16090 City Walk, Sugar Land, Texas 77479–6539.

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Washington, DC 20585. Phone: 202–586–5600.

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: The purpose of the Unconventional Resources Technology Advisory Committee is to provide advice on development and implementation of programs related to onshore unconventional natural gas and other petroleum resources to the Secretary of Energy; and provide comments and recommendations and priorities for the Department of Energy Annual Plan per requirements of the Energy Policy Act of 2005, Title IX, Subtitle J, Section 999D.

Tentative Agenda

September 9, 2010

7:30 a.m.–8 a.m. Registration.

8 a.m.–noon. Call to Order, Welcome, Introductions, Opening Remarks,

Overview of the Section 999 Research Portfolio (Unconventional Resources, Small Producers, and NETL Complementary Research).
1 p.m.–4:45 p.m. Overview of *Draft 2011 Annual Plan.*
4:45 p.m.–5 p.m. Public Comment.
5 p.m. Adjourn.

Public Participation: The meeting is open to the public. The Designated Federal Officer and the Chairman of the Committee will lead the meeting for the orderly conduct of business. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Elena Melchert at the address or telephone number listed above. You must make your request for an oral statement at least two business days prior to the meeting, and reasonable provisions will be made to include the presentation on the agenda. Public comment will follow the 5 minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 60 days at the Freedom of Information Public Reading Room, Room 1G–033, 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 4, 2010.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2010–19714 Filed 8–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–474–000]

Corning Natural Gas Corporation; Notice of Application

August 4, 2010.

Take notice that on July 26, 2010, Corning Natural Gas Corporation (Corning), 330 W. William Street, Corning, New York 14830, filed in the above referenced docket an application pursuant to section 7(f) of the Natural Gas Act (NGA) requesting the determination of a service area with which Corning may, without further Commission authorization, enlarge or expand its natural gas distribution facilities. Corning also requests a waiver of the Commission's accounting and reporting requirements and other regulatory requirements ordinarily applicable to interstate natural gas pipelines under the NGA and other such relief the Commission may deem appropriate, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Corning proposes to reconnect its natural gas distribution system in the State of New York to natural gas production in Pennsylvania, by returning two existing 12-inch-diameter pipeline stubs, each approximately 1,100 feet long to service at Douds Farm. Further, Corning proposes to expand its service area at Baxter Lake Road to interconnect existing Line 11 to one 12-inch diameter pipeline, no more than 1,100 feet in length. Corning states that it will not distribute, transport, or sell natural gas to any customers in the State of Pennsylvania as a result of the proposed service area determination.

Any questions concerning this application may be directed to S. Lorraine Cross, Counsel for Corning Natural Gas Corporation, Cross & Company PLLC, Suite 710, 10 G Street NE., Washington, DC 20002, at (202) 609–9862.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: August 25, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–19670 Filed 8–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12679–003]

ORPC Alaska, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

August 4, 2010.

On April 1, 2010, and supplemented on July 26, 2010, ORPC Alaska, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Cook Inlet

Tidal Energy Project to be located in Cook Inlet in the vicinity of Anchorage, Alaska, in the Municipality of Anchorage and Matanuksa-Susitna Borough, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project will consist of the following: (1) Four 250-kilowatt TideGen turbine-generator modules with a combined capacity of 1 megawatt (MW); (2) an approximately 4,000-foot-long underwater transmission cable from the module site to a shore station on Fire Island; (3) an approximately 4,600-foot-long transmission line connecting the shore station to an interconnection point on Fire Island; and (4) appurtenant facilities. The estimated annual generation of the Cook Inlet project would be 2,628 megawatt-hours.

Applicant Contact: Monty Worthington, Director of Project Development, ORPC Alaska, LLC, 725 Christensen Drive, Suite A, Anchorage, AK 99501; *phone:* (907) 339–7939.

FERC Contact: Jennifer Harper,(202) 502–6136.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12679–003) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–19669 Filed 8–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2106–059]

McCloud-Pit Project; Notice of Availability of the Draft Environmental Impact Statement for the McCloud-Pit Hydroelectric Project and Intention To Hold Public Meetings

July 30, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission or FERC) regulations contained in the Code of Federal Regulations (CFR) (18 CFR part 380 [FERC Order No. 486, 52 FR 47897]), the Office of Energy Projects has reviewed the application for license for the McCloud-Pit Hydroelectric Project (FERC No. 2106), located on the McCloud and Pit Rivers in Shasta County, California, and has prepared a draft environmental impact statement (EIS) for the project. The project occupies 1,621.9 acres of federal lands managed by the U.S. Department of Agriculture-Forest Service and 29.5 acres of federal lands managed by the U.S. Bureau of Land Management.

The draft EIS contains staff's analysis of the applicant's proposal and the alternatives for relicensing the McCloud-Pit Project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicant, and Commission staff.

A copy of the draft EIS is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "e-Library" link. Enter the docket number, excluding the last three digits, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

All comments must be filed by Tuesday, September 28, 2010, and should reference Project No. 2106–059. Comments may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "eComment." For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

In addition to or in lieu of sending written comments, you are invited to attend a public meeting that will be held to receive comments on the draft EIS. The time and location of the meeting is as follows:

Morning Meeting

Date: September 9, 2010.

Time: 9 a.m.–11 p.m.

Place: Holiday Inn Hotel.

Address: 1900 Hilltop Dr., Redding, CA.

Evening Meeting:

Date: September 9, 2010,

Time: 7 p.m.–9 p.m.

Place: Holiday Inn Hotel.

Address: 1900 Hilltop Dr., Redding, CA.

At these meetings, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments and recommendations regarding the draft EIS. The meetings will be recorded by a court reporter, and all statements (verbal and written) will become part of the Commission's public record for the project. This meeting is posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

For further information, please contact Emily Carter at (202) 502–6512 or at *emily.carter@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–19668 Filed 8–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–1–002]

Southern California Edison Company; Notice of Filing

August 4, 2010.

Take notice that on August 3, 2010, pursuant to the Federal Energy Regulatory Commission's (Commission) December 17, 2009 Order on Petition for Declaratory Order, *Southern California Edison Co.*, 129 FERC ¶ 61,246 (2009) (December 17, Order), Southern California Edison Company filed a compliance filing demonstrating satisfaction of the condition set forth in the Commission's December 17 Order.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 24, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–19671 Filed 8–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–73–000]

Northern Illinois Gas Company; Notice of Petition for Rate Approval

August 4, 2010.

Take notice that on July 30, 2010, Northern Illinois Gas Company (Nicor) filed a petition to establish (1) new service rates pursuant to section 284.123(b)(2) of the Commission's regulations; (2) establish a new storage loss recovery mechanism; and (3) incorporate minor housekeeping corrections and clarifications to its Operating Statement.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Friday, August 13, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–19667 Filed 8–9–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R9–SFUND–2010–0506; FRL–9187–3; EPA ICR No. 2399.01; OMB Control No. 2009–NEW]

Agency Information Collection Activities; Proposed Collection; Comment Request; Palos Verdes Shelf Seafood Consumption Survey

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that 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 12, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R9–SFUND–2010–0506 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: white.carmen@epa.gov.*
- *Fax:* 1–415–947–3526.
- *Mail:* Palos Verdes Shelf Seafood Consumption Survey, U.S. Environmental Protection Agency, Mailcode: SFD–8–2, 75 Hawthorne St., San Francisco, CA 94105.
- *Hand Delivery:* EPA Region 9 Reception Office, 75 Hawthorne St., San Francisco, CA 94105. The Reception Office is open from 8 a.m. to 4 p.m., Monday through Friday. Such deliveries are only accepted during normal hours of operation, and special arrangements

should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R9–SFUND–2010–0506. 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/dockets.*

FOR FURTHER INFORMATION CONTACT:

Carmen White, Region 9 Superfund Division, SFD–8–2, Environmental Protection Agency, 75 Hawthorne St., San Francisco, CA 94105; *telephone number:* 415–972–3010 *fax number:* 415–947–3526 *e-mail address: white.carmen@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–R9–SFUND–2010–0506, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Superfund Records Circulation Desk, 95 Hawthorne St., Room 405, San Francisco, CA 94105. The Superfund Records Center Circulation Desk is open from 8 a.m. to 5 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Circulation Desk is 415–820–4700.

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 anglers who fish in the Palos Verdes Shelf vicinity.

Title: Palos Verdes Shelf Seafood Consumption Survey.

ICR numbers: EPA ICR No. 2399.01, OMB Control No. 2009–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: The Palos Verdes Shelf Superfund site (PV Shelf) is a large sediment deposit off the coast of Los Angeles that contains approximately 110 tons of DDT and 10 tons of PCBs. The contaminants are in sediment too deep for direct human contact; however, fish in the PV Shelf area bioaccumulate the contaminants, exposing people who consume them to these hazardous substances. The objective of this information collection request (ICR) is to gather quantitative data that will provide estimates of angler seafood consumption in the PV Shelf area that can be used in EPA's outreach and education program and in human health risk assessments. The survey will (1) determine the fish species that are being caught and consumed at the highest rates, (2) identify demographic and ethnic subgroups within the general fishing population of the PV Shelf area that may be consuming large quantities of contaminants through selection, quantity, and/or cooking method of fish species, (3) gather quantitative data that can be used to characterize exposures of the general fishing population of the PV Shelf area to DDTs and PCBs from consumption of fish and shellfish caught in the PV Shelf area, and (4) gather sufficient information to determine whether the existing human health risk assessment needs to be revised before its use in a final Record of Decision. Anglers will be asked to answer about a dozen questions regarding their fishing habits. Participation is voluntary and confidential. Demographic data will be collected; however, no personal identification information will be collected.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 15 minutes per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 2396.

Frequency of response: One time.

Estimated total average number of responses for each respondent: One.

Estimated total annual burden hours: 119 hours.

Estimated total annual costs: $104,939.00. This includes an estimated burden cost of $0 and an estimated cost of $0 for capital investment or maintenance and operational 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 26, 2010

Jane Diamond,

Director, Region IX Superfund Division.

[FR Doc. 2010–19709 Filed 8–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–UST–2010–0625, FRL–9187–2]

Agency Information Collection Activities: Proposed Collection; Comment Request; Underground Storage Tanks: Technical and Financial Requirements, and State Program Approval Procedures (Renewal), EPA ICR Number 1360.12, OMB Control Number 2050–0068

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection which is scheduled to expire on March 31, 2011. 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 12, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–UST–2010–0625 to EPA by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *rcra-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Underground Storage Tanks Docket, Mail Code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA Docket Center, Underground Storage Tanks Docket, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, *Phone:* (202) 566–0270.

Instructions: Direct your comments to Docket ID No. EPA–HQ–UST–2010–0625. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Hal White, Office of Underground Storage Tanks, Mail Code 5403P, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (703) 603–7177; *fax number:* (703) 603–0175; *e-mail address: white.hal@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–UST–2010–0625, which is available for online viewing at *www.regulations.gov*, or in person viewing at the UST Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for UST Docket is 202–566–0270.

Use *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 those facilities that own and operate underground storage tanks (USTs) and those states that implement the UST programs.

Title: "Underground Storage Tanks: Technical and Financial Requirements, and State Program Approval Procedures (Renewal)."

ICR numbers: ICR Number 1360.12, OMB Control Number 2050–0068.

ICR status: This ICR is currently scheduled to expire on March 31, 2011. 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: Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended, requires that EPA develop standards for UST systems, as may be necessary, to protect human health and the environment, and procedures for approving state programs in lieu of the federal program. EPA promulgated technical and financial requirements for owners and operators of USTs at 40 CFR part 280, and state program approval procedures at 40 CFR part 281. This ICR is a comprehensive presentation of all information collection requirements contained at 40 CFR parts 280 and 281.

The data collected for new and existing UST system operations and financial requirements are used by owners and operators and/or EPA or the implementing agency to monitor results of testing, inspections, and operation of UST systems, as well as to demonstrate compliance with regulations. EPA believes strongly that if the minimum requirements specified under the regulations are not met, neither the facilities nor EPA can ensure that UST systems are being managed in a manner protective of human health and the environment.

EPA uses state program applications to determine whether to approve a state program. Before granting approval, EPA must determine that programs will be no less stringent than the federal program and contain adequate enforcement mechanisms.

The EPA would like to solicit comments 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.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 25 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Respondents/Affected Entities: UST facilities and states.

Estimated Number of Respondents: 237,589.

Frequency of Response: once, on occasion.

Estimated Total Annual Hour Burden: 5,969,217.

Estimated Total Annual Cost: $743,453,178 ($453,047,585 in labor costs; $95,975,266 in annualized capital/startup costs; and $194,430,327 in operation and maintenance costs).

Dated: August 2, 2010.

Carolyn Hoskinson,

Director, Office of Underground Storage Tanks.

[FR Doc. 2010–19712 Filed 8–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9186–9]

Science Advisory Board Staff Office; Notification of a Public Meeting of the Advisory Council on Clean Air Compliance Analysis (Council)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the Advisory Council on Clean Air Compliance Analysis (Council). The Council will review a final draft of the EPA Office of Air and Radiation's Second Section 812 Prospective Analysis of the benefits and costs of the Clean Air Act.

DATES: The meeting will be held on Thursday, September 2, 2010 from 8:30 a.m. to 5 p.m. (Eastern Time) and Friday, September 3, 2010 from 8:30 a.m. to noon (Eastern Time).

ADDRESSES: The public meeting will be held at the Park Hyatt Washington, 1201 24th Street, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information about this meeting may contact Ms. Stephanie Sanzone, Designated Federal Officer (DFO), EPA Science Advisory Board Staff Office (1400R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; by telephone/voice mail: (202) 564–2067 or e-mail at *sanzone.stephanie@epa.gov.* General information about the Council may be found on the Council Web site at *http://www.epa.gov/advisorycouncilcaa.*

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2, notice is hereby given that the Advisory Council on Clean Air Compliance Analysis (Council) will hold a public meeting to review draft EPA documents prepared for the Second Section 812 Prospective Benefit-Cost Analysis of the Clean Air Act. The Council was established in 1991 pursuant to the Clean Air Act (CAA) Amendments of 1990 (see 42 U.S.C. 7612) to provide advice, information and recommendations on technical and economic aspects of analyses and reports EPA prepares on the impacts of the CAA on the public health, economy, and environment of the United States. The Council is a Federal Advisory Committee chartered under FACA. The Council its subcommittees (Air Quality Modeling Subcommittee, Health Effects Subcommittee, and Ecological Effects Subcommittee) comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Pursuant to Section 812 of the 1990 Clean Air Act Amendments (CAAA), EPA conducts periodic studies to assess benefits and costs of the EPA's regulatory actions under the Clean Air Act. The Council has provided advice on an EPA retrospective study published in 1997 and an EPA prospective study completed in 1999. EPA initiated a second prospective study to evaluate the benefits and costs of EPA Clean Air programs for years 1990—2020. The Council has previously provided advice on the technical analyses prepared for this study. EPA's Office of Air and Radiation (OAR) has now completed the analytical work for the second prospective study, and has requested the Council's review of the draft synthesis report.

Previous Reviews: The Council and its subcommittees have previously reviewed EPA documents prepared in support of the Office of Air and Radiation's Second Section 812 Prospective Study, and the advisory reports from these activities are available on the Council Web site at (*http://www.epa.gov/advisorycouncilcaa*). As announced previously (**Federal Register**, Vol 75, Number 73, Pages 19969–19971), the Council met on May 4–5, 2010 to review EPA reports on uncertainty and economic analyses of the costs and benefits of the CAAA, including valuation of health and welfare benefits, estimates of direct costs, and results from the EMPAX–CGE economy-wide modeling. The Council also reviewed chapters from the preliminary draft integrated report, and offered suggestions for improvement, summarized in a Council report, *Advisory on a Preliminary Draft of the Second Section 812 Prospective Study of the Benefits and Costs of the Clean Air Act (April 2010).* The purpose of the September 2–3, 2010 meeting is for the Council to review the revised version of the draft integrated report. Background information on this advisory activity is available on the Council Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/2nd_Prospective_812_Study?OpenDocument.*

Technical Contacts: The Office of Air and Radiation technical contact for the Second Section 812 Benefit-Cost Analysis of the Clean Air Act is Mr. Jim DeMocker at (202) 564–1673 or *democker.jim@epa.gov.*

Availability of Meeting Materials: Draft EPA documents provided to the Council are available at *http://www.epa.gov/oar/sect812/prospective2.html* and on the Council Web site. The meeting agenda for September 2–3, 2010 and any background materials will be posted on the Council Web site at (*http://www.epa.gov/advisorycouncilcaa*) prior to the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written information on the group conducting the activity or written or oral information for the Council to consider on the topics of this advisory activity. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes per speaker, with no more than one hour for all speakers. Interested parties should contact Ms. Sanzone at the contact information provided above by August 26, 2010, to be placed on the public speaker list for the September 2–3, 2010 meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by August 26, 2010, so that the information may be made available to the Council for their consideration prior to the meeting. Written statements should be supplied to Ms. Sanzone in the following formats: one hard copy with original signature and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files). Submitters are asked to provide electronic versions of each document submitted with *and* without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. Sanzone at (202) 564–2067, or via e-mail at *sanzone.stephanie@epa.gov,* preferably at least ten (10) days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: August 4, 2010.

Anthony Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–19718 Filed 8–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9187–1]

Science Advisory Board Staff Office; Request for Nominations of Experts to Augment the Advisory Council on Clean Air Compliance Analysis (Council)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office is requesting public nominations of experts to augment the Advisory Council on Clean Air Compliance Analysis (Council) to review EPA's draft report to Congress on the climate effects of black carbon emissions.

DATES: Nominations should be submitted by August 31, 2010 per instructions below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Stephanie Sanzone, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2067; by fax at (202) 565–2098 or via e-mail at *sanzone.stephanie@epa.gov*. General information concerning the Council can be found on the EPA SAB Web site at *http://www.epa.gov/advisorycouncilcaa*. Any inquiry regarding EPA's draft report to Congress on black carbon should be directed to Erika Sasser of EPA's Office of Air Quality Planning and Standards (OAQPS) at *sasser.erika@epa.gov* or (919) 541–3889.

SUPPLEMENTARY INFORMATION:

Background: The Council was established in 1991 pursuant to the Clean Air Act (CAA) Amendments of 1990 (*see* 42 U.S.C. 7612) to provide advice, information and recommendations on technical and economic aspects of analyses and reports EPA prepares on the impacts of the CAA on the public health, economy, and environment of the United States. The Council is a chartered Federal Advisory Committee, and conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. Generally, Council meetings are announced in the **Federal Register**, conducted in public view, and provide opportunities for public input during deliberations. Staff support for the Council is provided by the SAB Staff Office. Additional information about the Council and its committees can be obtained on the SAB Web site at *http://www.epa.gov/advisorycouncilcaa*.

The October 2009 Interior Appropriations bill (Pub. L. 111–88) requires the EPA, in consultation with other Federal agencies, to prepare a comprehensive report to Congress on the climate effects of black carbon. Black carbon, or soot, results from incomplete combustion of organic matter such as fossil fuels and biomass. The report to Congress will evaluate and synthesize available information on sources of black carbon, impacts of black carbon on global and regional climate, and the potential utility and cost-effectiveness of mitigation options for reducing climate and public health impacts of black carbon.

EPA's Office of Air Quality Planning and Standards (OAQPS) have requested that the Council review the draft Report to Congress on Black Carbon to evaluate the report's scientific rigor and technical accuracy.

Request for Nominations

To augment expertise on the Council, the SAB Staff Office is seeking nominations of recognized experts in global and regional climate modeling; aerosol atmospheric chemistry; air emissions inventories; ambient monitoring; emissions measurement; health effects of black carbon and fine particulate matter ($PM_{2.5}$); black carbon/$PM_{2.5}$ controls and associated costs; and benefits assessment. In particular, we seek nominees with knowledge of black carbon emissions, impacts, and control strategies.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate individuals qualified in the area of science as described above to be considered for appointment to augment the Council for this review. Candidates also may nominate themselves. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" provided on the SAB Web site. The form can be accessed through the "Nomination of Experts" link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab*. To receive full consideration, nominations should include all of the information requested, and should be submitted in time to arrive no later than August 31, 2010. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

EPA's SAB Staff Office requests contact information about: the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vitae; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Ms. Sanzone, DFO, at the contact information provided above in this notice. Non-electronic submissions must follow the same format and contain the same information as the electronic.

The SAB Staff Office will acknowledge receipt of the nomination and inform nominees of the Committee for which they have been nominated. From the nominees identified by respondents to this **Federal Register** notice and other sources, the SAB Staff Office will develop a list of candidates for more detailed consideration. The list of candidates will be posted on the SAB Web site at *http://www.epa.gov/advisorycouncilcaa* and will include, for each candidate, the nominee's name and biosketch. Public comments on the list of candidates will be accepted for 21 calendar days. During this comment period, the public will be requested to provide information, analysis, or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates for the Committee.

For the SAB Staff Office, a balanced Committee is characterized by inclusion of candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation) and the collective breadth of experience to adequately address the charge. Public responses to the list of candidates will be considered in the selection of the Committee, along with information provided by candidates and information gathered by SAB Staff independently concerning the background of each candidate (*e.g.,* financial disclosure information and computer searches to evaluate a nominee's prior involvement with the topic under review). Specific criteria to be used in evaluation of an individual Committee member include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) absence of financial conflicts of interest; (c) scientific credibility and impartiality; (d) availability and willingness to serve; (e) ability to work constructively and effectively in committees; and (f) for the Committee as a whole, diversity of scientific expertise and viewpoints.

Prospective candidates will be required to fill-out the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. Ethics information, including EPA Form 3110–48, is available on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/Web/ethics?OpenDocument.*

Dated: August 4, 2010.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010–19719 Filed 8–9–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9186–8]

Tribal Drinking Water Operator Certification Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the program details of EPA's voluntary Tribal Drinking Water Operator Certification Program, effective October 1, 2010. The program enables qualified drinking water operators at public water systems in Indian country to be recognized as certified operators by EPA. This program will provide the benefits of certification to both the public water system operators and the Tribal communities they serve. Through the training required to receive and maintain certification, operators learn how to supply drinking water that meets national standards and gain understanding of the associated public health benefits. Certification demonstrates the operator has the skills, knowledge, education and experience necessary to deliver safe water supporting consumer confidence. Certification designates the water system operator as a public health professional and demonstrates the operator has the skills, knowledge, education and experience necessary to deliver safe water supporting consumer confidence.

FOR FURTHER INFORMATION CONTACT: The Safe Drinking Water Hotline, toll free 1–800–426–4791, can be contacted for general information about this document. For technical inquiries please contact Ronald Bergman, Office of Ground Water and Drinking Water, Drinking Water Protection Division, Protection Branch, 4606M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 202–564–3823, *e-mail address: bergman.ronald@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. How can I get copies of this document and other related information?

1. *Electronic Access.* EPA's Tribal Drinking Water Operator Certification Program updates and application materials regarding this program can be found at *http://www.epa.gov/safewater/tribal.html.*

2. *Hard Copies.* Hard copies of EPA's Tribal Drinking Water Operator Certification Program are available upon request. Please contact Kyle Carey, Office of Ground Water and Drinking Water, Drinking Water Protection Division, Protection Branch, 4606M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 202–564–2322, *e-mail: carey.kyle@epa.gov.*

B. Approved Providers and Reciprocity

Although participation in this Certification Program is voluntary, EPA requires a Tribe to have, or agree to obtain within a certain time frame, a certified operator(s) for their public drinking water system(s) in order to secure funds in the Drinking Water Infrastructure Grant Tribal Set-Aside (DWIG TSA) program. The Federal drinking water regulations require some system operators to be "qualified." Participation in EPA's Tribal Drinking Water Operator Certification program meets this requirement. Operators certified through this program will be listed by the Region on their "register" pursuant to the regulations (*i.e.*, CFR 141.130(c)). The EPA Tribal Drinking Water Operator Certification program is available in the nine EPA regions with federally recognized Tribes. Public water system operators in Indian country seeking certification and/or interested in the EPA national program should contact the Association of Boards of Certification (ABC), 208 5th Street, Suite 201 Ames, IA 50010–6259; telephone number: 515–232–3623, fax: 515–232–3778, *http://www.abccert.org* or the Intertribal Council of Arizona (ITCA), 2214 North Central Avenue, Suite 100, Phoenix, AZ 85004, *telephone number:* 602–258–4822, *fax:* 602–258–4825, *http://www.itcaonline.com.* Additional providers may be added per EPA approval.

Under the EPA Tribal Drinking Water Operator Certification Program, reciprocity will be extended to any operators already certified by a State with an approved operator certification program and on a case-by-case basis to operators already certified by other EPA-approved providers pre-dating this program.

Dated: August 4, 2010.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 2010–19715 Filed 8–9–10; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2010–0030]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Short Term Letter of Credit Export Credit Insurance Policy.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Application for Short Term Letter of Credit Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export Import Bank assistance under its insurance program. Export Import Bank customers will be able to submit this form on paper or electronically.

The Export Import Bank has made changes to incorporate new information in the Certification and Notice sections of this form to clarify and expand to encompass broader anti-corruption certifications. In the Certification and Notice sections we rewrote some of the language for clarification, we corrected references to the debarment list, and we added references to the OFAC and the EPLS system.

DATES: Comments should be received on or before October 12, 2010 to be assured of consideration.

DATES: Comments maybe submitted electronically on *http://www.regulations.gov* or by mail to Michele Kuester, Export Import Bank of the United States, 811 Vermont Ave., NW. Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–34 Application for Short Term Letter of Credit Export Credit Insurance Policy.

OMB Number: 3048–0009.

Type of Review: Regular.

Need and Use: The Application for Short Term Letter of Credit Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export Import Bank assistance under its insurance program.

Sharon A. Whitt,

Agency Clearance Officer.

BILLING CODE 6690–01–P

Print Form

OMB No. 3048-0009
Expires 10/31/2010

EXPORT-IMPORT BANK *of the* UNITED STATES

APPLICATION FOR SHORT-TERM LETTER OF CREDIT EXPORT CREDIT INSURANCE POLICY

App. Number (Ex-Im Bank Use Only)

This application is to be completed by a financial institution (or a broker acting on its behalf) in order to obtain a short-term letter of credit insurance policy. An online version of this application is available on Ex-Im Bank's web site. Ex-Im Bank encourages customers to apply online, as it will facilitate our review and allow customers a faster response time. Additional information on how to apply for Ex-Im Bank insurance can be found at Ex-Im's web site http://www.exim.gov.

Send this completed application to Ex-Im Bank, 811 Vermont Ave NW, Washington, D.C. 20571. Ex-Im Bank will also accept e-mailed pdf and faxed applications. Ex-Im Bank will not require the originals of these applications to be mailed. The application must be PDF scans of oirginal applications and all required attachments (Fax number 202.565.3675, e-mail exim.applications@exim.gov)

APPLICANT

Applicant Name: Phone #:
Contact Person: Fax #:
Position Title: E-mail:
Street Address: Nine-digit zip code:
City: State/Province: Country:

Does the applicant have a market rating? ☐ Yes ☐ No
If yes, indicate the name of the rating agency, rating, and the date of the rating

Please provide the following information from the applicant's most recent audited financial statements.

Statement period (fiscal or interim): Are the financial statements combined or consolidated?
Financial Statement Dates:
Auditor: Opinion:
Net Income: Net Loans:
Total Assets Equity:

Broker: If Applicable

Name of Broker: Phone #:
Ex-Im Bank Broker #: Fax #:
Contact Person: E-mail:

Affiliate(s) (if applicable)

Please provide the following information for any subsidiaries, branches, or affiliates that the applicant would like us to consider adding as Additional Named Insureds under the policy

Legal Name: Phone #:
Contact Person: Fax #:
Position Title: E-mail:
Street Address: Nine-digit zip code:
City: State/Province: Country:

EIB92-34
01/2007

OMB No. 3048-0009
Expires 10/31/2010

1. General Questions

A. Indicate the Ex-Im Bank programs the applicant has used. ☐ Insurance ☐ Working Capital ☐ Loan Guarantee

B. What type of charter does the applicant hold? ☐ State ☐ Local

C. Indicate the name of the applicant's regulatory authority.

D. Does the applicant have any foreign government ownership?

If yes, please indicate the country and the percentage owned:

E. Letter of Credit Experience

- In what year did the applicant's letter of credit business begin?
- What was the total amount of letter of credit transactions in the last 12 months?
- What was the total number of letter of credit transactions in the last 12 months?
- Please provide the following information on the individuals responsible for administering the letter of credit policy:

Name	Title	Years of Trade Finance Experience	Years of Letter of Credit Experience

2. Letter of Credit Portfolio

What is the expected maximum value of letters of credit outstanding at any time over the next 12 months?

Please provide the following details regarding projected transactions to be insured over the next 12 months.

Country	Number of Issuing Banks	Total Letters of Credit	Total Letters of Credit #
		0	
		0	
		0	

3. Attachments

Please provide any information (e.g., the applicant's most recent annual report) that would be helpful in evaluating this application.

EIB92-34
01/2007

CERTIFICATIONS AND NOTICES

OMB No. 3048-0009
Expires 10/31/2010

The Applicant (hereafter "Applicant" or "it") CERTIFIES, ACKNOWLEDGES and COVENANTS to the Export-Import Bank of the United States (hereafter "Ex-Im Bank") that to the best of Applicant's knowledge and belief, after due diligence, the statements set forth below are true and correct. Any reference below to "this transaction" shall refer to either the individual transaction or the Ex-Im Bank program or Insurance Policy that is the subject of the application, as appropriate.

A. Neither Applicant, nor any of its Principals (as defined in the Debarment Regulations identified below), has, within the past 3 years, been:
1) debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a Covered Transaction (as defined in the Ex-Im Bank and Government-wide debarment regulations, found at 2 CFR Part 3513 and 2 CFR Part 180, respectively) (collectively the "Debarment Regulations");
2) formally proposed for debarment from participating in a Covered Transaction, with a final determination still pending;
3) indicted, convicted or had a civil judgment rendered against it for any conduct or offenses described at 2 CFR § 180.800 in the Debarment Regulations;
4) delinquent on any amounts due and owing to the U.S. Government or its agencies or instrumentalities as of the date of execution of this certification; or
5) listed on any of the publically available debarment lists of the following international financial institutions: the World Bank Group; the African Development Bank; the Asian Development Bank; the European Bank for Reconstruction and Development, and the Inter-American Development Bank;
or
the Applicant has received a written statement of exception from Ex-Im Bank attached to this certification, permitting acceptance of this application notwithstanding an inability to make all of the certifications in clauses1) through 5) of this section A.

B. Applicant has conducted and will conduct reasonable due diligence in connection with this transaction, including checking the **Excluded Parties List System** (http://www.epls.gov/epls/search.do) **("EPLS")** and the **Specially Designated Nationals ("SDN") List of the Department of the Treasury, Office of Foreign Assets Control ("OFAC")** (http://www.ustreas.gov/offices/enforcement/ofac/sdn/). Applicant will not knowingly enter into any sales, leasing or financing agreements in connection with this transaction with any individual or entity that is listed on the EPLS or the SDN List (or is otherwise prohibited from conducting business with U.S. public and private entities pursuant to OFAC Regulations).

C. Either: (1)To the best of Applicant's knowledge and belief, **no funds have been paid or will be paid** to any person in connection with this application for influencing or attempting to influence:
(a) an officer or employee of any U.S. Government agency, or
(b) a Member of Congress or a Member's employee, or
(c) an officer or employee of Congress;
(This does not apply to commissions paid by the Bank to insurance brokers.)
or
(2) Applicant will complete and submit **Form-LLL** (the Anti-Lobbying Declaration/Disclosure forms available at http://www.exim.gov/pub/pdf/95-10apd.pdf)

D. Neither Applicant nor any agent or representative acting on Applicant's behalf, has or will engage in any activity in connection with this transaction that is a violation of: 1) the **Foreign Corrupt Practices Act of 1977**, 15 U.S.C. § 78dd-1, et seq.; 2) the **Arms Export Control Act**, 22 U.S.C.§ 2751 et seq., 3) the **International Emergency Economic Powers Act**, 50 U.S.C. § 1701 et seq., 4) the **Export Administration Act of 1979**,50 U.S.C. § 2401 et seq., and, 5) the regulations issued by the **OFAC**. Applicant also certifies that neither Applicant nor any agent or representative acting on Applicant's behalf, has been found by a court of the United States to be in violation of any of the foregoing statutes or regulations within the preceding 12 months, and to the best of its knowledge, the performance by the parties to this transaction of their respective obligations does not violate any of the foregoing or any other applicable law.

E. Neither the Applicant nor any agent or representative acting on Applicant's behalf in connection with this transaction is currently under charge or has been, within the past 5 years, convicted in any court of any country, or subject to national administrative measures of any country, for bribery of public officials.

F. The representations made and the facts stated in this application and its attachments **are true and Applicant has not misrepresented or omitted any material facts.** Applicant further covenants that if any statement(s) set forth in this application becomes untrue, or is discovered to have been untrue when made, Applicant will promptly inform Ex-Im Bank of such change. Applicant further understands that in accepting or approving this application, Ex-Im Bank is relying upon Applicant's statements set forth in the application and on the foregoing certifications, and all statements and certifications to Ex-Im Bank are subject to the penalties for false or misleading statements to the U.S. Government (18 USC § 1001, et. seq.).

NOTICES

The applicant is hereby notified that information requested by this application is done so under authority of the Export-Import Bank Act of 1945, as amended (12 USC 635 et. seq.); provision of this information is mandatory and failure to provide the requested information may result in Ex-Im Bank being unable to determine eligibility for support. If any of the information provided in this application changes in any material way or if any of the certifications made herein become untrue, the applicant must promptly inform Ex-Im Bank of such changes. The information provided will be reviewed to determine the participants' ability to perform and pay under the transaction referenced in this application. Ex-Im Bank may not require the information and applicants are not required to provide information requested in this application unless a currently valid OMB control number is displayed on this form (see upper right of each page). Ex-Im Bank reserves the right to decline to process or to discontinue processing of an application.

Paperwork Reduction Act Statement: We estimate that it will take you about 1 hour per response to complete this form. This includes the time it will take to read the instructions, gather the necessary facts and fill out the form. However, you are not required to provide information requested unless a valid OMB control number is displayed on the form. If you have comments or suggestions regarding the above estimate or ways to simplify this form, forward correspondence to Ex-Im Bank and the Office of Management and Budget, Paperwork Reduction Project, OMB # 3048-0009 Washington, D.C. 20503.

EIB92-34
01/2007

(Signature)	(Print Name and Title)	(Date)

[FR Doc. 2010–19664 Filed 8–9–10; 8:45 am]

BILLING CODE 6690–01–C

EXPORT-IMPORT BANK

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application for a $53 million long-term guarantee to support the export of approximately $48 million worth of steel processing equipment and services to the UK. The U.S. exports will enable the British company to process and sell a maximum of 20,000 metric tons of cold rolled steel, 180,000 metric tons of galvanized steel, and toll process up to 270,000 metric tons of pickled and oiled steel per year during the 7-year repayment term of the guarantee. The British steel processor is not an integrated steel producer. Available information indicates that this British production of cold rolled steel will be sold in the UK, and the galvanized steel will be sold internationally. It is anticipated that the toll processed pickled and oiled steel will be consumed in the UK and Europe. Interested parties may submit comments on this transaction by e-mail to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue, NW., Room 947, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Jonathan J. Cordone,

Senior Vice President and General Counsel.

[FR Doc. 2010–19663 Filed 8–9–10; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

August 4, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before October 12, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via email to Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov and Cathy.Williams@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Cathy Williams on (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1078.

Title: Rules and Regulations Implementing the Controlling the Assault of Non–Solicited Pornography and Marketing Act of 2003, CG Docket No. 04–53.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households; Business or other for–profit entities; Not–for–profit institutions.

Number of Respondents and Responses: 5,443,062 respondents; 5,443,062 responses.

Estimated Time per Response: 1 – 10 hours (average per response).

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is the CAN–SPAM Act of 2003, 15 U.S.C. 7701 – 7713, Public Law No. 108–187, 117 Stat. 2719.

Total Annual Burden: 30,254,373 hours.

Total Annual Cost: $16,244,025.80.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's system of records notice (SORN), FCC/CGB–1, "Informal Complaints and Inquiries." As required by the Privacy Act, 5 U.S.C. 552a, the Commission also published SORN, FCC/CGB1, "Informal Complaints and Inquiries," in the Federal Register on December 15, 2009 (74 FR 66356), which became effective on January 25, 2010.

Privacy Impact Assessment: Yes. The Privacy Impact Assessment was completed on June 28, 2007. It may be reviewed at: <http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html>. The Commission is in the process of updating the PIA to incorporate various revisions to it as a result of revisions to the system of records notice (SORN).

Needs and Uses: The reporting requirements included under this OMB Control Number 3060–1078 enable the Commission to collect information regarding violations of the Controlling the Assault of Non–Solicited Pornography and Marketing Act of 2003 (CAN–SPAM Act). This information is used to help wireless subscribers stop receiving unwanted commercial mobile services messages.

On August 12, 2004, the Commission released an Order, Rules and Regulations Implementing the Controlling the Assault of Non–Solicited Pornography and Marketing Act of 2003, CG Docket No. 04–53, FCC 04–194, adopting rules to prohibit the sending of commercial messages to any address referencing an Internet domain name associated with wireless subscribers' messaging services, unless the individual addressee has given the sender express prior authorization. The information collection requirements consist of 47 CFR 64.3100(a)(4), (d), and (f) of the Commission's rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–19686 Filed 8–9–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

August 5, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 9, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page http://reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called "Currently Under Review", (3) click on the downward–pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information or copies of the information collection(s), contact Judith B. Herman, OMD, 202–418–0214 or email judith–b.herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1139.

Title: Residential Fixed Broadband Services Testing and Measurement.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Individuals or households.

Number of Respondents and Responses: 11,000 respondents; 11,000 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion and biennial reporting requirements.

Obligation to Respond: Voluntary. Statutory authorities for this information collection is contained in the American Reinvestment and Recovery Act (ARRA) of 2009, Pub. L. No. 111–5 and the Broadband Data Improvement Act of 2008, Pub. L. No. 110–385.

Total Annual Burden: 11,000 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: Yes. However, no personally identifiable information (PII) will be transmitted to the Commission from the survey contract vendor as a matter of vendor policy. SamKnows, Inc. maintains a series of administrative, technical and physical safeguards to protect against the transmission of personally identifying information. At point of registration, individuals will be given full disclosure, highlighting what information will be collected, and importantly, what information will not be collected.

Nature and Extent of Confidentiality: Yes. See Privacy Act Impact Assessment above.

Needs and Uses: The Commission will submit this expiring information collection during this comment period to obtain the full three year clearance from the Office of Management and Budget (OMB). There is no change in the reporting requirement and there is no change in the Commission's burden estimates.

On April 2, 2010, the Commission submitted this information collection to the OMB under their emergency processing provisions of 5 CFR 1320.13. The Commission obtained OMB approval on 4/30/2010. Emergency approvals are only granted for six months. Therefore, the Commission is now seeking the regular clearance from them.

The Commission's Office of Strategic Policy and Planning Analysis and the Consumer Intergovernmental Affairs Bureau plan to continue to conduct a hardware–based test and analysis of 11,000 consumer broadband connections to examine the performance of services across a number of parameters. This survey is crucial to comparing what consumers know – and need to know – about the speeds and performance, and terms and conditions of broadband and related services to services purchased.

The Commission has contracted with SamKnows, Inc. to measure the speeds and performance of a representative, cost–effective, statistically relevant sample of US fixed broadband households across geographies, technologies and providers. This measurement will occur on an opt–in, voluntary basis. This representative sample will be used to create a baseline level of performance and measurements for the FCC. The third party contractor (SamKnows, Inc.) will deploy testing devices to begin measurement, and these results will be then used to inform measurement standards for performance of broadband services, in support of the FCC–led National Broadband Plan.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–19687 Filed 8–9–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

August 5, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other

Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 9, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page http://reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called "Currently Under Review", (3) click on the downward–pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information or copies of the information collection(s), contact Judith B. Herman, OMD, 202–418–0214 or email judith–b.herman@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0799.

Title: FCC Ownership Disclosure Information for the Wireless Telecommunications Services.

Form Number: FCC Form 602.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 4,115 respondents; 5,215 responses.

Estimated Time per Response: .5 hours – 1.5 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 154(i), 303(g), 303(r), and 332(c)(7).

Total Annual Burden: 5,215 hours.

Total Annual Cost: $508,200.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Respondents may request that material or information submitted to the Commission be withheld from public inspection pursuant to 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) during this comment period to obtain the full three year clearance from them. There is no change to the reporting and/or third party disclosure requirements. There is no change in the Commission's burden estimates.

The purpose of the FCC Form 602 is to obtain the identity of the filer and to elicit information required by 47 CFR 1.2112 of the Commission's rules regarding: 1) Persons or entities holding a 10 percent or greater direct or indirect ownership interest or any general partners in a general partnership holding a direct or indirect ownership interest in the applicant ("Disclosable Interest Holders"); and 2) All FCC–regulated entities in which the filer or any of its Disclosable Interest Holders owns a 10 percent or greater interest. The data collected on the FCC Form 602 includes the FCC Registration Number (FRN), which serves as a "common link" for all filings an entity has with the FCC. The Debt Collection Improvement Act of 1996 requires that entities filing with the Commission use a FRN. The FCC form 602 was designed for, and must be filed electronically by, all licensees that hold licenses in auctionable services.

The FCC Form 602 is comprised of the main form containing information regarding he filer and the Schedule A is used to collect ownership data pertaining to the Disclosable Interest Holder(s). Each Disclosable Interest Holder will have a separate Schedule A. Thus, a filer will submit its FCC Form 602 with multiple copies of Schedule A, as necessary to list each Disclosable Interest Holder and associated information.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–19688 Filed 8–9–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB), Comments Requested

August 5, 2010.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 – 3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden for small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a currently valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 9, 2010. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via fax at 202–395–5167 or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to the Federal Communications Commission via email to PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page http://reginfo.gov/public/do/PRAMain, (2) look for the section of the web page called "Currently Under Review", (3) click on the downward–pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214. For additional information or copies of the information collection(s), contact [insert name, phone and Internet address of OMD PRA analyst].

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0798.

Title: FCC Application for Radio Service Authorization: WTB and PSHSB.

Form Number: FCC Form 601.

Type of Review: Revision of a currently approved collection.

Respondents: Individuals or households, business or other for–profit, not–for–profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 253,120 respondents; 253,120 responses.

Estimated Time per Response: .5 hours – 1 hour.

Frequency of Response: Every decade and on occasion reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 152, 154(i), 155(c), 157, 201, 202, 208, 214, 301, 302a, 303,307, 308, 309, 310, 311, 314, 316, 319, 324, 331, 332, 333, 336, 534, and 535.

Total Annual Burden: 221,780 hours.

Total Annual Cost: $55,140,000.

Privacy Act Impact Assessment: Yes. Information on the FCC Form 601 is maintained in the Commission's system of records notice or 'SORN', FCC/WTB–1, "Wireless Services Licensing Records". These licensee records are publicly available and routinely used in accordance with subsection b. of the Privacy Act, 5 U.S.C. 552a(b), as amended.

Nature and Extent of Confidentiality: Respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this revised information collection due to an increase in the filing fees associated with the FCC Form 601. The annual cost to the respondent has increased by $4,746,000. This cost was previously estimated at $50,664,000.

The FCC Form 601 is a consolidated, multi–part application form, or "long form", that is used for general market–based licensing and site–by–site licensing for wireless telecommunications and public safety services filed through the Commission's Universal Licensing System (ULS). FCC Form 601 is composed of a main form that contains the administrative information and a series of schedules used for filing technical and other information. Respondents are encouraged to submit FCC Form 601 electronically and are required to do so when submitting FCC Form 601 to apply for an authorization for which the applicant is the winning bidder in a spectrum auction.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–19690 Filed 8–9–10; 8:45 am]

BILLING CODE 6712–01–S

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Issuance of Statement of Federal Financial Accounting Standard 39, *Subsequent Events: Codification of Accounting and Financial Reporting Standards Contained in the AICPA Statement on Auditing Standards and Technical Release 12, Accrual Estimates for Grant Programs*

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

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 Statement of Federal Financial Accounting Standard 39, Subsequent Events: Codification of Accounting and Financial Reporting Standards Contained in the AICPA Statement on Auditing Standards. The FASAB also announces the issuance of Technical Release 12, Accrual Estimates for Grant Programs.

The Standard is available on the FASAB home page *http://www.fasab.gov/standards.html.* The Technical Release is available on the FASAB home page *http://www.fasab.gov/aapc.html.*

Copies can be obtained by contacting FASAB at (202) 512–7350.

FOR FURTHER INFORMATION CONTACT: Wendy Payne, Executive Director, at (202) 512–7350.

Authority: Federal Advisory Committee Act, (Pub. L. 92–463).

Dated: August 4, 2010.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. 2010–19684 Filed 8–9–10; 8:45 am]

BILLING CODE 1610–02–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

TIME AND DATE: 3 p.m., Thursday, August 12, 2010.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following two cases in open session: *Secretary of Labor on behalf of Mark Gray* v. *North Fork Coal Corp.*, Docket

No. KENT 2009–1429–D; and *Kevin Baird* v. *PCS Phosphate Co.*, SE 2010–74–DM. (Issues include whether a temporary reinstatement order remains in effect in situations where the Secretary of Labor subsequently determines that no violation of section 105(c) of the Mine Safety and Health Act has occurred.)

A majority of the Commission members have determined that agency business requires that no earlier notice of this meeting could be given.

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

August 5, 2010.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 2010–19874 Filed 8–6–10; 4:15 pm]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 25, 2010.

A. Federal Reserve Bank of Atlanta (Clifford Stanford, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. *Shelby C. Peeples, Jr., and Willena Peeples*, both of Dalton, Georgia; W. Bryan Peeples, Amy L. Peeples, G. Thomas Peeples, Garrett T. Peeples Trust, with G. Thomas Peeples as trustee, and Vickie D. Peeples, all of Ringgold, Georgia; Jane Stanfield, Dalton, Georgia; Syndi Peeples Paris, Ringgold, Georgia; Michelle Stanfield Evans, and John P. Neal, III, both of Dalton, Georgia, as trustee for Asa Wallace Peeples Trust, Chapman D. Peeples Trust, Rhett Shelby Peeples Trust, Ellys Allene Peeples Trust, Gage W. Peeples Trust, Garrett T. Peeples Trust, Lily L. Peeples Trust, Syndi M. Peeples Trust, all of Ringgold, Georgia, and W. Michelle Stanfield Evans Trust, Dalton, Georgia, to retain voting shares of FBD Holding Company, Inc., and thereby indirectly retain voting shares of First Bank of Dalton, both of Dalton, Georgia.

2. *John Milton Wise, Sr.; Lilellen Hicks Wise; Mack Arthur Wise; John Milton Wise, Jr.; Stephanie Wise Jones; Michael Eugene Jones; Candace Aline Jones Sansing; Klein McCaegor Jones; and Sadie Ellen Jones*, all of Luverne, Alabama, to collectively acquire additional voting shares of First Citizens–Crenshaw Bancshares, Inc., and thereby indirectly acquire additional voting shares of First Citizens Bank, both of Luverne, Alabama.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Richard G. Anderson*, Helena, Montana, individually, and as part of a group acting in concert with Dick and Margaret Anderson, FLP; Dick Anderson Construction, Inc.; Dick Anderson Construction Profit Sharing Plan & Trust; MA Construction, Inc., (fka MAC Equipment Rental); Margaret F. Anderson; Norma J. Anderson, all of Helena, Montana; and David L. Anderson, Los Altos Hills, California; to acquire and retain control of Mountain West Financial Corp., and thereby indirectly acquire and retain control of Mountain West Bank, National Association, both of Helena, Montana.

2. *Sandra and Jule Jacobson*, both of Plentywood, Montana; to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana. In addition, Edward and Lois Angvick, Medicine Lake, Montana, as a group acting in concert, have also applied to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana. Furthermore, Walter Norbo; the Julia J. Norbo Exemption Trust; and Patsy Morstad, trustee of the Julia J. Norbo Exemption Trust, all of Plentywood, Montana, as a group acting in concert, have applied to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana.

Board of Governors of the Federal Reserve System, August 5, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–19682 Filed 8–9–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 25, 2010.

A. Federal Reserve Bank of Atlanta (Clifford Stanford, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. *Shelby C. Peeples, Jr., and Willena Peeples*, both of Dalton, Georgia; W. Bryan Peeples, Amy L. Peeples, G. Thomas Peeples, Garrett T. Peeples Trust, with G. Thomas Peeples as trustee, and Vickie D. Peeples, all of Ringgold, Georgia; Jane Stanfield, Dalton, Georgia; Syndi Peeples Paris, Ringgold, Georgia; Michelle Stanfield Evans, and John P. Neal, III, both of Dalton, Georgia, as trustee for Asa Wallace Peeples Trust, Chapman D. Peeples Trust, Rhett Shelby Peeples Trust, Ellys Allene Peeples Trust, Gage W. Peeples Trust, Garrett T. Peeples Trust, Lily L. Peeples Trust, Syndi M. Peeples Trust, all of Ringgold, Georgia, and W. Michelle Stanfield Evans Trust, Dalton, Georgia, to retain voting shares of FBD Holding Company, Inc., and thereby indirectly retain voting shares of First Bank of Dalton, both of Dalton, Georgia.

2. *John Milton Wise, Sr.; Lilellen Hicks Wise; Mack Arthur Wise; John Milton Wise, Jr.; Stephanie Wise Jones; Michael Eugene Jones; Candace Aline Jones Sansing; Klein McCaegor Jones; and Sadie Ellen Jones*, all of Luverne,

Alabama, to collectively acquire additional voting shares of First Citizens–Crenshaw Bancshares, Inc., and thereby indirectly acquire additional voting shares of First Citizens Bank, both of Luverne, Alabama.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Richard G. Anderson*, Helena, Montana, individually, and as part of a group acting in concert with Dick and Margaret Anderson, FLP; Dick Anderson Construction, Inc.; Dick Anderson Construction Profit Sharing Plan & Trust; MA Construction, Inc., (fka MAC Equipment Rental); Margaret F. Anderson; Norma J. Anderson, all of Helena, Montana; and David L. Anderson, Los Altos Hills, California; to acquire and retain control of Mountain West Financial Corp., and thereby indirectly acquire and retain control of Mountain West Bank, National Association, both of Helena, Montana.

2. *Sandra and Jule Jacobson*, both of Plentywood, Montana; to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana. In addition, Edward and Lois Angvick, Medicine Lake, Montana, as a group acting in concert, have also applied to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana. Furthermore, Walter Norbo; the Julia J. Norbo Exemption Trust; and Patsy Morstad, trustee of the Julia J. Norbo Exemption Trust, all of Plentywood, Montana, as a group acting in concert, have applied to acquire voting shares of Treasure Bancorp, Inc., and thereby indirectly gain control of Montana State Bank, both of Plentywood, Montana.

Board of Governors of the Federal Reserve System, August 5, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–19691 Filed 8–9–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 3, 2010.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Kirkwood Bancorporation Co.*, Bismarck, North Dakota and Kirkwood Bancorporation of Nevada, Inc., Las Vegas, Nevada; to acquire 94.89 percent of the voting shares of Eagle Valley Bank, National Association, Saint Croix Falls, Wisconsin.

Board of Governors of the Federal Reserve System, August 4, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–19597 Filed 8–9–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[Docket No. 9341]

Intel Corporation; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before September 7, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Intel, Docket No. 9341" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential....," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/intel/*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

based form at the weblink: (*https://ftcpublic.commentworks.com/ftc/intel/*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "Intel, Docket No. 9341" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Richard Feinstein (202-326-3658), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 3.25(f) the Commission Rules of Practice, 16 CFR 3.25(f), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for August 4, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission" or "FTC") accepted for public comment an Agreement Containing Consent Order ("Proposed Consent Order") with Intel Corporation ("Intel") to resolve an Administrative Complaint issued by the Commission on December 16, 2009.[2] The Complaint alleged that Intel unlawfully maintained its monopoly in the relevant CPU markets, and sought to acquire a second monopoly in the relevant graphics markets, using a variety of unfair methods of competition. Consumers were harmed by Intel's conduct, which resulted in higher prices, less innovation, and less consumer choice in the relevant markets. Consumers were also harmed by Intel's deceptive disclosures related to its compilers, which violated both competition and consumer protection principles. The Proposed Consent Order will bring immediate relief in the relevant markets and puts Intel under Commission Order.

As described in detail below, the Proposed Consent Order has two fundamental goals. First, it seeks to undo the effects of Intel's past restraints on competition by enhancing the ability of AMD, NVIDIA, Via, and others to compete effectively with Intel. To that end, the Proposed Consent Order seeks: 1) to make it easier for AMD, NVIDIA, and Via to use third-party foundries to manufacture products (to enable them to better match Intel's manufacturing advantages) (Section III.A.); 2) to give AMD, NVIDIA, and Via flexibility to secure modifications of change of control provisions in their Licensing Agreements with Intel (Section III.B); 3) to extend Via's intellectual property license (Section III.C); and 4) to provide assurances to manufacturers of complementary and peripheral products that they will be able to connect their devices to Intel's CPUs (Section II). These provisions compel Intel to make certain offers; they do not compel a third party to accept them. The goal is to require Intel to open the door to renewed competition, not to force a third party to take any particular action.

Second, the Proposed Consent Order is designed to protect the ability of customers and existing and future Intel competitors to engage in mutually beneficial trade, while prohibiting Intel from using certain practices to deter or thwart such trade. The Proposed Consent Order therefore prohibits Intel from engaging in: 1) certain pricing practices that could allow Intel to exclude competitors while maintaining high prices to consumers (Section IV.A.); 2) predatory design that disadvantages competing products without providing a performance benefit to the Intel product (Section V); and 3) deception related to its product road maps, its compilers, and product benchmarking (Sections VI, VII, and VIII).

The Proposed Consent Order is for settlement purposes only and is tailored to remedy the effects of Intel's specific conduct in the market context in which that conduct took place. The purpose of the Commission's Order is not punitive but rather remedial.[3] Intel's adherence to the specific provisions will not insulate it from future Commission scrutiny or enforcement action if its conduct otherwise violates the antitrust laws. That is, the Proposed Consent Order does not operate as a safe harbor for Intel. The Commission can not only challenge (and seek civil fines for) Order violations, but also has authority to challenge any practice not prohibited by the Proposed Consent Order (including, but not limited to, any pricing practice or design change that harms competition) in a potential future legal challenge. The prohibitions and standards utilized in the Proposed

[2] The Complaint was brought under Section 5 of the Federal Trade Commission Act, which "was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as 'unfair methods of competition' existing violations" of those acts and practices. *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (*quoting F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)); *see also F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986). In addition, the Commission has the jurisdiction under Section 5 to challenge "unfair or deceptive acts or practices in or affecting commerce . . ."

[3] As a general rule, the Commission's statutory authority is designed to remedy conduct going forward as opposed to punishing past conduct. For example, the Commission does not have the authority to levy fines for antitrust violations.

Consent Order do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal. The Commission expressly reserves the right to challenge Intel's future anticompetitive conduct if it has reason to believe that, considered in context, the effect of Intel's conduct is to enable it to increase or maintain power over price, output, or non-price competition in any market in which it is a participant. Furthermore, the Commission has the authority to monitor and determine whether the Commission has reason to believe that Intel has not strictly complied with all of the provisions of this Proposed Consent Order (including, but not limited to, the obligation to negotiate a license in good faith after a change of control of AMD, NVIDIA, or Via). The Commission expressly reserves its right to exercise this authority as well.

The Proposed Consent Order has been placed on the public record for 30 days for comments. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Proposed Consent Order and comments received and will decide whether it should withdraw from the Proposed Consent Order or make final the Order contained in the Agreement. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order.

1. The Commission's Complaint

The Federal Trade Commission voted 3-0 to issue an Administrative Complaint against Intel on December 16, 2009. Intel is a Delaware corporation with its principal place of business in Santa Clara, California. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs and graphics processors. The Complaint alleged that Intel engaged in a course of conduct over a ten-year period that was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct allowed Intel to unlawfully maintain its monopoly in the relevant CPU markets through means other than competition on the merits and created a dangerous probability that Intel would acquire a monopoly in the relevant GPU markets.

First, the Complaint alleges that Intel maintained its monopoly in the markets for x86 CPUs for desktops, notebooks, and servers, as well as smaller relevant markets, by engaging in a course of conduct that foreclosed or limited the adoption of non-Intel x86 CPUs. The CPU of a computer system processes data and controls other devices in the system, acting as the computer's "brains." The x86 CPU architecture and instruction set is the industry standard for CPUs used in notebooks, desktops, workstations, and volume servers.[4] The Complaint alleges a variety of relevant markets tied to the x86 CPU architecture including an overall x86 market. The non-x86 CPU alternatives did not constrain Intel's monopoly during the relevant time period.

Intel's only significant competitor in the relevant x86 CPU markets is AMD, based in Sunnyvale, California. AMD mounted serious challenges to Intel's position in 1999 when it released its Athlon x86 CPU and again in 2003 when it released its Opteron x86 CPU. The only other firm that sells x86 CPUs is a small Taiwanese firm, Via Technologies. A fourth firm, Transmeta, sold a small number of x86 CPUs in the notebook market but exited the market in 2006.

Over the last decade, Intel's share of the overall x86 CPU market (desktop, notebook, and server) has consistently exceeded 65 percent; its share of the x86 CPU desktop market has consistently exceeded 70 percent; and its share of the x86 CPU notebook market has consistently exceeded 80 percent. Intel's monopoly position in these markets is partially protected by significant barriers to entry, including reputation, scale economies, intellectual property rights, costs associated with building and operating large manufacturing facilities, and research and development costs. These legitimate barriers to entry make vigorous enforcement of the competition laws all the more important. The Proposed Order is designed to ensure that Intel cannot blunt entry and expansion by raising barriers in the relevant markets using means other than competition on the merits.

Second, the Complaint also challenges Intel's unfair methods of competition in the Graphics Processing Unit ("GPU", also referred to as "graphics") markets. GPUs originated as specialized processors for generating computer graphics. In recent years, GPUs have become increasingly sophisticated as computing graphics have grown in importance. GPUs have also evolved to take on more functionality. GPUs are increasingly performing computations traditionally performed by the CPU, allowing OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance. As a result, GPUs are creating better products at lower prices for consumers.

The graphics market is highly concentrated with high barriers to entry. Intel competes in the graphics market with NVIDIA and AMD/ATI. Intel makes and sells graphics processors that are either integrated into chipsets or directly onto the CPU. NVIDIA and AMD/ATI sell both graphics processors integrated into chipsets as well as discrete graphics cards. NVIDIA has been at the forefront of developing GPU functionality beyond merely graphics applications. The growth of NVIDIA's General Purpose GPU ("GP-GPU") computing allegedly threatened to undermine Intel's x86 CPU monopoly. The Complaint alleges that Intel engaged in behavior, other than competition on the merits, to marginalize NVIDIA and slow the adoption of GP-GPU computing.

A. Unfair and Exclusionary Commercial Practices in the Relevant CPU Markets

The Complaint alleges that Intel engaged in a variety of unfair methods of competition to foreclose or limit the adoption of non-Intel x86 CPUs by the world's largest original equipment manufacturers ("OEMs"). The largest original equipment manufacturers ("Tier One OEMs") include Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu, which combined account for more than 60 percent of all personal computer sales and are the only suppliers qualified to fulfill certain needs of large business buyers. Tier One OEMs provide a crucial distribution channel for any manufacturer of CPUs, chipsets or GPUs. Tier One OEMs supply high volume sales with the concomitant substantially reduced distribution cost. In three respects, Intel's conduct foreclosed significantly non-Intel x86 CPU suppliers from selling product to Tier One OEMs.

First, Intel induced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs. When Intel failed to prevent an OEM from adopting non-Intel CPUs, it sought to limit such purchases to a small percentage of the sales of certain computer products. The Complaint alleges, for example, that Intel entered into *de facto* exclusive dealing arrangements and market-share deals with those Tier One OEMs that agreed to limit their purchases of AMD or Via products. Tier One OEMs that

[4] There are a handful of alternative CPU architectures that are used in very high-end servers or handheld devices. However, these alternatives did not compete in the notebook, desktop, workstation, or volume server x86 CPU markets during the relevant time period.

purchased all or nearly all of their CPU requirements from Intel received large rebates and lump-sum payments from Intel, as well as guarantees of supply during supply shortages. In other cases, Intel paid Tier One OEMs not to sell computers with non-Intel CPUs, such as AMD's, Transmeta's or Via's CPUs. The Complaint alleges that these arrangements did not represent competition on the merits, were designed to minimize pass-through of rebates to consumers, and that Intel entered into these arrangements to block or slow the adoption of competitive products by the Tier One OEMs and thereby maintain its monopoly.

Second, Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

Third, Intel sought to induce OEMs to limit advertising and branding, and to forgo advantageous channels of distribution for computers that contained non-Intel CPUs. For example, Intel induced OEMs to forgo advertising, branding, certain distribution channels, and/or promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, technical support, supply, and/or to terminate joint development projects, among other things.

These practices severely limited the number of instances in which OEMs selling non-Intel-based PCs competed directly against OEMs selling Intel-based PCs, especially in servers and in commercial desktops and notebooks. When an OEM selling Intel-based PCs competed against OEMs selling AMD-based PCs, Intel often had to sell CPUs at competitive prices. When such competition was eliminated, Intel could sell CPUs at supra-competitive prices. Consequently, it was able simultaneously to charge above-competitive prices and at the same time to exclude its rivals, resulting in both higher prices and fewer choices for consumers. In addition, Intel's retroactive quantity discounts were of a type that could readily disguise effective below-cost pricing, which would, under the circumstances, present a strong risk of predatory effects.

This effectively allowed Intel to compete by raising the effective prices of AMD's and Via's products rather than lowering the effective prices of its own. It did this by effectively imposing a penalty on any customers who purchased from Intel's rivals. Intel's market share discounts and retaliatory practices described above all had this effect, constituting an effective increase to the rival's price. The end result was that Intel could make a rival's actual low prices look very costly to customers without Intel's needing to reduce its own prices or expand its own output.

B. Compiler and Benchmark Deception

The Complaint alleges that Intel's failure to fully disclose the changes it made to its compilers and libraries beginning in 2003 violated both competition and consumer protection provisions of Section 5 of the FTC Act.

A compiler is a tool used by software developers to write software. The compiler translates the "source code" written in high-level computer languages into 0's and 1's that can be run as software on consumers' computers. Intel's compilers compete with Microsoft's compilers, open-source compilers, and others. Intel's compiler is used by developers of high-performance applications.

The Complaint alleges that AMD's Athlon CPU, released in 1999, and its Opteron CPU, released in 2003, equaled, and in some segments surpassed, Intel's technology. Intel introduced a new version of its compiler shortly before AMD released its Opteron CPU. The compiler features introduced by Intel in 2003 effectively slowed the performance of software written using Intel's compilers on non-Intel x86 CPUs such as Opteron. To the unknowing public, OEMs, and software vendors, the slower performance of non-Intel-based computers when running certain software applications was mistakenly attributed to the performance of non-Intel CPUs.

The Complaint also alleges that the direct impact of Intel's deceptive disclosures was on independent software vendors and developers that used Intel's compiler to write software. They were unaware of the changes in the Intel compiler that would impact the performance of their software when it ran on non-Intel-based computers. The Complaint alleges Intel intentionally misrepresented the cause of the performance differences and whether it could be solved.

Intel's deceptive disclosures related to its compiler redesign were compounded by the adoption of industry standard benchmarks that included software compiled using Intel's compiler. Benchmarks are performance tests that compare attributes of competing CPUs. Industry standard benchmarks are used by OEMs and consumers to judge performance of competing CPUs. Intel failed to disclose to benchmarking organizations the effects of its compiler redesign on non-Intel CPUs. Several benchmarking organizations adopted benchmarks that measured performance of CPUs by running software programs compiled using the Intel compiler. The software compiled using Intel's compiler skewed the performance results in Intel's favor. Intel promoted its systems' performance under such benchmarks as realistic measures of typical or "real world" computer performance. The benchmarks were not accurate or realistic measures of typical computer performance and they overstated the performance of Intel's products as compared to non-Intel products.

The Complaint alleges Intel's deceptive disclosures related to its compiler contributed to Intel's maintenance of its monopoly power. For example, AMD's CPU performance advantages were muted by Intel's compiler. Intel's deception distorted the competitive dynamic and harmed consumers. The Complaint also alleges that Intel's failure to disclose was a deceptive act or practice.

Among the harms to consumers caused by Intel's deceptive conduct was the harm to the credibility and reliability of industry benchmarks. Industry benchmarks are important tools for consumers to make informed purchasing choices. Informed consumer choice is a basic building block of competition.

C. Unfair and Exclusionary Conduct to Suppress GPU Competition

Intel worked with NVIDIA for a number of years to ensure that NVIDIA's GPUs could interoperate with Intel CPUs, and licensed NVIDIA to allow it to manufacture Intel-compatible chipsets with integrated graphics (also referred to as "chipsets with integrated GPUs"). The Complaint alleges that Intel began to perceive NVIDIA as a threat in both the market for chipsets with integrated graphics and the market for CPUs. The Complaint further alleges that Intel took a number of actions to blunt the competitive threat posed by NVIDIA. For example, Intel denied NVIDIA the ability to produce integrated chipsets that would be compatible with Intel's next generation CPUs. In doing so, the Complaint alleges that Intel misled NVIDIA on Intel's "roadmaps" or product plans, causing NVIDIA to waste resources and crucial time researching and designing integrated chipsets when, in fact, Intel allegedly had no intention of permitting NVIDIA integrated chipsets to interoperate with Intel's next generation of x86 microprocessors. This increased NVIDIA's costs and delayed the development of other products that would have increased competition in both the market for chipsets and the market for CPUs. The Complaint also alleges that Intel took steps to create technological barriers to preclude non-Intel integrated chipsets from interconnecting with future Intel CPUs. The Complaint further alleges that Intel bundled its CPUs with its own integrated chipsets and then priced the bundle to punish OEMs for buying non-Intel integrated chipsets.

II. Terms of the Proposed Consent Order

The touchstone of the Proposed Consent Order is the protection of consumers and competition. Thus, the Proposed Consent Order provides structural relief designed to restore the competition lost as a result of Intel's past conduct, and injunctive relief that prevents Intel from engaging in future unfair methods of competition. The injunctive relief would prohibit Intel, when faced with new competitive threats, from engaging in the exclusionary and unfair conduct alleged in the Complaint. These provisions are designed to open the door to fair and vigorous competition in the relevant markets, leading to lower prices, more innovation, and more choice for consumers. The immediacy of this relief is particularly important in these rapidly changing markets.

The Complaint did not seek to strip Intel of its x86 monopoly, which was in large measure gained by innovation and associated intellectual property rights. Rather, the Proposed Consent Order is designed to undo the effects of Intel's anticompetitive conduct and prevent its recurrence, by restoring as much as possible the competitive conditions that would have prevailed absent the anticompetitive behavior and by ensuring that the doors to competition remain open. The Proposed Consent Order clarifies and extends AMD's and Via's rights to the x86 technology. The injunctive relief in the Proposed Consent Order is thus particularly important today to ensure that AMD's new CPU products can have a fair test in the marketplace on the merits and that Via more quickly has the clear path it needs to design and produce its next generation of CPU products. The Complaint did not seek to fine or penalize Intel for its conduct because the Commission lacks that authority for violations of the antitrust laws.

A. Section II of the Proposed Consent Order

Section II of the Proposed Consent Order requires Intel to maintain an open PCI Express ("PCIe") Bus Interface on all of its CPU platforms for six years. The PCIe bus is an industry standard bus used to connect peripheral products such as discrete GPUs to the CPU. A bus is a connection point between different components on a computer motherboard. The PCIe bus serves a critical function on the Intel platform. Intel's commitment to maintain an open PCIe bus will provide discrete graphics manufacturers, such as NVIDIA and AMD/ATI, and manufacturers of other peripheral products, assurances that their products will remain viable and thus maintain their incentives to innovate — including the continued development of alternative computing architectures such as General Purpose GPU computing. Intel's commitment extends to high performance computing platforms that have been at the forefront of General Purpose GPU computing. The Commission recognizes the importance of the continued development of this potential alternative computing architecture.

The Commission recognizes that it may be difficult to forecast the future of innovation in these markets. The CPU and GPU markets are dynamic, and technology may be very different in three or four years. The Commission has the authority to reduce the number of years Intel must maintain the PCIe bus on any of its CPU platforms. For example, the Commission may reduce the commitment if the market has moved away from PCIe and it no longer serves a gateway function to Intel's CPU.

Section II.C of the Proposed Consent Order prohibits Intel from limiting the performance of the PCIe bus in a manner that would hamper graphics performance or GP-GPU compute functionality of discrete GPUs. The provision would assure NVIDIA, AMD/ATI, and other potential manufacturers of products that would use the PCIe bus that they will be able to connect to Intel CPUs in both mainstream and high-performance computers in the future, and that the performance of their products will not be degraded by Intel. These assurances will also allow NVIDIA and others to continue developing GP-GPU computing as a complement to the processing power of the CPU.

B. Intel Assurances on Third Party Foundry Rights

Section III.A of the Proposed Consent Order would require Intel to allow AMD, NVIDIA, and Via to disclose relevant "have made" rights under their respective licensing agreements with Intel to foundries and customers. The Proposed Consent Order would further require Intel to confirm to any foundry or customer that AMD, NVIDIA, and Via licenses confer such "have made" rights. "Have made" rights allow AMD, NVIDIA, and Via to contract out manufacturing to third parties. Absent Intel's assurances and disclosures, customers and foundries might be deterred from making or selling the products of these competitors when they are, in fact, licensed, based upon unwarranted fear of being sued by Intel for infringement. These disclosures will help eliminate any uncertainty surrounding the rights of AMD, NVIDIA, and Via to use third party foundries to manufacture x86 microprocessors or other products under their respective cross licenses.

C. Change of Control Modifications to Current License Agreements with AMD, NVIDIA, and Via

Section III.B of the Proposed Consent Order would require Intel to offer to modify the change of control terms in Intel's intellectual property licenses with AMD, NVIDIA, and Via. The Commission is concerned that Intel's past conduct has weakened AMD and Via – Intel's only x86 competitors. This provision seeks to ensure that these existing competitors can partner with third parties to create a more formidable competitor to Intel.

The existing change of control terms in licensing agreements potentially limit the ability of AMD, NVIDIA, and Via to take part in a merger or joint venture, or to raise capital. The provisions in the Proposed Consent Order are designed to allow AMD, NVIDIA, and Via to enter into a merger or joint venture with a third party, or to otherwise raise capital, without exposing itself to an immediate patent infringement suit by Intel. In the event that AMD, NVIDIA, or Via undergo a change of control, these provisions prohibit Intel from suing for patent infringement for 30 days. Furthermore, Intel must offer a one-year standstill agreement during which the acquiring party and Intel would not sue each other for patent infringement while both parties enter into good faith negotiations over a new license agreement.

The Commission takes seriously Intel's commitment under these provisions in the Proposed Consent Order. The Commission has authority under the Order to evaluate and determine whether Intel in fact engages in good faith negotiations and the Commission will be able to enforce the Proposed Consent Order if Intel does not negotiate in good faith. In the event the change of control terms are invoked, the Commission will carefully scrutinize Intel's conduct and take action, if appropriate.

D. Via x86 Licensing Agreement Extension and Assurances

Section III.C of the Proposed Consent Order requires Intel to offer a five year extension to its cross-license with Via. The extension of the cross license guarantees that Via has the opportunity to continue competing in the x86 CPU market until at least 2018. Section III.C also requires Intel to confirm that Via may lawfully make, sell, and import x86 products without violating the Intel license. This disclosure is designed to eliminate uncertainty surrounding Via's right to compete in the relevant x86 CPU markets through 2018.

The extension of the Via license agreement, coupled with the modifications to the change-of-control provisions in Section III.B, open the door to a potential joint venture or acquisition of Via and its x86 license by a strong and well financed entrant to the x86 markets.

E. Commercial Practices Provisions

The prohibitions in Section IV.A of the Proposed Consent Order address Intel's commercial practices. These provisions are specifically designed to protect competition, not any one competitor. The Proposed Consent Order protects competition in the markets for CPUs (including CPUs with integrated graphics), chipsets, and GPUs. In contrast, Intel's settlement with AMD in November 2009 only protected AMD from certain exclusionary practices and did not extend to GPUs or chipsets.

The rationale for extending the prohibitions to all chipsets is two-fold. First, Intel's CPUs and chipsets are sold on a one-to-one basis. That is, an Intel chipset will only work with an Intel CPU. Thus, an agreement to purchase chipsets exclusively from Intel means that an OEM must purchase CPUs exclusively from Intel. Likewise, an OEM's agreement to purchase 95 percent of its chipsets from Intel means that an OEM will purchase at least 95 percent of its CPUs from Intel. Second, extending the Proposed Consent Order to chipsets also protects competition in the market for chipsets. The Commission recognizes that chipsets still play an important role in platform innovation. The provisions are designed to protect the development of new competitive options that may emerge from this market.

1. Prohibitions on Commercial Practices

The Proposed Consent Order prohibits Intel from engaging in seven enumerated sales practices in the CPU, chipset, and GPU markets. Section IV.A prohibits Intel from offering benefits to OEMs, original design manufacturer ("ODMs"), or End Users in exchange for assurances that the customers will refrain from dealing with Intel's competitors. "Benefit" is broadly defined and includes not only monetary consideration but also encompasses access to technical information, supply, and technical and engineering support. Section IV.A also prohibits Intel from punishing its customers by withholding benefits from those that purchase from non-Intel suppliers of CPUs, chipsets, and GPUs.

Section IV.A.1 would prohibit Intel from conditioning a benefit on an OEM's, ODM's, or End User's agreement to purchase a CPU, chipset, and/or GPU exclusively from Intel in any geographic area (*e.g.*, the United States), market segment (*e.g.*, servers, workstations, commercial desktops, etc.), product segment (*e.g.*, multi-processor servers, high-end desktops, etc.), or distribution channel. For example, the Proposed Consent Order would prohibit Intel from conditioning a benefit on an OEM's agreement to purchase CPUs for servers exclusively from Intel.

Section IV.A.2 would prohibit Intel from conditioning a benefit on an OEM's, ODM's, or End User's agreement to limit, delay, or refuse to purchase a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel would be prohibited from conditioning a benefit to an OEM on that OEM's agreement to delay the introduction of a computer product incorporating a non-Intel product.

Sections IV.A.3 and IV.A.4 address threats to retaliate against an OEM, ODM, or End User for doing business with a non-Intel supplier. Section IV.A.3 would prohibit Intel from conditioning a benefit on whether an OEM, ODM, or End User purchases, sells, or launches a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel could not condition a benefit on an OEM's agreement to cancel a launch of a Personal Computer that includes a non-Intel GPU. Section IV.A.4 prohibits Intel from withholding a benefit from an OEM, ODM, or End User if it designs, manufactures, distributes, or promotes a product incorporating a non-Intel CPU, chipset, and/or GPU. For example, Intel could not withhold a benefit from an OEM because that OEM participated in an AMD launch event.

Section IV.A.5 would prohibit Intel from directly or indirectly conditioning a benefit on the share of CPUs, chipsets, and/or GPUs that the OEM or End User purchases from Intel. For example, Intel could not condition a benefit on an OEM's agreement to purchase at least 95 percent of its CPU requirements for commercial desktops from Intel. Nor could Intel condition a benefit on an OEM's agreement to purchase no more than 5 percent of its CPU requirements for commercial desktops from a non-Intel supplier. In a market such as this one, where the most realistic mode of competition by competitors to a monopolist involves their selling initially modest quantities to direct buyers who also buy large quantities from the monopolist, such conditioning can amount to a tax on the growth of such competition, and can enable the monopolist to sustain high prices at the same time as it limits competition and decreases consumer choice.

Section IV.A.6 would prohibit Intel from bundling the sales of its CPUs with its chipsets when the effective selling price of either piece of the bundle is below Intel's Product Cost. Intel's Product Cost is based on data maintained in the ordinary course of business by Intel, is represented to be used by Intel for business decisions, and is significantly higher than its average variable cost. The provision is based on the standard articulated by the Ninth Circuit in *PeaceHealth* and is administrable using that standard and the Product Cost data. This provision is designed to target specific conduct alleged in the Complaint. For example, the Complaint alleges that Intel bundled the sale of its Atom x86 CPU and chipset in such a way that the effective selling price of the chipset was below cost, in an effort to foreclose third party vendors of chipsets. The provision does not reflect an endorsement or adoption of *PeaceHealth* by the Commission as the applicable legal test for bundling practices. The Commission expressly retains the right to pursue independent claims against Intel or any alleged monopolist under Section 2 of the Sherman Act or Section 5 of the FTC Act based on a different legal standard such as (by way of example), the standard articulated by the *en banc* decision in the Third Circuit's *LePage's* case.[5]

Section IV.A.7 would prohibit Intel from offering lump sum payments to an OEM, ODM, or End User for reaching a

[5] *Compare LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 155, 162 (3d Cir. 2003) (en banc) *with Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

particular threshold of purchases from Intel. For example, Intel would be prohibited from offering an OEM a $100 million rebate once it purchases 5 million x86 CPUs. The retroactive nature of these payment structures can disguise implicitly below-cost pricing that can unfairly exclude equally efficient competitors and smaller entrants, resulting in a loss of competition and harm to consumers. Intel, however, would not be precluded from offering volume discounts on incremental purchases above a particular threshold. For example, Intel could offer an OEM a price of $100 for each CPU up to 1 million units and a price of $90 for each CPU in excess of 1 million units. However, Intel would not be permitted to offer a price below Product Cost for the excess units. The Commission will carefully scrutinize Intel's implementation of this provision to ensure it does not price its products in such a way that forecloses competition.

2. Exceptions to the Commercial Practices Prohibitions

The exceptions to the prohibitions in Section IV.A are designed to allow Intel to offer competitive pricing and enter into other procompetitive deals with OEMs, ODMs, and End Users. These exceptions permit conduct that may truly benefit consumers while still preventing Intel from engaging in the type of anticompetitive behavior identified in the Complaint. Nothing in these exceptions, however, would prevent the Commission from pursuing independent claims against Intel under Section 2 of the Sherman Act or Section 5 of the FTC Act if Intel engages in practices that do not violate the Proposed Consent Order but are nonetheless exclusionary or unfair and result in harm to consumers.

Under Section IV.B.1, Intel is not prohibited from conditioning a Benefit on sales terms that are not expressly prohibited by the Order. For example, Intel could offer a discount to an OEM for a CPU with the condition that it is used in a laptop with a screen size of less than 9 inches.

Under Section IV.B.2, Intel is not prohibited from agreeing with an OEM, ODM, or End User customer that the customer will use distinct model numbers for Intel and non-Intel-based products. Similarly, Intel can agree with its customers that the customer will not falsely label a product based on non-Intel parts as based on Intel parts. The provision allows Intel and OEMs to use naming schemes that are intended to avoid customer confusion. For example, Intel could agree with an OEM that a specific laptop model would be branded Laptop-100A if it uses an AMD CPU and Laptop-100B if it uses an Intel CPU. However, this provision would not allow Intel to condition benefits on an OEM's agreement not to market or brand a product, which is explicitly prohibited by IV.A.3 and IV.A.4.

Under Section IV.B.3, Intel is not prohibited from meeting terms or benefits it "reasonably believes" are being offered by a rival supplier. This section does not immunize the offering of more favorable terms and conditions than those offered by the competitor, *i.e.*, predatory pricing. In addition, this exception is limited in that Intel's offer must be limited to the quantity of the competitive offer; it cannot be conditioned on exclusivity or share of the OEM's or end user's business, and it must be limited to less than a year. Intel may condition its bid upon the purchase of a minimum number of units. For example, if Intel reasonably believes that a rival supplier is offering to sell 10,000 CPUs for $90 to an OEM, it can offer to meet that price so long as the OEM agrees to purchase at least 9,000 CPUs.

Sections IV.B.4 and IV.B.5 simply make explicit what is already implicit in the Proposed Consent Order. Under Section IV.B.4., Intel would not violate the Proposed Consent Order merely because it wins all of an OEM's business, so long as it has not engaged in other conduct prohibited by the Order. The fact that an OEM purchases a Relevant Product or Chipset exclusively from Intel would not automatically support a violation of the Proposed Consent Order. Under Section IV.B.5, Intel would not violate the Proposed Consent Order if it engaged in conduct not explicitly prohibited by the Proposed Consent Order.

Under Section IV.B.6, Intel is not prohibited from offering volume discounts directly to purchasers of computers in bidding situations. Intel's offers must be in writing and must be responsive only to single bids and not contingent on future purchases.

Section IV.B.7 would permit Intel to make supply allocation decisions during times of shortage so long as it does not use that process to retaliate against an OEM that is using non-Intel CPUs, chipsets, or GPUs. For example, Intel could not withhold chipset supply from an OEM to punish that OEM for using AMD CPUs.

Section IV.B.8 would allow Intel to enter into no more than ten exclusive agreements over the next ten years when it provides an OEM with "extraordinary assistance" under certain circumstances. The Commission recognizes that Intel has worked with OEMs and other customers to create innovative products that have benefitted consumers. The Commission wants to ensure that Intel has the opportunity to continue to invest monies in projects with OEMs and other customers to support future innovations. Intel, like any other firm, will only invest in research and development if it achieves a return on that investment. Section IV.B.8 recognizes that in "extraordinary" circumstances Intel should be able to negotiate exclusivity for a specific product in which it has invested research and development resources with an OEM or other customer. At the same time, the Commission is wary of creating a loophole to the Proposed Consent Order that can be exploited by Intel to eviscerate the prohibitions in Section IV.A. Thus, this provision is carefully limited.

First, Intel's "extraordinary assistance" to an OEM must be valued at greater than $50 million and must not be made generally available to all customers. For example, the payment cannot simply take the form of marketing funds that are given to several OEMs but instead must be a unique offer to a particular OEM. Second, the "extraordinary assistance" must be intended to enable a customer to develop new and innovative products or sponsor an OEM's entry into a new market segment where the OEM did not previously compete. For example, a payment of $50 million to an OEM in return for that OEM's agreement to use Intel's newest CPU in its laptop lines would not qualify as "extraordinary assistance." Third, in return for investing in new product development with a particular OEM, Intel may ask for a period of limited exclusivity of no more than 30 months to recoup its investment. Fourth, Intel would only be able to seek exclusivity for the specific segment or specific product in which it has offered the "extraordinary assistance." For example, if Intel offered "extraordinary assistance" to an OEM to develop a new server it could only seek exclusivity for that particular product line, it could not seek exclusivity for other servers or other computer products manufactured by that OEM. Fifth, any agreement regarding "extraordinary assistance" must be in writing and include the terms of the assistance, investment, and exclusivity. Finally, Intel would not be permitted to enter into more than 10 arrangements that meet this limited exception over the 10-year duration of the Proposed Consent Order. Exclusive dealing is harmful to the extent that it forecloses an important distribution channel; well-justified exclusive dealing with (on average) just one or two of the Tier 1 OEMs is unlikely to do so.

Section IV.B.9 allows Intel to insist that a Customer maintain the confidentiality of Intel's confidential business information.

Section IV.B.10 allows Intel to offer buy ten, get one free promotions to its smaller customers. The exception is literally limited to sales of fewer than 11 products. For example, Intel would not be allowed to multiply such an offer a thousand-fold. Thus, this exception would not allow Intel to offer an OEM the opportunity to buy 10,000 units and get 1,000 free.

F. Prohibition on Explicit Predatory Design

Section V of the Proposed Order would prohibit Intel from designing or engineering its CPU or GPU products to solely disadvantage competitive or complementary products. This provision addresses allegations in the Complaint that Intel engaged in predatory innovation by cutting off competitors' access to its CPUs and slowing down various connections to the CPU. The Proposed Consent Order would be violated if a design change degrades performance of a competitive or complementary product and Intel fails to demonstrate an actual benefit to the Intel product at issue. For example, Intel could not introduce a design change in its CPU that degrades the performance of a competitive GPU unless it could demonstrate that the design change resulted in an *actual* benefit to Intel's CPU. The benefit must be real – not simply a theoretical benefit. Nor can the benefit to Intel be simply the fact that the competitive product is rendered less attractive by the design change (and thus enhances the competitive position of Intel's product).

The burden is on Intel to demonstrate that any engineering or design change complies with the terms of Section V. However, Section V does not require proof that a design change was made to intentionally harm competitive or complementary products, or was otherwise anticompetitive, nor does Section V require a balancing test that would weigh the anticompetitive harms against the benefits of a particular Intel design change; it is sufficient that there be actual benefits. A balancing test would be appropriate in a legal challenge to an Intel design change under Section 5 of the FTC Act or Section 2 of the Sherman Act. As noted earlier, the Commission retains the authority to challenge any Intel design changes that are not prohibited by this provision of the Proposed Consent Order.

G. Assurances on the Accuracy of Intel Roadmaps

The provisions in Section VI address allegations in the Complaint that Intel misrepresented its roadmap to the detriment of competition. Section VI.A would prohibit Intel from disclosing inaccurate or misleading roadmaps for the 10-year duration of the Proposed Consent Order and would require Intel to respond, and do so truthfully, to any inquiries regarding potential roadmap changes for one year after it discloses its roadmap. Section VI.A does not require that Intel disclose its roadmap in the first instance; rather, it places conditions on disclosure in the event that Intel does so. Section VI.B would require Intel to disclose to NVIDIA, on an annual interval, what bus interfaces its platforms will use through 2015.

Together, these provisions address allegations in the Complaint that Intel misled third parties concerning its interface roadmap. Reliable disclosure of Intel's interface roadmap will help to eliminate uncertainty about the availability of connections and interoperability with Intel platforms. With reliable roadmap information, competitors that design, manufacture, or sell products that rely on interconnections with Intel platforms will be able to make informed and confident decisions about resource allocation and research and development efforts. Similarly, Intel customers that receive Intel roadmaps will be able to count on the continuing accuracy of those roadmaps and develop products based on combinations of Intel and non-Intel parts. The provisions would help give NVIDIA, AMD/ATI, and other potential manufacturers of products that would interconnect with Intel's platform, assurances that they will be able to connect with the CPU in the future and will also allow continuing development of GP-GPU computing.

H. Compiler Disclosures

Section VII would require Intel to take steps to prevent future misrepresentations related to its compilers and libraries, which are used by software developers to write software and make it work efficiently. Intel's compilers and libraries, however, may generate different software code depending on the vendor of the CPU on which software is running. For example, when the software code runs on an Intel-based computer, it may use certain optimizations such as advanced instruction sets or faster algorithms. However, when that same software code runs on a non-Intel-based computer that has the same optimizations, it may not use those optimizations. Intel's compilers and libraries thus may disable functionality and performance available on non-Intel CPUs. The disclosure requirements in Section VII provide software developers with non-misleading information regarding the extent to which Intel's compilers and libraries optimize differently for different vendors' CPUs. These disclosures allow software developers to make more informed decisions about their use of Intel compilers and libraries, such as whether to investigate the types of optimizations disabled on non-Intel CPUs, whether to use any methods to override the code dispatch mechanisms in Intel compilers and libraries, and whether to use Intel compilers and libraries at all.

Section VII applies to Intel "Compilers," which includes all Intel compilers, runtime libraries supplied with those compilers, and other libraries supplied by Intel for use with Intel and non-Intel compilers. Libraries are pre-compiled code or sample code provided to software developers for use in their programs. Because Intel could implement CPU vendor-based code dispatching in either compilers or in libraries, the disclosures required in Section VII must apply to both.

Section VII.C of the Proposed Order requires Intel to inform its customers when and how its compilers and libraries optimize for Intel processors but not for non-Intel processors that are capable of using such optimizations. If Intel's compilers or libraries optimize for a standard instruction, such as SSE3, only for Intel CPUs but not for compatible AMD or Via CPUs, even in some circumstances, Intel must clearly and prominently disclose the extent to which the standard instruction set is not used and which instruction set is used instead. Section VII.C would also require Intel to disclose when its compiler performs other optimizations only on Intel CPUs but disables the same features on other CPUs that support the features.[6]

Intel also would be required under Section VII.D to notify its customers and implement an Intel Compiler Reimbursement Program that includes a $10 million reimbursement fund from which Intel would reimburse customers who relied on Intel's statements

[6] Although compiler users will not know which precise optimizations are not available on non-Intel CPUs, they will be on notice that their compiler will not fully optimize for non-Intel CPUs.

regarding its compilers or libraries for the costs associated with recompiling their software using non-Intel compiler or library products. A customer seeking to use the Intel Compiler Reimbursement program must describe an Intel statement on which it relied to ensure that the program is used by customers who were misled by Intel's disclosures.

Section VII.E of the Proposed Consent Order prevents Intel from making claims about the performance of its compiler unless Intel has substantiated that those claims are true and accurate using accepted analytical methods. This prohibition seeks to prevent Intel from claiming, without substantiation, that its compiler and libraries are superior to other available compilers and libraries. Intel may not claim to have superior compilers and libraries for AMD CPUs, when other products, such as the GNU C Compiler (GCC) or AMD's Core Math Library (ACML) have better performance in some circumstances. This prohibition is particularly important regarding Intel's representations about performance of its compilers on non-Intel CPUs. This section ensures that Intel will provide the appropriate disclosures when it makes performance claims about its compilers and libraries.

I. Benchmark Disclosures

Section VIII would require Intel to make disclosures concerning the reliability and relevance of performance claims based on benchmarks. The provision requires Intel to notify any customers, whether hardware manufacturers or end consumers, that the performance tests may have been optimized only for Intel CPUs. Intel must make disclosures whenever it makes performance claims comparing its CPUs to competitors' processors and whenever it relies on a benchmark. The provision requires disclosures in all advertising or marketing materials that include performance claims, including presentations, audio-visual advertisements, and in prominent locations regarding performance on Intel's web site. The required disclosure will inform consumers and OEMs that certain benchmarks may not provide accurate performance comparisons with non-Intel CPUs. The provision will encourage consumers and OEMs to use benchmark results carefully and rely on multiple benchmarks in order to get accurate performance information about CPUs. The provision will thus help provide for more informed purchasing decisions.

J. Compliance Terms

Sections IX through XIII of the Proposed Consent Order contain reporting, access, and notification provisions that are common in the Commission's orders, and are designed to allow the Commission to monitor compliance with the Proposed Consent Order. Section IX permits the Commission to appoint Technical Consultants to assist in assessing Intel's compliance with several provisions of the Proposed Consent. Such consultants are warranted in light of the technical nature of the products at issue and the potential complexity of some compliance issues, including cost accounting, microprocessor design, and software design. Intel would be required to pay for the Technical Consultants, up to a total of $2 million during the ten-year period of the Proposed Consent Order.

Section X would require Intel to submit to the Commission a written plan explaining what Intel has done and will do to ensure compliance with the Proposed Consent Order. Intel would also be required to submit annual reports for six years explaining how it has complied with the Proposed Consent Order. Intel would be required, in these reports, to submit to the Commission any communications Intel receives from its customers regarding compliance with the Proposed Consent Order, including complaints that it is violating the Proposed Consent Order.

Sections XI and XII would require Intel, for the next five years, to retain its written sales contracts and to allow the Commission access to Intel's records and employees. Section XIII would require Intel to notify the Commission at least thirty days prior to changes in corporate structure that would impact Intel's compliance provisions, such as Intel being purchased by another company or Intel creating or purchasing corporate subsidiaries.

Paragraph XIV provides that the Proposed Consent Order shall terminate ten (10) years after the date it becomes final.

By direction of the Commission, Commissioner Kovacic recused.

Donald S. Clark

Secretary.

[FR Doc. 2010–19694 Filed 8–9–10; 7:10 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day-10–0004]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road, NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov.*

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 a 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 clarify 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 information technology. Written comments should be received within 60 days of this notice.

Proposed Project

National Disease Surveillance Program II. Disease Summaries (0920–0004 Exp. 6/30/2013)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID) (proposed), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Surveillance of the incidence and distribution of disease has been an important function of the U.S. Public Health Service (PHS) since 1878. Through the years, PHS/CDC has formulated practical methods of disease control through field investigations. The CDC National Disease Surveillance Program is based on the premise that diseases cannot be diagnosed, prevented, or controlled until existing knowledge is expanded and new ideas developed and implemented. Over the years, the mandate of CDC has broadened to include preventive health activities and the surveillance systems maintained have expanded.

CDC and the Council of State and Territorial Epidemiologists (CSTE) collect data on disease and preventable conditions in accordance with jointly approved plans. Changes in the surveillance program and in reporting methods are effected in the same manner. At the onset of this surveillance program in 1968, the CSTE and CDC decided on which diseases warranted surveillance. These diseases are reviewed and revised based on variations in the public's health. Surveillance forms are distributed to the State and local health departments who voluntarily submit these reports to CDC at variable frequencies, either weekly or monthly. CDC then calculates and publishes weekly statistics via the Morbidity and Mortality Weekly Report (MMWR), providing the states with timely aggregates of their submissions.

The following diseases/conditions are included in this program: Diarrheal disease surveillance (includes campylobacter, salmonella, and shigella), foodborne outbreaks, arboviral surveillance (ArboNet), Influenza virus, including the annual survey and influenza-like illness, Respiratory and Enterovirus surveillance, rabies, waterborne diseases, cholera and other vibrio illnesses, Listeria, babesiosis, brucellosis, Harmful Algal Bloom-related Infectious Surveillance System (HABISS) data entry form, and the HABISS monthly reporting form. These data are essential on the local, state, and Federal levels for measuring trends in diseases, evaluating the effectiveness of current prevention strategies, and determining the need for modifying current prevention measures.

This request is for revision of the currently approved data collection for three years. The revisions include minor changes to reporting forms already approved under this OMB Control Number. In addition, new influenza forms and one new rabies form have been added. A new parasitic disease is being included, babesiosis, to help track the increasing cases from transfusions. Furthermore, a brucellosis case report form that has been revised and updated from the 1980 form has been added to this OMB Control number to enhance surveillance and assist with understanding the changing epidemiology of brucellosis in the United States. Because of the distinct nature of each of the diseases, the number of cases reported annually is different for each. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents: state epidemiologists/ form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Diarrheal Disease Surveillance: *Campylobacter* (electronic)	53	52	3/60	138
Diarrheal Disease Surveillance: *Salmonella* (electronic)	53	52	3/60	138
Diarrheal Disease Surveillance: *Shigella* (electronic)	53	52	3/60	138
Foodborne Outbreak Form	54	31.5	20/60	567
Arboviral Surveillance (ArboNet)	57	1,421	5/60	6,750
Influenza virus (fax, Oct–May)	5	33	10/60	28
Influenza virus (fax, year round)	21	52	10/60	182
Influenza virus (Internet; Oct–May)	3	33	10/60	17
Influenza virus (Internet; year round)	35	52	10/60	303
Influenza virus (electronic, year round PHLIP)	5	52	5/60	22
Influenza virus (electronic, year round PHIN–MS)	17	52	5/60	74
Influenza Annual Survey	86	1	15/60	22
Weekly Influenza-like Illness (Oct–May)	540	33	15/60	4,455
Weekly Influenza-like Illness (year round)	1,260	52	15/60	16,380
Daily Influenza-like Illness (Oct–May)	200	33	15/60	1,650
Daily Influenza-like Illness (Year Round)	75	52	15/60	975
Influenza-Associated Pediatric Death Case Report Form	57	1	30/60	29
Novel and Pandemic Influenza A Virus Infection Case Investigation Form	57	1	30/60	29
Novel and Pandemic Influenza A Virus Infection Contact Trace Back Form	57	1	30/60	29
Novel and Pandemic Influenza A Virus Infection Contact Trace Forward Form	57	1	30/60	29
Novel Human Influenza A Virus Infection Case Report Form	57	1	30/60	29
Daily Novel and Pandemic Influenza A Virus State Case Status Summary Update	57	1	15/60	14
City health officers or vital statistics registrars	122	52	12/60	1,269
Monthly Respiratory & Enterovirus Surveillance Report: Excel format (electronic)	25	12	15/60	75
National Respiratory & Enteric Virus Surveillance System (NREVSS)	90	52	10/60	780
Enhanced Animal Rabies Surveillance (electronic)	52	52	3/60	135
Rabies (paper)	3	12	15/60	9
Possible Human Rabies Patient Info	50	1	15/60	13
Waterborne Diseases Outbreak Form	57	1	20/60	19
Cholera and other Vibrio illnesses	450	1	20/60	150
Listeria	53	1	30/60	27
HABISS data entry form	10	12	8	960
HABISS monthly reporting form	10	12	30/60	60
Babesiosis Case Report Form	54	12	10/60	108
Brucellosis	56	2	20/60	37
Total				35,640

Dated: August 4, 2010.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–19703 Filed 8–9–10; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day-10–0212]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer at 404–639–5960 or send comments to CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

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. Written comments should be received within 60 days of this notice.

Proposed Project

Revision of the National Hospital Discharge Survey (NHDS) (OMB No. 0920–0212 exp. 10/31/2011)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on the extent and nature of illness and disability of the population of the United States. This three-year clearance request includes hospital recruitment and data collection for 2011, 2012, and 2013 of the redesigned National Hospital Discharge Survey, as well as a pretest of data collection on acute coronary syndrome for a supplement to the NHDS which will be sponsored by the National Heart, Lung and Blood Institute.

The National Hospital Discharge Survey (NHDS) has been conducted continuously by the National Center for Health Statistics, CDC, since 1965. It is the principal source of data on inpatient utilization of short-stay, non-Federal hospitals and is the principal annual source of nationally representative estimates on the characteristics of discharges, lengths of stay, diagnoses, surgical and non-surgical procedures, and patterns of use of care in hospitals in various regions of the country. It is the benchmark against which special programmatic data sources are measured.

Although the current NHDS is still fulfilling its intended functions, it is based on concepts from the health care delivery system, as well as the hospital and patient universes, of previous decades. It has become clear that a redesign of the NHDS that provides greater depth of information is necessary. Consequently, 2010 will serve as the last year in which the current NHDS will be fielded. Meanwhile, the redesigned National Hospital Discharge Survey (NHDS) is scheduled to begin in 2011.

A new sample of 500 hospitals drawn for the NHDS will be recruited beginning in June 2011 and continuing through September 2012. In 2011, data collection will begin by collecting the electronic Uniform Bills (UB–04s) from recruited hospitals for the year 2011 followed by data for 2012 and 2013. A pretest of a survey supplement on acute coronary syndrome sponsored by the National Heart Lung and Blood will also be fielded in 2011.

The data items to be collected from the UB–04 in the NHDS will include patient level data items including basic demographic information, personal identifiers, name, address and medical record number (if available on the UB–04), and characteristics of the discharges including admission and discharge dates, diagnoses, and surgical and non-surgical procedures. Facility level data items include demographic information, clinical capabilities, and financial information.

The pretest of the supplement on acute coronary syndrome will be conducted in a convenience sample of 32 hospitals and discharges will be identified from the UB–04 codes for a diagnosis of acute myocardial infarction.

Users of NHDS data include, but are not limited to CDC, Congressional Research Office, Office of the Assistant Secretary for Planning and Evaluation (ASPE), American Health Care Association, Centers for Medicare & Medicaid Services (CMS), and Bureau of the Census. Data collected through NHDS are essential for evaluating health status of the population, for the planning of programs and policy to elevate the health status of the Nation, for studying morbidity trends, and for research activities in the health field. NHDS data have been used extensively in the development and monitoring of goals for the Year 2000 and 2010 Healthy People Objectives. In addition, NHDS data provide annual updates for numerous tables in the Congressionally-mandated NCHS report, *Health, United States.* Other users of these data include universities, contract research organizations, many in the private sector, foundations, and a variety of users in the print media. There is no cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN TABLE

Respondents	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Redesigned NHDS:					
Hospital CEO/CFO	Survey presentation to hospital	167	1	1	167

ESTIMATED ANNUALIZED BURDEN TABLE—Continued

Respondents	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Director of health information management (DHIM) or Health information technology (DHIT).	Induction (including initial facility questionnaire).	167	1	4	668
DHIM or DHIT	Post induction annual facility questionnaire.	500	2	1	1,000
DHIM or DHIT	transmit UB–04	500	4	1	2,000
Acute Coronary Syndrome Pretest:					
Hospital CEO/CFO	Presentation at hospital	11	1	1	11
DHIM or DHIT	Pulling medical records for abstraction.	11	1	30/60	6
Total					3,852

Dated: August 4, 2010.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–19704 Filed 8–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day-10–10CV]

Agency Forms Undergoing Paperwork Reduction Act review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov*. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Early Aberration Reporting System (EARS) Registration Module—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID)(proposed), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

To support two of CDC's main priority areas: (1) Improving CDC's support for state and local health departments, and (2) strengthening surveillance and epidemiology, CDC is requesting approval from the Office of Management and Budget (OMB) to improve the Early Aberration Reporting System (EARS) by collecting data from individuals who request a download of EARS from the CDC Web site.

The Early Aberration Reporting System, developed within the Division of Bioterrorism Preparedness and Response, is a Web-enabled tool that analyzes public health surveillance data using methods that detect abnormal trends that could possibly indicate an outbreak of infectious disease. The local public health professionals manage the entire tool and can implement the defaults or can adjust the tool in order to meet their local needs. The goal of this process is to assist public health professionals in the early identification of outbreaks of disease as well as bioterrorism events. EARS is used to assess whether the current number of reported cases of an event is higher than usual.

The term syndromic surveillance is used to describe surveillance that uses health-related data that precede diagnosis and that signals a sufficient probability of a case or an outbreak of infectious disease to warrant further public health response. Syndromic surveillance systems are used by state, local, national and international health departments to monitor syndrome-based (*e.g.*, case information collected in emergency departments (EDs) and diagnostic data sources for early detection of outbreaks and other public health events). More recently these systems are used during public health responses to provide more rapid near real-time situational awareness regarding the health status of the target population. EARS were the first software platform to support local syndromic surveillance systems. EARS has been designed and used to monitor syndromic data from emergency departments, 911 calls, physician office data, school and business absenteeism, over-the-counter drug sales, laboratory testing and results data and reportable disease surveillance systems. In the past several years, EARS systems have been integral in the local public health surveillance arsenal. EARS has been used at events such as the Beijing Summer Olympics; multiple Superbowls (football) and World Series (baseball); the political conventions of both major US political parties; and the Presidential Inauguration (2009).

Today, EARS is a highly successful and sustainable system and has over 200 users at the federal, state, local, and international levels. These users include international Ministries of Health and domestic state and local public health departments. Additionally, EARS detection methods have been integrated in well-known surveillance platforms such as BioSense at CDC, ESSENSE at Johns Hopkins, NAMRD at US Department of Defense, and Emergint at Northrop Grumman.

EARS is widely-accepted and easily sustainable due to its being free to all end users, the capacity to use multiple forms of data, flexibility and user-driven design and maintenance. EARS is a service provided by CDC as share-ware and is available by download at no cost from the CDC Web site *http://www.bt.cdc.gov/surveillance/EARS*.

In an effort to continue to improve and enhance EARS, the collection of registration information is needed to track users and organizations to assist in future needs assessments. Requiring the users to register will provide CDC with contact information (*i.e.*, e-mail addresses) to use for broadcast e-mails regarding new releases for upgrades and enhancements; track the number of users, the download frequency, and the type of data that users will monitor with

EARS; and solicit users for feedback for future upgrades and enhancements.

There is no cost to respondents to participate in this program. The total estimated annualized burden for this data collection is 25 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Users	150	1	10/60

Dated: August 4, 2010.

Maryam I. Daneshvar,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–19702 Filed 8–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0190]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Infant Formula Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by September 9, 2010.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0256. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley Jr., Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–3793.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Infant Formula Requirements—21 CFR Parts 106 and 107 (OMB Control Number 0910–0256)—Extension

Statutory requirements for infant formula under the Federal Food, Drug, and Cosmetic Act (the act) are intended to protect the health of infants and include a number of reporting and recordkeeping requirements. Among other things, section 412 of the act (21 U.S.C. 350a) requires manufacturers of infant formula to establish and adhere to quality control procedures, notify FDA when a batch of infant formula that has left the manufacturers' control may be adulterated or misbranded, and keep records of distribution. FDA has issued regulations to implement the act's requirements for infant formula in parts 106 and 107 (21 CFR parts 106 and 107). FDA also regulates the labeling of infant formula under the authority of section 403 of the act (21 U.S.C. 343). Under the labeling regulations for infant formula in part 107, the label of an infant formula must include nutrient information and directions for use. The purpose of these labeling requirements is to ensure that consumers have the information they need to prepare and use infant formula appropriately. In a notice of proposed rulemaking published in the **Federal Register** of July 9, 1996 (61 FR 36154), FDA proposed changes in the infant formula regulations, including some of those listed in tables 1, 2, and 3 of this document. The document included revised burden estimates for the proposed changes and solicited public comment. In the interim, however, FDA is seeking an extension of OMB approval for the current regulations so that it can continue to collect information while the proposal is pending.

In the **Federal Register** of May 4, 2010 (75 FR 23777), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Federal Food, Drug, and Cosmetic Act or 21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Section 412(d) of the act	5	13	65	10	650
21 CFR 106.120(b)	1	1	1	4	4
21 CFR 107.50(b)(3) and (b)(4)	3	2	6	4	24
21 CFR 107.50(e)(2)	1	1	1	4	4
Total					682

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
106.100	5	10	50	400	20,000
107.50(c)(3)	3	10	30	300	9,000
Total					29,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3.—ESTIMATED ANNUAL THIRD PARTY DISCLOSURE BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency of Disclosure	Total Annual Disclosures	Hours per Disclosure	Total Hours
107.10(a) and 107.20	5	13	65	8	520

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In compiling these estimates, FDA consulted its records of the number of infant formula submissions received in the past. All infant formula submissions to FDA may be provided in electronic format. The hours per response reporting estimates are based on FDA's experience with similar programs and information received from industry.

FDA estimates that it will receive 13 reports from 5 manufacturers annually under section 412(d) of the act, for a total annual response of 65 reports. Each report is estimated to take 10 hours per response for a total of 650 hours. FDA also estimates that it will receive one notification under § 106.120(b). The notification is expected to take 4 hours per response, for a total of 4 hours.

For exempt infant formula, FDA estimates that it will receive 2 reports from 3 manufacturers annually under §§ 107.50(b)(3) and (b)(4), for a total annual response of 6 reports. Each report is estimated to take 4 hours per response for a total of 24 hours. FDA also estimates that it will receive one notification under § 107.50(e)(2). The notification is expected to take four hours per response, for a total of four hours.

FDA estimates that 5 firms will expend approximately 20,000 hours per year to fully satisfy the recordkeeping requirements in § 106.100. It is estimated that 3 firms will expend approximately 9,000 hours per year to fully satisfy the recordkeeping requirements in § 107.50(c)(3).

FDA estimates that compliance with the labeling requirements of §§ 107.10(a) and 107.20 will require 520 hours annually by 5 manufacturers.

Dated: August 5, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–19640 Filed 8–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–P–0218]

Determination That DECA-DURABOLIN (Nandrolone Decanoate) Injection, 200 Milligrams/Milliliter, 1 Milliliter, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its determination that DECA-DURABOLIN (nandrolone decanoate) Injection, 200 milligrams/milliliter (mg/mL), 1 mL, was not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for nandrolone decanoate, 200 mg/mL, 1 mL, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Nikki Mueller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6312, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the "listed drug," which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is known generally as the "Orange Book." Under FDA regulations, drugs are removed from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162). Under 21 CFR 314.161(a)(1), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. FDA may not approve an ANDA that does not refer to a listed drug.

DECA-DURABOLIN (nandrolone decanoate) Injection is the subject of NDA 13–132, held by Organon, Inc.

(Organon), and was initially approved on October 5, 1962. Under the Drug Efficacy Study Implementation (DESI), FDA concluded that nandrolone decanoate was effective for the indications described in the **Federal Register** notice published on July 15, 1983 (DESI 7630, 48 FR 32394). DECA-DURABOLIN is an anabolic steroid indicated for the management of the anemia of renal insufficiency and has been shown to increase hemoglobin and red cell mass. Organon notified FDA in a letter dated May 21, 2002, that it was no longer marketing DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, and the drug product was moved to the "Discontinued Drug Product List" section of the Orange Book. PharmaForce, Inc., submitted a citizen petition dated May 7, 2009 (Docket No. FDA–2009–P–0218), under 21 CFR 10.30 requesting that the agency determine whether DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, was withdrawn from sale for reasons of safety or effectiveness.

FDA has reviewed its records and, under § 314.161, has determined that DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, was not withdrawn from sale for reasons of safety or effectiveness. The petitioner identified no data or other information suggesting that DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, was withdrawn for reasons of safety or effectiveness. FDA has independently evaluated relevant literature and data for possible postmarketing adverse events and has found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness. Accordingly, the agency will continue to list DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to DECA-DURABOLIN (nandrolone decanoate) Injection, 200 mg/mL, 1 mL, may be approved by the agency if all other legal and regulatory requirements for the approval of ANDAs are met. If FDA determines that labeling for this drug product should be revised to meet current standards, the agency will advise ANDA applicants to submit such labeling.

Dated: August 5, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–19698 Filed 8–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0391]

Determination That MOTRIN (Ibuprofen) Tablets and Four Other Drug Products Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that the five drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to these drug products, and it will allow FDA to continue to approve ANDAs that refer to the products as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Olivia Pritzlaff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6308, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the "listed drug," which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is generally known as the "Orange Book." Under FDA regulations, a drug is withdrawn from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under § 314.161(a) (21 CFR 314.161(a)), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness: (1) Before an ANDA that refers to that listed drug may be approved; (2) whenever a listed drug is voluntarily withdrawn from sale and ANDAs that refer to the listed drug have been approved; and (3) when a person petitions for such a determination under 21 CFR 10.25(a) and 10.30. Section 314.161(d) provides that if FDA determines that a listed drug was withdrawn from sale for reasons of safety or effectiveness, the agency will initiate proceedings that could result in the withdrawal of approval of the ANDAs that refer to the listed drug.

FDA has become aware that the drug products listed in the table in this document are no longer being marketed. (As requested by the applicant, FDA withdrew approval of NDA 18–354 for ORTHO–NOVUM 10/11–21 and 10/11–28 (ethinyl estradiol; norethindrone) Tablets in the **Federal Register** of February 11, 2009 (74 FR 6896).)

Application No.	Drug	Applicant
NDA 17–463	MOTRIN (ibuprofen) Tablets, 300 milligrams (mg), 400 mg, 600 mg, and 800 mg	McNeil Consumer Healthcare, 7050 Camp Hill Rd., Fort Washington, PA 19034
NDA 18–303	LOPRESSOR HCT (hydrochlorothiazide; metoprolol tartrate) Tablets, 50 mg; 100 mg	Novartis Pharmaceuticals Corp., 59 Rte. 10, East Hanover, NJ 07936–1080

Application No.	Drug	Applicant
NDA 18–354	ORTHO-NOVUM 10/11–21 and 10/11–28 (ethinyl estradiol; norethindrone) Tablets, 0.035 mg, 0.035 mg; 0.5 mg, 1 mg	Ortho McNeil Janssen Pharmaceuticals, Inc., 1125 Trenton Harbourton Rd., Titusville, NJ 08560
NDA 18–423	HIBICLENS (chlorhexidine gluconate) Topical Sponge, 4 %	Molnycke Health Care, 5550 Peachtree Parkway, Ste. 500, Norcross, GA 30092
NDA 19–436	PRIMACOR (milrinone lactate) Injection, Equivalent to (EQ) 1 mg base/milliliter	Sanofi Aventis U.S. LLC, 55 Corporate Dr., Bridgewater, NJ 08807

FDA has reviewed its records and, under § 314.161, has determined that the drug products listed in this document were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the agency will continue to list the drug products listed in this document in the "Discontinued Drug Product List" section of the Orange Book. The "Discontinued Drug Product List" identifies, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness.

Approved ANDAs that refer to the NDAs listed in this document are unaffected by the discontinued marketing of the products subject to those NDAs. Additional ANDAs that refer to these products may also be approved by the agency if they comply with relevant legal and regulatory requirements. If FDA determines that labeling for these drug products should be revised to meet current standards, the agency will advise ANDA applicants to submit such labeling.

Dated: July 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–19638 Filed 8–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–F–0320]

United States Pharmacopeial Convention; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that the U.S. Pharmacopeial Convention has filed a petition proposing that the food additive regulations that incorporate by reference food-grade specifications from prior editions of the Food Chemicals Codex (FCC) be amended to incorporate by reference food-grade specifications from the FCC, 7th Edition.

FOR FURTHER INFORMATION CONTACT: Mical E. Honigfort, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1278.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (section 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 0A4782) has been filed by U.S. Pharmacopeial Convention, 12601 Twinbrook Pkwy., Rockville, MD 20852. The petition proposes that the food additive regulations in table 1 of this document, which incorporate by reference food-grade specifications from prior editions of the FCC, be amended to incorporate by reference food-grade specifications from the FCC, 7th Edition.

TABLE 1.—LIST OF REGULATIONS

21 CFR Section	FCC Edition and/or Supplement Currently Referenced	Name of Additive	Current FCC Reference
172.167(b)	6th Ed.	Hydrogen peroxide	Meets FCC specifications.
172.320(b)(1)	3d Ed.	Amino acids	Meets FCC specifications.
172.345(b)	4th Ed.	Folic acid (folacin)	Meets FCC specifications.
172.379(b)	6th Ed.	Vitamin D_2	Meets FCC specifications.
172.380(b)	5th Ed.	Vitamin D_3	Meets FCC specifications.
172.665(d)(2)	4th Ed.	Gellan gum	Residual isopropyl alcohol limit not to exceed 0.075% by the procedure described in the Xanthan Gum monograph.
172.712(b)	4th Ed.	1,3-Butylene glycol	Conforms to FCC identity and specifications.
172.723(b)(3)	4th Ed.	Epoxidized soybean oil	Heavy metals (as lead) content cannot be more than 10 parts per million (ppm) as determined by the "Heavy Metals Test."
172.736(b)(2)	5th Ed.	Glycerides and polyglycides of hydrogenated vegetable oils	Acid value not greater than 2, and hydroxyl value, not greater than 56 as determined by "Acid Value" and "Hydroxyl Value" methods.

TABLE 1.—LIST OF REGULATIONS—Continued

21 CFR Section	FCC Edition and/or Supplement Currently Referenced	Name of Additive	Current FCC Reference
172.780(b)	5th Ed.	Acacia (gum arabic)	Meets FCC specifications.
172.800(b)(2)	3d Ed.	Acesulfame potassium	Fluoride content not more than 30 ppm as determined by Method III of the Fluoride Limit Test.
172.804(b)	3d Ed., 1st Supp.	Aspartame	Meets FCC specifications.
172.810	3d Ed.	Dioctyl sodium sulfosuccinate	Meets FCC specifications.
172.812(a)	3d Ed.	Glycine	Meets FCC specifications.
172.831(b)	4th Ed.	Sucralose	Meets FCC specifications.
172.833(b)(4)	4th Ed.	Sucrose acetate isobutyrate (SAIB)	Lead not to exceed 1.0 milligram/kilogram (mg/kg) determined by the "Atomic Absorption Spectrophotometric Graphite Furnace Method, Method I," with an attached modification to sample digestion section.
172.841(b)	5th Ed., 1st Supp.	Polydextrose	Meets FCC specifications.
172.846(b)	3d Ed.	Sodium stearoyl lactylate	Meets FCC specifications.
172.858(a)	3d Ed.	Propylene glycol alginate	Meets FCC specifications.
172.862(b)(1)	3d Ed.	Oleic acid derived from tall oil fatty acids	Meets FCC specifications except that titer (solidification point) shall not exceed 13.5 degrees Celsius and unsaponifiable matter shall not exceed 0.5%.
172.867(b)	4th Ed., 1st Supp.	Olestra	Meets FCC specifications.
172.869(b)(6)	4th Ed.	Sucrose oligoesters	Acid value not more than 4.0 as determined by the method "Acid Value," Appendix VII, Method I (Commercial Fatty Acids).
172.869(b)(7)	4th Ed.	Sucrose oligoesters	Residue on ignition not more than 0.7% as determined by "Residue on Ignition," Appendix IIC, Method I (using a 1 gram sample).
172.869(b)(8)	4th Ed., 1st Supp.	Sucrose oligoesters	Residual methanol not more than 10 mg/kg as determined by the method listed in the monograph for "Sucrose Fatty Acid Esters."
172.869(b)(9)	4th Ed., 1st Supp.	Sucrose oligoesters	Residual dimethyl sulfoxide not more than 2.0 mg/kg as determined by the method listed in the monograph "Sucrose Fatty Acid Esters."
172.869(b)(10)	4th Ed., 1st Supp.	Sucrose oligoesters	Residual isobutyl alcohol not more than 1.0 mg/kg as determined by the method listed in the monograph "Sucrose Fatty Acid Esters."
172.869(b)(11)	4th Ed.	Sucrose oligoesters	Lead not more than 1.0 mg/kg as determined by "Atomic Absorption Spectrophotometric Graphite Furnace Method," Method I.
173.115(b)(3)	4th Ed.	Alpha-acetolactate decarboxylase (*a*-ALDC) enzyme preparation derived from a recombinant Bacillus subtilis	Enzyme preparation must meet general and additional requirements for enzyme preparations in FCC.
173.160(d)	3d Ed.	*Candida guilliermondii*	Citric acid produced must conform to FCC specifications (under "Citric acid").

TABLE 1.—LIST OF REGULATIONS—Continued

21 CFR Section	FCC Edition and/or Supplement Currently Referenced	Name of Additive	Current FCC Reference
173.165(d)	3d Ed.	*Candida lipolytica*	Citric acid produced must conform to FCC specifications (under "Citric acid").
173.228(a)	4th Ed.	Ethyl acetate	Meets FCC specifications.
173.280(c)	3d Ed.	Solvent extraction process for citric acid	Meets FCC specifications.
173.310(c)	4th Ed.	Boiler water additives; Sodium carboxymethylcellulose	Contains not less than 95% sodium carboxymethylcellulose on a dry-weight basis, with maximum substitution of 0.9 carboxymethylcellulose groups per anhydroglucose unit, and with a minimum viscosity of 15 centipoises for 2% by weight aqueous determined by the method cited in FCC.
173.310(c)	4th Ed.	Boiler water additives; Sorbitol anhydride esters	Meets FCC specifications.
173.368(c)	4th Ed.	Ozone	Meets FCC specifications.
178.1005(c)	3d Ed.	Hydrogen peroxide solution	Meets FCC specifications.
180.25(b)	3d Ed.	Mannitol	Meets FCC specifications.
180.30(a)	3d Ed.	Brominated vegetable oil	Meets FCC specifications.
180.37(b)	3d Ed.	Saccharin, ammonium saccharin, calcium saccharin, and sodium saccharin	Meets FCC specifications.

The agency has determined under 21 CFR 25.30(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Dated: August 4, 2010.

Catherine L. Copp,

Acting Director, Office of Food Additive Safety, Center for Food Safety and Applied Nutrition.

[FR Doc. 2010–19722 Filed 8–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Advisory Board, September 7, 2010, 8:30 a.m. to September 8, 2010, 12 p.m., National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892, which was published in the **Federal Register** on July 22, 2010, 75 FR42758.

This amendment has been processed to change the start and end times of the NCAB meeting. The meeting will now start at 4 p.m. and end at 5:45 p.m. on September 7, 2010. On September 8, 2010, the closed session will be held from 8:30 a.m. to 10 a.m. The open session will start at 10:15 a.m. and end at 5 p.m.

Dated: August 4, 2010.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–19681 Filed 8–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Griffithsin, Glycosylation-Resistant Griffithsin, and Related Conjugates as Biotherapeutics for the Treatment of HIV and HCV Infections

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i), that the National Institutes of Health (NIH), Department of Health and Human Services (HHS), is contemplating the grant of an exclusive license to practice the inventions embodied in:

1. U.S. Provisional Patent Application Serial No. 60/576,056, filed on June 1, 2004, entitled "Griffithsin, Glycosylation-Resistant Griffithsin, and Related Conjugates, Compositions, Nucleic Acids, Vectors, Host Cells, Methods of Production And Methods of Use", converted to PCT/US2005/18778, filed May 27, 2005, and entered national stage in U.S. (patent application serial number 11/569,813), Canada (patent application serial number 2,567,728), Australia (patent application serial number 2005250429), Europe (patent application serial number 05804849.7), Japan (patent application serial number 2007–515398), Israel (patent application serial number 179236), New Zealand (patent number 2006/09573), and South Africa (patent application serial number 2006/09573) (HHS reference E–106–2003/0) from Dr. Barry O'Keefe *et al.* (NCI).

2. U.S. Provisional Patent Application Serial No. 60/741.403, filed on

December 1, 2005, entitled "Antiviral Activity Of Griffithsin Against SARS And HCV", converted to PCT/US2006/045930, filed December 1, 2006, and entered national stage in U.S. (patent application serial number 12/095,697), and Europe (patent application serial number 06838737.2) (HHS reference E–025–2006/0) from Dr. Barry O'Keefe *et al.* (NCI).

To Rodos Biotarget GmbH (Rodos here after) having a place of business in Germany. The patent rights in these inventions have been assigned to the United States of America.

DATES: Only written comments and/or application for a license, which are received by the NIH Office of Technology Transfer on or before September 9, 2010 will be considered.

ADDRESSES: Requests for a copy of the patent application, inquiries, comments and other materials relating to the contemplated license should be directed to: Sally Hu, PhD, M.B.A., Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; *E-mail: hus@od.nih.gov; Telephone:* (301) 435–5606; *Facsimile:* (301) 402–0220.

SUPPLEMENTARY INFORMATION:

The first invention, E–106–2003, provides for isolated and purified Griffithsin protein and antibodies, plus related purified nucleic acids. Griffithsin is a novel, potent anti-HIV protein isolated from an aqueous extract of the red algae Griffithsia and Griffithsin inhibits viral binding, fusion and entry into the host cells by binding to viral envelope gp120. In addition, E–106–2003 also provides the methods of producing Griffithsin and methods of inhibiting a viral infection (incl. HIV), as well as vaccine development, and screening assays.

The second invention, E–025–2006, follows its predecessor patent application (E–106–2003) and claims new indications in particular for severe acute respiratory syndrome (SARS) and Hepatitis C. More specifically, the subject invention provides for a composition of an anti-viral polypeptide, Griffithsin, glycosylation-resistant Griffithsin, and related conjugates, compositions, nucleic acids, vectors, host cells, antibodies and methods of production and use.

Based on the above two inventions, Griffithsin can be developed as an HIV entry inhibitor therapeutically or prophylactically against retroviral infections and also can be developed as an inhibitor against non-retroviruses infectious such as influenza virus, including H5N1, SARS, Hepatitis C, and Ebola, measles, varicella, human herpes viruses and others. In addition, Griffithsin can be used in combination with other anti-viral agents to treat patients who have drug-resistant virus.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within 30 days from the date of this published Notice, NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

The prospective exclusive license will enter an agreement with University of Canterbury in Christchurch of New Zealand complying with the U.S. Government's policy of the U.N. CBD for sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic researches with the "Source Country" providing such resources (U.N. CBD; Article 15.7: *http://www.cbd.int/convention/convention.shtml*).

The field of use may be limited to the development of non-encapsulated and encapsulated Griffithsin for use in treating human viral infections where those viral infections are human immunodeficiency virus (HIV) or hepatitis C virus (HCV).

Properly filed competing applications for a license filed in response to this notice will be treated as objections to the contemplated license. Comments and objections submitted in response to this notice will not be made available for public inspection, and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: August 3, 2010.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2010–19680 Filed 8–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0364]

Advancing the Development of Medical Products Used In the Prevention, Diagnosis, and Treatment of Neglected Tropical Diseases; Public Hearing; Change of Hearing Date and Location

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a change in date and location for the upcoming public hearing entitled "Advancing the Development of Medical Products Used in the Prevention, Diagnosis, and Treatment of Neglected Tropical Diseases." A new date and address are given for those attending the public hearing.

DATES: The public hearing will be held on September 23, 2010, from 9 a.m. to 5 p.m. However, depending on the level of public participation, the meeting may be extended or it may end early.

ADDRESSES: The public hearing will be held at the National Labor College, 10000 New Hampshire Ave., Silver Spring, MD 20903. Persons attending the public hearing are advised that FDA is not responsible for providing access to electrical outlets.

FOR FURTHER INFORMATION CONTACT: Ann M. Staten, Office of Critical Path Programs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg., 32, rm. 4106, Silver Spring, MD 20993–0002, 301–796–8504, *Ann.Staten@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of July 20, 2010 (75 FR 42103), FDA published a notice announcing a public hearing that is intended to solicit general views and information from interested persons on issues related to advancing the development of medical products (drugs, biological products, and medical devices) used in the prevention, diagnosis, and treatment of neglected tropical diseases. The registration dates from the July 20, 2010, notice have not changed. Individuals interested in making an oral presentation should submit a notice of participation by September 1, 2010. All others attending the public hearing are requested to register by September 17, 2010.

Because of a scheduling conflict with the published date, FDA is announcing in this notice a new date and location for the public hearing.

II. New Date and Location for the Pubic Hearing

The new date will be September 23, 2010 (see **DATES**). The new location will be the National Labor College (see **ADDRESSES**). Directions and information on parking, accommodations, and transportation options can be found at *http://www.nlc.edu/about/maps-and-directions.*

Dated: August 4, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–19637 Filed 8–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2010–0231]

Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625–0089

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day Notice requesting comments; correction.

SUMMARY: The U.S. Coast Guard is issuing a correction to a **Federal Register** Notice published on July 9, 2010 to extend the comment period for ten (10) additional days, and address previous comments received on this collection of information: 1625–0089, National Recreational Boating Survey. The Notice stated that no comments were received from the public when in fact we received four. The comment period for the Notice, which closes August 9, 2010, is now extended to August 19, 2010. All comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before August 19, 2010, or reach the Docket Management Facility (DMF) by that date.

DATES: Please submit comments on or before August 19, 2010.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2010–0231] to the DMF at the U.S. Department of Transportation (DOT) or to the Office of Information and Regulatory Affairs (OIRA). To avoid duplicate submissions, please use only one of the following means:

(1) *Online:* (a) To Coast Guard docket at *http://www.regulation.gov.* (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov.*

(2) *Mail or Hand delivery.* (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) *Fax.* (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–5806. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), ATTN Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St., SW., Stop 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard is issuing this correction to an earlier Notice published on July 9, 2010, (75 FR 39552) in order to extend ten (10) additional days to the comment period and address previous comments received on this collection of information: 1625–0089, National Recreational Boating Survey.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2010–0231]. For your comments to OIRA to be considered, it is best if they are received on or before August 19, 2010.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. *Please see* the "Privacy Act" paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2010–0231], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu, select "Notices" and insert "USCG–2010–0231" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and address them accordingly.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0231" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To find out OIRA's decision on this ICR, visit *http://www.reginfo.gov/public/do/PRAMain* after the comment period. An OMB notice of action on this request will become available on that Web site through a hyperlink in the OMB Control Number: 1625–0089. *Privacy Act:* Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Privacy Act statement regarding our public dockets in the

January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Previous Request for Comments

The Coast Guard published the 60-day Notice (75 FR 19413, April 14, 2010) as required by 44 U.S.C. 3506(c)(2). That Notice elicited four comments from the public. We diligently reviewed each of the comments received, and made changes to our survey's supporting statement where deemed appropriate. The present document provides a summary of public comments, our responses thereto, and changes made to the supporting statement.

i. General Supportive Comments

All comments supported the National Recreational Boating Survey's broad goals, and reiterated the importance of collecting more targeted data in response to the elements included in the National Recreational Boating Safety (NRBS) Program's strategic plan. This Plan calls for the collection of participation/exposure data to develop reliable national and state level measures of the risk incidental to recreational boating. Valid comparisons of injury or fatality rates across States or other geographic entities, which have always been of interest, require the use of participation/exposure data as common base for calculating rates' denominators. This survey will make exposure data available to the boating community, in addition to collecting various other boating participation data broken down by various boat characteristics including type and length.

ii. The Survey and the Strategic Plan Objectives

One commenter indicated that the current survey does not account for the more recent developments in the NRBS strategic planning efforts. While it is accurate that the NRBS strategic plan is undergoing some changes, the Coast Guard had to base the design of its survey on the latest version of the Plan that was adopted by the National Boating Safety Advisory Council. However, it is expected that subsequent iterations of the survey will be updated as new versions of the Plan are adopted.

iii. Survey Costs

A number of comments raised a concern that the cost for conducting this survey was unduly high, suggesting the questionnaires could be trimmed substantially to the point of collecting only information that is critical to the implementation of the NRBS strategic plan. It is accurate that government surveys are increasingly expensive, especially when conducted by mail/telephone. But the definitive costs of the 2011 survey have not yet been determined, and will ultimately be negotiated with the Coast Guard's contractor ICF–Macro. The Coast Guard will negotiate the lowest price possible for each survey iteration without significantly altering data requirements as specified by its boating partners from States, academia, and industry. To reduce survey costs, the Coast Guard will encourage survey participants to take the web version of the survey whenever possible. Another option for reducing cost is not to produce state-level statistics for those not providing registration data to the Coast Guard. Collecting data in States with legislation that precludes them from releasing boat registration to the Coast Guard will increase data collection costs dramatically. However, it appears essential to the Coast Guard to satisfy all its boating partners who put in the effort to express their data needs.

iv. Collection of 2010 Data

Some comments indicated that Coast Guard's effort to collect 2010 data in the first survey cycle, where participants will have to recall a year's worth of information will result in poor data quality. It is accurate that in addition to collecting the 2011 data on a monthly basis, the Coast Guard will ask questions regarding the 2010 boating season. While accurate 2010 exposure data will be difficult to obtain, the Coast Guard expects to be able to collect accurate and useful 2010 information on boat ownership and demographic data on the boating population. This data will be compiled and made available much faster than the 2011 data which will be collected until the beginning of 2012.

v. Miscellaneous

♦ A commenter pointed out the difficulty most boaters have in identifying life jacket types they use. The Coast Guard's contractor discovered this problem during the pilot test. The decision was made to eliminate the lifejacket type question from the telephone survey. However, this question will remain on the web version of the trip survey, where respondents will be able to visualize the different lifejacket types.

♦ Another comment questioned the need to ask boaters whether lifejackets were worn during the outing, when the Coast Guard's observational study collects the same information. This survey is not duplicating other Coast Guard information collection efforts. The objective here is to understand the reasons why boaters do not wear lifejackets, or the reasons why they wear them when they do.

♦ A comment was made regarding the estimated time to complete the different survey questionnaires that may be understated. While survey questionnaires were field-tested by our contractor, times reported on the Supporting Statement are estimated averages across questionnaires and across survey respondents. It is understood that some survey questionnaires will take longer to complete than others. Moreover, even respondents taking the same survey will spend varying amounts of time depending on the information being reported. It is anticipated that some respondents with limited involvement in boating may take less than five minutes to complete a questionnaire that may take 15 to 20 minutes for respondents who are heavy boaters.

Information Collection Request

Title: National Recreational Boating Survey.

OMB Control Number: 1625–0089.

Type of Request: Re-instatement with change.

Respondents: Recreational boating participants/owners of recreational boaters/vessels.

Abstract: The Federal Boat Safety Act of 1971 determines the framework of the Coast Guard Recreational Boating Safety Program. This Program, as set forth in 46 U.S.C., Chapter 131, requires the Coast Guard to "encourage greater State participation and uniformity in boating safety efforts, and particularly to permit the States to assume a greater share of boating safety education, assistance, and enforcement activities." (*See* 46 U.S.C. 13102.) The Coast Guard Office of Boating Safety achieves these goals by providing timely and relevant information on subject activities that occur in each respective jurisdiction. The boating information provided by the Coast Guard enables each State agency to tailor and implement safety initiatives addressing specific needs of boaters in local jurisdictions. The primary objective of this collection is to provide the Coast Guard with the required information in a format suitable to effectively manage the Program.

Forms: None.

Burden Estimate: This is a biennial requirement. In the year the survey is conducted, the burden is estimated to be 10,880 hours.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: August 3, 2010.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2010–19632 Filed 8–9–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Blackstone River Valley National Heritage Corridor Commission: Notice of Meeting

Notice is hereby given in accordance with Section 552b of Title 5, United States Code, that a meeting of the John H. Chafee Blackstone River Valley National Heritage Corridor Commission will be held on Thursday, September 16, 2010.

The Commission was established pursuant to Public Law 99–647. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated resource management plan for those lands and waters within the Corridor.

The meeting will convene on September 16, 2010 at 9 a.m. at Slater Mill Historic Site located at 67 Roosevelt Avenue, Pawtucket, RI for the following reasons:

1. *Approval of Minutes.*
2. *Chairman's Report.*
3. *Executive Director's Report.*
4. *Financial Budget.*
5. *Public Input.*

It is anticipated that about thirty people will be able to attend the session in addition to the Commission members.

Interested persons may make oral or written presentations to the Commission or file written statements. Such requests should be made prior to the meeting to: Jan H. Reitsma, Executive Director, John H. Chafee, Blackstone River Valley National Heritage Corridor Commission, One Depot Square, Woonsocket, RI 02895, *Tel.:* (401) 762–0250.

Further information concerning this meeting may be obtained from Jan H. Reitsma, Executive Director of the Commission at the aforementioned address.

Jan H. Reitsma,

Executive Director, BRVNHCC.

[FR Doc. 2010–19616 Filed 8–9–10; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R3–ES–2010–N140; 30120–1113–0000–F6]

Endangered and Threatened Wildlife and Plants; Indiana Bat; Notice of Intent To Prepare an Environmental Impact Statement on a Proposed Habitat Conservation Plan and Incidental Take Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare an Environmental Impact Statement (EIS) on a proposed Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) for the Indiana Bat (*Myotis sodalis*) at a wind power project in Adair, Sullivan, and Putnam Counties, Missouri (Project). Construction and operation of the Project has the potential to cause the take of Indiana bat, an endangered species, protected by the Endangered Species Act (ESA). We provide this notice to advise other agencies, tribes, and the public of our intentions, and to obtain suggestions and information on the scope of review under NEPA (National Environmental Policy Act), as well as issues to consider during the planning process.

DATES: We will consider comments we receive on or before September 9, 2010.

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

U.S. mail or hand-delivery: Ms. Jane Ledwin, U.S. Fish and Wildlife Service, 101 Park DeVille Drive, Suite A, Columbia, MO 65203.

E-mail: jane_ledwin@fws.gov.

Facsimile: (573) 234–2181 (Attention: Jane Ledwin).

FOR FURTHER INFORMATION CONTACT: Ms. Jane Ledwin, (573) 234–2132. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at (800) 877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, tribes, industry, or any other interested party on this notice. We will consider all comments we receive in complying with the requirements of NEPA and in the development of an HCP, NEPA document, and potential ITP.

You may submit your comments and materials considering this notice by one of the methods listed in the **ADDRESSES** section.

Comments and materials we receive, as well as supporting documentation we use in preparing the NEPA document, will be available for public inspection by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ecological Services Missouri Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

You may obtain copies of this notice by mail from the Ecological Services Missouri Field Office, or on the Internet at: *http://www.fws.gov/midwest/Endangered/permits/hcp/r3hcps.html.*

Background

The Indiana Bat was added to the list of Endangered and Threatened Wildlife and Plants on March 11, 1967 (32 FR 4001). It is currently listed as an endangered species under the ESA (16 U.S.C. 1531 *et seq.*) The population has declined as a result of pesticides, agricultural development, and loss of forest habitat affecting the summer range. Impacts to caves used for hibernation have also contributed to population declines. White-nose syndrome (*Geomyces destructans*), a fungus causing infected bats to rouse from hibernation early and attempt to hunt for food, is now believed to be a cause of death in Indiana bats.

The range of the Indiana bat extends from eastern Vermont, western Oklahoma, southern Wisconsin, and northern Florida. Indiana bats migrate between their summer forested ranges and winter hibernacula, which typically are climatically stable caves and mines. During summer months, they forage for insects along streams, in riparian forests and floodplains, and in upland forests and low open areas. Males roost individually or in small groups throughout the range, preferring areas near hibernacula. Females, forming larger maternity colonies of 50 to 100, roost in dead or dying trees or living trees with broken and flaking bark.

There are no known hibernacula in the Project area or nearby. However, maternity roosts and maternity colonies have been identified proximate to and within the Project area. The Service and the Applicant have determined that the development and operation of the Project, in proximity to summer maternity colonies and spring and fall migratory flight paths, may affect the Indiana bat and their habitat, possibly resulting in the involuntary take of Indiana bats.

Shuteye, LLC continues to develop an HCP and plans to request issuance of an

ITP from the Service. The HCP will include the following: (1) Conservation measures for siting and constructing the Project, (2) postconstruction monitoring to gather data regarding the impact of the first phase on local Indiana bats; and (3) an Adaptive Management Plan to ensure appropriate procedures are in place which adequately modify operations to minimize and mitigate the effects the Project may have on the Indiana bat.

The Project will encompass portions of Adair, Sullivan, and Putnam Counties, Missouri, near the towns of Greencastle and Green City. It will directly affect 240 acres, or 0.7 percent of approximately 36,757 acres of privately leased rural land. This area is an agricultural landscape composed predominately of pasture land, with some cultivated cropland and isolated areas of deciduous forest scattered throughout.

The Project will provide as much as 300 megawatts (MW) of renewable energy from as many as 200 1.5-MW wind energy turbines and the related facilities (access roads, collection lines, operation and maintenance facilities (O&M), substations, and a transmission line). The Project will be constructed in two phases. Phase I involves up to 200 MWs of renewable energy and includes a 16-mile transmission line extending from the Project area east to a substation located southwest of the city of Kirksville, Missouri.

Phase II consists of the balance of the Project and will not be developed until at least 1 full year of postconstruction data is obtained, and the Applicant and the Service have agreed that all reasonable measures have been taken to minimize and mitigate harm to the Indiana bat. This information will be used to determine whether adaptive management is required and to assist in the design and operation of Phase II of the Project.

Turbine installation will temporarily impact a 125-to-150-foot radius surrounding a turbine, with the final footprint limited to a 25-foot radius from the turbine center. The rotor diameter of each turbine will be approximately 82.5 meters (271 feet), with the hub height expected to be at either 80 or 100 m. Assuming a 100-m hub height, the maximum height of each turbine will be 141.25 m (463 feet (ft)) when the rotor blade is at the top of its rotation.

Access roads during construction will be within a 50-ft right-of-way (ROW) and will be used for moving construction equipment among the turbine locations. The access roads will be reduced to 15 feet after construction and will be used for Project maintenance.

Collection lines, used to transfer power from the turbines to the substations, will be buried underground and will not disturb the landscape after construction is completed. A transmission line will be constructed within a 150-ft-wide ROW. Wood H-frames, varying from 60 to 115 ft in height and spaced from 600 to 700 ft apart, will be used to support the transmission line. The Project may have up to four substations and two O&M facilities.

Environmental Review

The purpose of the public scoping process is to identify relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the process for developing the EIS. In addition to the Indiana bat, the Service has identified the following preliminary issues: Nonavian wildlife, avian wildlife and bats, topography, geology and soils, water and wetlands resources, air quality, vegetation and land use, and cultural resources.

Authority

We furnish this notice under NEPA regulations (40 CFR 1501.7 and 1508.22). The intent of this notice is to enable us to obtain suggestions and additional information from other agencies and the public on the scope of issues to be considered.

Dated: July 26, 2010.

Tom Melius,

Regional Director, Region 3, Fort Snelling, MN.

[FR Doc. 2010–19721 Filed 8–9–10; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1071–1072 (Review)]

Magnesium From China and Russia

AGENCY: United States International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the antidumping duty orders on alloy magnesium from China and pure and alloy magnesium from Russia.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the antidumping duty orders on alloy magnesium from China and pure and alloy magnesium from Russia would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* July 28, 2010.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On June 4, 2010, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (75 FR 35086, June 21, 2010). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the reviews will be placed in the nonpublic record on November 8, 2010, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on December 7, 2010, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before November 30, 2010. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on December 2, 2010, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is November 18, 2010. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is December 16, 2010; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before December 16, 2010. On February 1, 2011, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before February 3, 2011, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: August 3, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–19599 Filed 8–9–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on August 4, 2010, a proposed Consent Decree (the "Decree") in *United States* v. *Massachusetts Bay Transportation Authority ("MBTA") and Massachusetts Bay Commuter Railroad Company, L.L.C.*, Civil Action No. 1:10–cv–11311, was lodged with the United States District Court for the District of Massachusetts.

In a complaint, filed simultaneously with the Decree, the United States alleges that the Massachusetts Bay Transportation Authority ("MBTA") and the Massachusetts Bay Commuter Railroad Company, L.L.C. ("MBCR") violated the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and 310 CMR § 7.11(2)(b), a regulation included in the Massachusetts' State Implementation Plan, by causing, suffering, allowing, or permitting the unnecessary foreseeable idling of a diesel powered locomotive for a continuous period of time longer than thirty minutes, and not subject to the regulation's exception.

Pursuant to the Decree, MBTA and MBCR will: (1) Install sufficient electric plug-in stations throughout the MBTA's commuter rail system to fully supply electric auxiliary power to all diesel locomotives that lay over at all of the MBTA's layover facilities; (2) implement a fuel switch supplemental environmental project ("SEP") that requires Defendants to switch the MBTA's entire commuter train fleet from low sulfur diesel fuel (500 ppm sulfur) to ultra-low sulfur diesel fuel (15 ppm sulfur) two years prior to federal regulations mandating the switch; and (3) retrofit 14 diesel locomotives with new head end power units that have increased emission controls. MBTA and MBCR will also pay a $225,000 civil penalty to the United States pursuant to the Decree.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S.

Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Massachusetts Bay Transportation Authority ("MBTA") and Massachusetts Bay Commuter Railroad Company, L.L.C.*, D.J. Ref. 90–5–2–1–09617.

During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–19622 Filed 8–9–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1933–PXI Systems Alliance, Inc.

Correction

In notice document 2010–12033 appearing on page 28294 in the issue of Thursday, May 20, 2010 make the following correction:

In the second column, in the last paragraph, in the second line "April 1, 2010" should read "April 15, 2010".

[FR Doc. C1–2010–12033 Filed 8–9–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[Docket No. ATF 36N]

Hearing Procedures Relating to Federal Firearms Licenses (2010R–2T)

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice.

ACTION: General notice.

SUMMARY: In this notice, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) advises federal firearms licensees and other interested parties of its current procedures regarding administrative hearings held as part of firearms license proceedings. The intended purpose of the notice is to ensure that federal firearms licensees and persons applying for a federal firearms license are familiar with the hearing process relative to the denial, revocation, or suspension of a federal firearms license, or the imposition of a civil fine. This notice does not contain any policy guidelines as to whether a notice of denial, revocation, suspension or fine should be issued.

FOR FURTHER INFORMATION CONTACT: Gary Taylor; Office of Field Operations; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Department of Justice; 99 New York Avenue, NE., Washington, DC 20226, telephone (202) 648–7259.

SUPPLEMENTARY INFORMATION:

I. Background

The Attorney General is responsible for enforcing the provisions of the Gun Control Act of 1968 ("the Act"), 18 U.S.C. Chapter 44. He has delegated that responsibility to the Director of ATF, subject to the direction of the Attorney General and the Deputy Attorney General. 28 CFR 0.130(a). ATF has promulgated regulations that implement the provisions of the Act in 27 CFR Part 478.

Pursuant to the authority vested in the Director of ATF by 28 U.S.C. 599A and 28 CFR 0.130–0.133, the authority to issue notices, conduct licensing hearings, render final decisions and issue final notices after a firearms licensing hearing has been redelegated to the Director of Industry Operations (DIO) in each field division in most instances. However, these same authorities are redelegated to the Deputy Assistant Director, Industry Operations, for all matters that he/she determines to involve novel or unusual issues of fact, law, or enforcement policy; matters of national or international significance; or matters that involve or are related to issues arising in more than one ATF field division. Thus, the term "Director" in this document is referring to the deciding official who may be the ATF Director, or a delegate, including the DIO, in most instances, or the Deputy Assistant Director, Industry Operations.

The regulations in Subpart E of Part 478, §§ 478.71–478.78, relate to proceedings involving federal firearms licenses, including the denial, revocation, or suspension of a license, or the imposition of a civil fine. In particular, § 478.71 provides that the Director of ATF may issue a notice of denial on ATF Form 4498 (Notice of Denial of Application for License) to an applicant for a license if he has reason to believe that the applicant is not qualified, under the provisions of § 478.47, to receive a license. The notice sets forth the matters of fact and law relied upon in determining that the application should be denied, and affords the applicant 15 days from the date of receipt of the notice in which to request a hearing to review the denial. If a request for a hearing is not filed within such time, the application is disapproved and a copy, so marked, is returned to the applicant.

Under § 478.72, an applicant who has been denied an original or renewal license may file a request with the Director of Industry Operations (DIO) for a hearing to review the denial of the application. On conclusion of the hearing and after consideration of all relevant facts and circumstances presented by the applicant or his representative, the Director (or his or her delegate) renders a decision confirming or reversing the denial of the application. If the decision is that the denial should stand, a certified copy of the Director's findings and conclusions are furnished to the applicant with a final notice of denial, ATF Form 4501 (now ATF Form 5300.13), Final Notice of Denial of Application or Revocation of Firearms License. In addition, a copy of the application, marked "Disapproved," is furnished to the applicant. If the decision is that the license applied for should be issued, the applicant will be so notified, in writing, and the license will be issued.

Section 478.73 provides that whenever the Director has reason to believe that a firearms licensee has willfully violated any provision of the Act or part 478, a notice of revocation of the license (ATF Form 4500) may be issued. In addition, a notice of revocation, suspension, or imposition of a civil fine may be issued on Form 4500 whenever the Director has reason to believe that a licensee has knowingly transferred a firearm to an unlicensed person and knowingly failed to comply with the requirements of 18 U.S.C. 922(t)(1), relating to a NICS (National Instant Criminal Background Check System) background check or, in violation of 18 U.S.C. 922(z) and 924 (p), has sold, delivered, or transferred any handgun to any unlicensed person without providing a secure gun storage or safety device.

As specified in § 478.74, a licensee who receives a notice of license suspension or revocation, or imposition of a civil fine, may file a request for a hearing with the DIO. On conclusion of the hearing and after consideration of all the relevant information presented at the hearing, the Director renders a decision and prepares a brief summary of the findings and conclusions on which the decision was based. If the decision is that the license should be revoked or, in actions under 18 U.S.C. 922(t)(5) or 924(p), that the license should be revoked or suspended, and/or that a civil fine should be imposed, a certified copy of the summary is furnished to the licensee with the final notice of revocation, suspension, or imposition of a civil fine on ATF Form 4501. If the decision is that the license should not be revoked, or in actions under 18 U.S.C. 922(t)(5) or 924(p), that the license should not be revoked or suspended, and a civil fine should not be imposed, the licensee will be notified in writing.

Under § 478.76, a firearms licensee or an applicant for a firearms license may be represented at a hearing by an attorney, certified public accountant, or other person recognized to practice before ATF, provided certain requirements are met. The Director may be represented in hearing proceedings by an attorney in the Office of Chief Counsel. Pursuant to § 478.77, hearings concerning notification of license denials, suspensions, revocations, or the imposition of a civil fine are held in a location convenient to the aggrieved party.

Currently, ATF has procedures in place regarding administrative hearings held as part of federal firearms license proceedings. Those procedures are set forth in the following section. ATF believes that providing this information will ensure that federal firearms licensees and persons applying for a federal firearms license are familiar with the hearing process relative to the denial, revocation, or suspension of a firearms license, or imposition of a civil fine.

II. Hearing Procedures Relating to Federal Firearms Licenses

The law and regulations (18 U.S.C. 923(f)(2) and 27 CFR part 478, subpart E) provide for a hearing if requested by an applicant or licensee upon receipt of a Notice of Denial or Revocation. If the Director's decision is to revoke or deny the license subsequent to the hearing, the aggrieved party may file a petition in the U.S. District Court for a *de novo* judicial review of the denial or revocation. In a *de novo* proceeding, a court may consider any evidence submitted by the parties, whether or not the evidence was considered at the hearing.

Hearing procedures in firearms licensing matters are informal in nature; the regulations found in the Administrative Procedure Act (APA) (5 U.S.C. 554) do not apply to hearings held under 18 U.S.C. 923(f)(2) because a federal firearms licensing hearing is subject to *de novo* judicial review in district court under 18 U.S.C. 923(f)(3).

Authorities

Delegation of Authority: Pursuant to authorities vested in the Director, ATF, by 6 U.S.C. 531 and 28 CFR 0.130–0.133, the Chief, Firearms and Explosives Services (FES) Division is authorized and retains full authority to designate hearing officers.

Designation of Hearing Officers: Unless otherwise noted, the Chief, FES Division delegates the authority to assign hearing officers to FES Division program managers as designees. This authority may not be redelegated.

Selection and Training of Hearing Officers

The Chief, FES Division will select hearing officers from a list of contractors and volunteers furnished by the Office of Field Operations. While there are no formal selection requirements, at a minimum, candidates for hearing officer should possess the following:

- Comprehensive knowledge of firearms laws and regulations.
- Excellent oral and written communication skills.
- Ability to condense complex information into a clear and concise report.
- Ability to maintain order and decorum in an adversarial proceeding.
- Not have been the subject of adverse action as the result of an investigation by the Office of Professional Responsibility and Security Operations (OPRSO) within 5 years preceding selection to serve as a hearing officer.
- If, subsequent to being selected as a hearing officer, the subject is the recipient of adverse action as the result of an investigation by the OPRSO, the hearing officer will be removed from performing those duties.

Prior to conducting a firearms hearing, hearing officers will complete the appropriate training on hearing procedures conducted by the Office of Training and Professional Development (TPD) or by an experienced hearing officer. If an experienced hearing officer, who has received training on hearing procedures conducted by the Office of Training and Professional Development (TPD), provides training on hearing procedures to a newly selected hearing officer who has not had the opportunity to attend hearing officer training provided by TPD, such training will be deemed adequate.

Hearing officers are appointed by and serve at the discretion of the Chief, FES Division with the concurrence of the hearing officer's DIO or other appropriate field division management official. Expenses for hearing officer travel and equipment needs will be funded by the FES Division.

Designation of Hearing Officer and Preliminary Procedures

Upon receipt of a timely filed request for a hearing, the DIO will advise the Chief, FES Division that a request for a hearing has been made. The Chief, FES Division will designate a hearing officer for the case. The selection of the hearing officer will be made according to the following criteria:

- Complexity and nature of the case will be considered. More experienced hearing officers will be assigned to complex cases.
- The hearing officer's impartiality and/or prior relationship with or knowledge of the applicant or licensee will be considered. The Chief, FES Division will consider whether there is reasonable cause to believe that the hearing officer's ability to conduct a fair and impartial inquiry is impaired by the hearing officer's prior knowledge of the case or interactions with the applicant/licensee.
- The hearing officer's location will be considered. To ensure impartiality, the hearing officer will generally be appointed from outside the applicant's/licensee's division; however, if staffing and resource issues demand, a hearing officer from within the applicant's/licensee's division may be assigned.
- When assigning cases, the Chief, FES Division will attempt to rotate selection among all eligible hearing officers in order to maintain a high level of proficiency in conducting hearings.

Upon selection, the Chief, FES Division will notify the hearing officer or the hearing officer's DIO, the Office of Chief Counsel, and the DIO of the division which issued the notice of denial, revocations, suspension or fine. A Hearing Officer's Assignment Notification will be issued to the DIO of the division where the hearing will be held.

An individual should decline to act as a hearing officer in a particular case if he/she is not fully confident that he/she can administer a fair and impartial proceeding. If, at any time after being designated as hearing officer for a case, the officer determines that he/she cannot administer a fair and impartial proceeding, the hearing officer should immediately recuse himself or herself from the matter and notify the Chief, FES Division.

The Office of Chief Counsel will represent the Government, unless, upon review of the facts of a case, the DIO and Chief Counsel's office concur that counsel's presence is not warranted at the hearing.

Notification of Applicant/Licensee

The DIO in the applicant's/licensee's division will make arrangements for the hearing and advise the applicant/ licensee in writing (by certified mail, return receipt requested, contract carrier or hand delivery) of the date, time, place, and name of the hearing officer, in accordance with 27 CFR 478.72, 478.74, 478.76, and 478.77. Copies of this notification will be provided to the Chief, FES Division and the designated hearing officer.

The specific location for the hearing is within the discretion of the agency, as is the time for the commencement of the hearing, and both should be set with due regard for the convenience of the parties, the availability of an appropriate setting for the hearing, and security considerations.

The DIO will coordinate the scheduling of the hearing with the hearing officer and the assigned counsel, if any, to ensure that there is no scheduling conflict and to ensure that all notifications are conducted according to law and regulation. Within 30 days of the assignment of a hearing officer, a hearing date is to be established. This hearing date is to be no later than 90 days from the date the hearing officer was assigned, except for good cause shown and approved by the Chief, FES Division. A party's initial request for the rescheduling of a hearing may be approved if the party establishes a legitimate need for the rescheduling. The rescheduled date should be within 30 days of the original hearing date. Subsequent requests for rescheduling by a party should be denied unless the request is a result of an emergency outside the party's control, e.g., illness or similar personal or family emergency.

Hearing officers should not have any contact with the licensee/applicant prior to the hearing. All questions/ inquiries should be directed to the DIO of the applicant's/licensee's division.

The individual who presents the case for the Government will make all arrangements for witnesses and documentary evidence relevant to the Government's case, with the assistance of the DIO, if needed.

Recording of the Hearing

The hearing shall be recorded using an audiotape recorder or digital voice recorder, which will be provided by the agency and operated by the hearing officer. The tape or recording, along with the exhibits, shall constitute the official record of the hearing.

The applicant/licensee may make an audiotape recording or digital voice recording of the proceedings, or have the proceedings recorded by a stenographer, at his/her own expense, provided this is not disruptive to the proceedings. The proceedings will not be videotaped.

Any person (including the applicant/ licensee) desiring a copy of the official record of the hearing may make a written request to ATF's Disclosure Division at the following address: Disclosure Division, Office of the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, 99 New York Avenue, NE., Washington, DC 20226.

Prior to concluding the hearing, the hearing officer shall ensure that the hearing has been recorded properly. If the hearing, or any portion thereof, was not recorded properly, the DIO may consult with agency counsel, the hearing officer, or any other party he/ she deems necessary, including opposing counsel, to determine the appropriate remedy. The DIO may consider all legal remedies available in such circumstances including, but not limited to, repeating the hearing. The DIO will determine the appropriate remedy for an inadequate recording or poor sound quality in a recording.

Conduct of the Hearing

Hearings are informal in nature, and adherence to civil court rules and procedures is not required. However, the hearing officer will ensure that the proceedings are conducted in an orderly and professional manner. The purpose of the hearing is to allow both parties to fully present all relevant evidence and arguments deemed necessary regarding the denial, revocation, or suspension of a license, or the imposition of a civil fine. The hearing is properly closed when these issues have been fully explored in the judgment of the hearing officer.

The hearing officer is responsible for all materials necessary to conduct the hearing, *e.g.*, audiotape recorder, tapes, digital voice recorder, batteries, labels to mark exhibits, writing materials, memorandum designating the hearing officer, and a copy of the written notice giving the time and place of the proceeding.

The hearing officer will advise the parties that firearms are not permitted at the hearing, and that all proceedings will cease if this policy is violated.

The hearing officially begins at the time the audiotape recorder or digital voice recorder is activated by the hearing officer. The hearing officer will explain general procedures to be followed.

There may be some preliminary comments regarding the hearing procedures before the audiotape recorder or digital voice recorder is activated. Following activation of the audiotape recorder or digital voice recorder, the hearing officer will:

- State the purpose of the hearing;
- State the hearing officer's identity, and have all persons present identify themselves on the record;
- Address whether any non-witness observers may attend the hearing; the hearing officer may also exclude witnesses from the hearing until their appointed time to testify;
- State the time, date, and location of the hearing;
- State that the proceeding is being recorded, and that the recording being made by him/her is the official recording of the proceeding;
- State that if the DIO decides to deny the application, revoke or suspend the license, or impose a civil fine, the aggrieved party is entitled to *de novo* judicial review of the decision, and that the record of the present proceedings may become part of that review;

In addition, during the hearing, the hearing officer will identify and enter into the official record:

- All exhibits, including his/her designation as hearing officer;
- Any power of attorney, if filed;
- The license or application;
- Notice of denial or revocation;
- Proof of delivery of notice of denial or revocation;
- Notice of hearing; and
- Proof of delivery of notice of hearing;

At the hearing, the Government will present its evidence first. The applicant/ licensee will then present evidence for its case. The hearing officer has the discretion to allow the rebuttal of evidence. All evidence offered by either party (including hearsay, whether offered through a witness or by document) shall be admissible, unless the hearing officer determines that the evidence is completely irrelevant, manifestly unreliable, or unduly repetitive.

Both parties shall have the right to question all witnesses. The party calling a witness shall have the right to re-direct examination of the witness. The hearing officer may permit further questioning beyond re-direct examination for good cause. The hearing officer may question the parties and the parties' witnesses at any time during the hearing.

In the event that a hearing becomes disorderly, the hearing officer may take one or more of the following actions to regain control of the proceedings:

- Caution the parties to conduct themselves in an orderly manner;
- Call for a short recess;
- Express disapproval on the record and warn against repetition of the offensive conduct;
- Postpone the proceedings; or
- Suspend the proceedings, in which case the hearing officer shall notify the DIO of his/her action and the reason(s) immediately, to be followed by written notification to the Chief, FES Division as soon as possible. In such circumstances, the hearing officer shall grant the parties an appropriate period of time to submit additional written evidence.

When the hearing officer is satisfied that all evidence and arguments have been fully presented by the parties, the hearing officer will state that the DIO will make a decision in the matter and will notify the licensee/applicant of the final decision in writing. The hearing officer will state for the record that if the licensee/applicant is not satisfied with the final decision, he/she may appeal this decision to Federal district court within 60 days, according to 18 U.S.C. 923(f)(3), and that these proceedings may become part of that review.

If either party states that he/she wishes to submit additional documents, which are not available in the hearing, the hearing officer may state on the record, during the hearing, that such specified documents will be received and considered along with other evidence in the case. The hearing officer should specify a time frame for the submission of such documents. The hearing officer will declare the proceedings closed on the record; however, the record will remain open for the timely submission of the specified documents not available at the hearing pursuant to the hearing officer's instructions. The hearing officer may set conditions under which additional documentation, including rebuttal documentation, may be submitted.

Hearing Officer Report

Following the completion of the proceedings, the hearing officer shall prepare a report summarizing the proceedings. The report shall be completed within 30 calendar days of the conclusion of the hearing and at a minimum include the following items:

- An introduction outlining the reason for the hearing, notification procedures, date and location of the hearing, and persons present at the hearing;
- Summaries of the presentations by the Government and by the applicant/licensee party;
- Findings of fact based only upon the information presented, including applicable references to laws and regulations;
- Conclusions based only upon the findings of fact;
- Recommendation; and
- List of exhibits.

Upon completion of the report, the hearing officer will forward the report and the recording of the proceedings directly to the DIO via the carrier under ATF contract. The hearing officer will retain a receipt of shipping and notify the Chief, FES Division or his/her designee. The recording will be labeled with the licensee's/applicant's name, Federal Firearms License (FFL) number, date of hearing, and tape, CD, or cassette number (*i.e.*, Tape or Cassette 1 of 3).

Following a decision by the DIO, the report and the recording should be maintained by the DIO, unless counsel requests the recording to be forwarded for review.

The DIO should notify the Chief, FES Division or the designee of the date of receipt of the hearing officer's report; the date the report is forwarded to ATF Counsel for final review; and the date final action is taken on the case.

Post Hearing Procedures

The original report, including exhibits and recording, shall become part of the applicant's/licensee's official file at the Federal Firearms Licensing Center.

The hearing officer will be provided a copy of the Final Notice, if issued, or be advised of other action taken by the DIO in lieu of the recommended denial, revocation, suspension, or fine.

Drafting Information

The author of this document is James P. Ficaretta; Enforcement Programs and Services; Bureau of Alcohol, Tobacco, Firearms and Explosives.

Authority and Issuance

This notice is issued pursuant to 5 U.S.C. 552(a).

Approved: August 2, 2010.

Kenneth E. Melson,

Deputy Director.

[FR Doc. 2010–19740 Filed 8–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—NIC Cost Containment Online Resource Center Project

AGENCY: National Institute of Corrections, U.S. Department of Justice.

ACTION: Solicitation for cooperative agreement.

SUMMARY: The National Institute of Corrections (NIC) is soliciting proposals from organizations, groups, or individuals to enter into a cooperative agreement for an 18-month project period. The goal of this agreement is the development of a cost containment online resource center. The NIC Cost Containment Online Resource Center (CCORC) will be housed on the NIC Web site and contain materials to assist corrections practitioners with developing and implementing systems-level cost containment strategies. The CCORC will serve as a forum for information exchange and a repository for current, practical evidence-based information about cost containment. The project's four tasks are to (1) compile a guide providing a detailed review of existing evidence-based models, including their strengths, weaknesses, and applicability to correctional agencies, for managing cost containment interventions at the systems level; (2) gather supplemental materials designed to provide concrete and practical strategies for planning, implementing, and sustaining cost containment interventions (The intent is to combine packaged materials with "off-the-shelf" modules that agencies can use to develop workable solutions.); (3) work with the NIC Information Center's Contracting Officer's Technical Representative(COTR), NIC's intermediary with the Information Center, to develop the online site; and (4) coordinate two meetings of a review panel to advise the project early in the development of its products and near the end to evaluate their utility for the corrections field. All expenses for these meetings will be provided out of the funding awarded under this agreement. The two meetings are expected to last one and a half days for up to 10 participants. With the assistance of the recipient, NIC will identify the participants for each meeting. The recipient of this award will assist NIC in locating an appropriate venue and coordinating local arrangements at the site, including meeting rooms and food and beverage services. The recipient will also assist participants in arranging

travel and lodging and in reimbursing costs in conformity with Federal guidelines.

With input from NIC, the recipient will prepare each meeting agenda, participant lists, white papers, handouts, and supplementary materials; duplicate them in sufficient quantities; and deliver them to the venue. With input from NIC, the recipient will also supply or arrange for a facilitator and a note taker for each meeting to be paid out of the funding awarded under this agreement.

DATES: Applications must be received by 4 p.m. EDT on Monday, August 30, 2010. Selection of the successful applicant and notification of review results to all applicants will be sent by October 2010.

ADDRESSES: Mailed applications must be sent to Director, National Institute of Corrections, 320 First Street NW., Room 5007, Washington, DC 20534. Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date.

Hand delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. At the front desk, call (202) 307–3106, extension 0 for pickup. Faxed applications will not be accepted. The only electronic applications (preferred) that will be accepted can be submitted via *www.grants.gov.*

FOR FURTHER INFORMATION: A copy of this announcement can be downloaded from the NIC Web site at *www.nicic.gov.*

All technical or programmatic questions concerning this announcement should be directed to Dee Halley, Correctional Program Specialist, Research and Evaluation Division, National Institute of Corrections. She can be reached by calling 1–800–995–6423 extension 4–0374 or by e-mail at *dhalley@bop.gov.*

Required Expertise: Applicant organizations and project teams should be able to demonstrate the capacity to accomplish all four project tasks and have experience with and/or an understanding of correctional operations, assessing cost benefits and effectiveness, and budget planning, development, and management.

Application Requirements: The application should be concisely written, typed double-spaced and reference the NIC Opportunity Number and Title provided in this announcement. The program narrative text is to be limited to 25 double-spaced pages, exclusive of resumes and summaries of experience (do not submit full curriculum vitae). In addition to the program narrative, an application package must include OMB Standard Form 425, Application for Federal Assistance; a cover letter that identifies the audit agency responsible for the applicant's financial accounts as well as the audit period or fiscal year that the applicant operates under (*e.g.,* July 1 through June 30); and an outline of projected costs. The following additional forms must also be included: OMB Standard Form 424A, Budget Information—Non-Construction Programs; OMB Standard Form 424B, Assurances—Non-Construction Programs (all OMB Standard Forms are available at *www.grants.gov*); DOJ/FBOP/NIC Certification Regarding Lobbying, Debarment, Suspension and Other Responsibility Matters; and the Drug-Free Workplace Requirements (available at *www.nicic.org/Downloads/PDF/certif-frm.pdf.*)

Authority: Public Law 93–415.

Funds Available and Budget Considerations: Up to $150,000 is available for this project, but preference will be given to applicants who provide the most efficient solutions in accomplishing the scope of work. Determination will be made based on best value to the Government, not necessarily the lowest bid. Funds may be used only for the activities that are directly related to the project. This project will be a collaborative venture with the NIC Research and Evaluation Division.

Eligibility of Applicants: An eligible applicant is any state or general unit of local government, private agency, educational institution, organization, individual, or team with expertise in the described areas. Applicants must have demonstrated ability to implement a project of this size and scope.

Review Considerations: Applications received under this announcement will be subject to the NIC Review Process. The criteria for the evaluation of each application will be as follows:

Programmatic (40%)

Are all of the four project tasks adequately discussed and support the overall goal? Is there a clear description of how each project task will be accomplished, including sub-tasks; the strategies to be employed; required staffing; responsible parties, and other required resources? Are there any unique or exceptional approaches, techniques, or design aspects proposed that will enhance the project?

Organizational (35%)

Does the proposed project staff possess the skills, knowledge, and expertise necessary to complete the four project tasks, meeting all of the criteria listed in the solicitation? Does the applicant agency, institution, organization, individual or team have the organizational capacity to complete the project tasks? Are the proposed project management and staffing plans realistic and sufficient to complete the project within the 18-month timeframe?

Project Management/Administration (25%)

Does the applicant identify reasonable objectives, milestones, and measures to track progress? If consultants and/or partnerships are proposed, is there a reasonable justification for their inclusion in the project and a clear structure to ensure effective coordination and supervision? Is the proposed budget realistic, provide sufficient cost detail/narrative, and represent good value relative to the anticipated results?

Note: NIC will NOT award a cooperative agreement to an applicant who does not have a Dun and Bradstreet Database Universal Number (DUNS) and is not registered in the Central Contractor Registry (CCR).

A DUNS number can be received at no cost by calling the dedicated toll-free DUNS number request line at 1–800–333–0505 (if you are a sole proprietor, you would dial 1–866–705–5711 and select option 1).

Registration in the CCR can be done online at the CCR Web site: *http://www.ccr.gov.* A CCR Handbook and worksheet can also be reviewed at the Web site.

Number of Awards: One.

NIC Opportunity Number: 10PEI40. This number should appear as a reference line in the cover letter, where indicated on Standard Form 424, and outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.602.

Executive Order 12372: This program is not subject to the provisions of Executive Order 12372.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. 2010–19641 Filed 8–9–10; 8:45 am]

BILLING CODE 4410–36– P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

August 4, 2010.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including, among other things, a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Linda Watts Thomas on 202–693–4223 (this is not a toll-free number); *e-mail mail to: DOL_PRA_PUBLIC@dol.gov*.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor—Mine Safety and Health Administration (MSHA), Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, *Telephone:* 202–395–4816/ Fax: 202–395–5806 (these are not toll-free numbers), *e-mail: OIRA_submission@omb.eop.gov* within 30 days from the date of this publication in the **Federal Register.** In order to ensure the appropriate consideration, comments should reference the applicable OMB Control Number (*see* below).

The OMB is particularly interested in comments which:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Mine Safety and Health Administration.

Type of Review: Extension.

Title of Collection: Operations Under Water.

OMB Control Number: 1219–0020.

Affected Public: Business or other for-profit.

Total Estimated Number of Respondents: 80.

Total Estimated Annual Burden Hours: 400.

Total Estimated Annual Cost Burden (operating/maintaining): $33,880.

Description: Title 30 CFR 75.1716, 75.1716–1 and 75.1716–3 require operators of underground coal mines to provide MSHA notification before mining under bodies of water and to obtain a permit to mine under a body of water if, in the judgment of the Secretary, it is sufficiently large to constitute a hazard to miners. The regulation is necessary to prevent the inundation of underground coal mines with water which has the potential of drowning miners. Section 103(h) of the Mine Act, 30 U.S.C. 813, authorizes MSHA to collect information necessary to carryout its duty in protecting the safety and health of miners. For additional information, see related notice published in the **Federal Register** on June 24, 2010 (Vol. 75, page 36122).

Dated: August 4, 2010.

Linda Watts Thomas,

Acting Departmental Clearance Officer.

[FR Doc. 2010–19683 Filed 8–9–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Hearing on Certain Issues Relating to Lifetime Income Options for Participants and Beneficiaries in Retirement Plans

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor; Internal Revenue Service, Department of the Treasury.

ACTION: Notice of hearing.

SUMMARY: Notice is hereby given that the Department of Labor and the Department of the Treasury (the "Agencies") will hold a joint hearing to further consider several specific issues relating to lifetime income or other arrangements designed to provide a lifetime stream of income after retirement for participants and beneficiaries in retirement plans.

DATES: The hearing will be held on September 14, 2010, and, if necessary, September 15, 2010, beginning at 9 a.m., EST.

ADDRESSES: The hearing will be held at the U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Stephanie L. Ward or Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, at (202) 693–8500 or Peter J. Marks, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service, Department of the Treasury, at (202) 622–6090. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Agencies published in the **Federal Register** on February 2, 2010 (75 FR 5253), a request for information (RFI) regarding whether, and, if so, how, by regulation or otherwise, it would be appropriate for them to enhance the retirement security of participants in employer-sponsored retirement plans and in individual retirement arrangements (IRAs) by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement. The Agencies received approximately 780 comments in response to the RFI.

The RFI posed several questions on a broad range of topics designed to help the Agencies assess the issues relating to the shift from defined benefit plans that offer employees lifetime annuities to defined contribution plans that typically distribute retirement savings in a lump sum payment. With the continuing trend away from traditional defined benefit plans to defined contribution plans and hybrid plans, including the associated trend away from annuities toward lump sum distributions, employees are not only increasingly responsible for the adequacy of their savings at the time of retirement, but also for ensuring that their savings last throughout their retirement years and, in many cases, the remaining lifetimes of their spouses and dependents.

Following a careful review of all the comments received in response to the RFI, the Agencies have decided to conduct a limited public hearing for the purpose of further considering and gathering further information on a few discrete issues and proposals raised or presented in RFI submissions. In this regard, the scope of the public hearing will be limited to testimony and questions relating to the following specific issues:

1. Certain Specific Participant Concerns Affecting the Choice of Lifetime Income Relative to Other Options. A number of individuals and participant representative groups indicated that many participants who are choosing the form in which to

receive their retirement benefits were reluctant to consider a lifetime income option because of their concerns about, among other things, the long-term viability of the institution issuing the lifetime income product, inflation risk, the fees and complexity associated with some lifetime income products, and concerns about a lack of or limits on death benefits and withdrawal options. The Agencies are interested in hearing testimony on these considerations and concerns, how they are or can be addressed in the market or via plan design, and recommendations concerning steps policymakers and regulators might take to address them.

2. Information to Help Participants Make Choices Regarding Management and Spend Down of Retirement Benefits. The Agencies are interested in learning more about the particular types of information that would be useful to participants when making their choices about how to manage and spend their retirement benefits, and the methods and materials by which the information could be provided to participants, including what behavioral finance teaches in this regard. Several commenters on the RFI recommended that the Department of Labor provide guidance on how plan sponsors and service providers can assist participants in understanding and preparing for the spend down of retirement assets without potential fiduciary liability. For instance, one specific question is how the Department of Labor should expand and clarify Interpretive Bulletin 96–1 to provide useful spend down guidance to be relied upon in providing participants with information to help them make better informed retirement income decisions.

3. Disclosure of Account Balances as Monthly Income Streams. Many commenters believe there is a need to make available to participants more information on the benefits and value of a lifetime stream of income as compared to a lump sum distribution. The Agencies are interested in hearing testimony on whether participants in 401(k) and other defined contribution plans would be more likely to give due consideration to lifetime income stream options if they were furnished a benefit statement that, in addition to their account balance, sets forth their benefit in the form of a monthly lifetime benefit. If so, should such income streams be based on the participant's accrued benefit (account balance) as of the date of the statement or based on the individual's projected account balance at some future date, such as normal retirement age under the plan or social security retirement age, and would this information would be more helpful to participants who are close to retirement than to younger participants? If the stream of payments depicted in the benefit statement is based on an account balance projected to some future date (*e.g.*, normal retirement age), what contribution rate (*e.g.*, the participant's current contribution rate or a specified percentage of current compensation adjusted annually) and what rate of return should be assumed during the accumulation phase, and what interest rate should be used for converting the account balance into an income stream? Alternatively, if the stream of payments depicted is based on the participant's *current* account balance converted immediately to payments commencing at a future date (*e.g.*, normal retirement age), what interest rate should be used for the conversion? In either case, what mortality rates should be used? Should the statement explain what actuarial assumptions were used in estimating the actuarial equivalent of an account balance in the form of a monthly lifetime benefit? Should it quantify or otherwise explain any uncertainty associated with the reported monthly income? Should the Agencies or another Federal agency create a computer model or guidelines that can be accessed for purposes of performing such calculations? What administrative costs and burdens should be factored in to assessing the merits of either encouraging or requiring 401(k) or other defined contribution plan administrators to provide such information on an individual benefit statement?

4. Fiduciary Safe Harbor for Selection of Lifetime Income Issuer or Product. A number of commenters recommended that the Department of Labor revise the annuity selection safe harbor to provide an objective standard that fiduciaries could rely on in selecting and evaluating the various lifetime income products. The Department of Labor is interested in hearing testimony on what particular changes should be made to the fiduciary safe harbor for the selection of annuity providers for the purpose of benefit distributions from defined contribution plans in the Department of Labor's regulation 29 CFR 2550.404a–4. In this regard, should different criteria apply to a fiduciary's decision depending on the size of the plan? Should different criteria apply depending on the type of lifetime income product? Are there standards that the Department of Labor could establish to provide comfort to plan fiduciaries regarding the solvency of the provider? Should the safe harbor be extended to other lifetime income options?

5. Alternative Designs of In-Plan and Distribution Lifetime Income Options. Several commenters provided information concerning a variety of in-plan and distribution lifetime income options, some insured, others not. The Agencies are interested in better understanding and further exploring those and other approaches to offering streams of lifetime income to plan participants, including approaches that are or will be available in the marketplace, and related financial, actuarial and legal issues.

The hearing will be held on September 14, 2010, and, if necessary, September 15, 2010, beginning at 9 a.m., EST, in the plaza auditorium of the U.S. Department of Labor, Frances Perkins Building, at 200 Constitution Avenue, NW., Washington, DC 20210.

Persons interested in presenting testimony and answering questions at this public hearing on one or more of the five issues specified above must submit, by 3:30 p.m., EST, August 16, 2010, the following information: (1) A written request to be heard; indicating which of the five specified issues the person proposes to address and (2) an outline of the main points to be discussed regarding the specified issue or issues, indicating the time allocated to each point. It should be noted that, while reasonable efforts will be made to accommodate requests to testify on the specified issues, it may be necessary to limit the number of those testifying in order to adhere to the hearing's format. Any persons not afforded an opportunity to testify will nonetheless have an opportunity to submit a written statement on the specified issues for the record. The hearing will be open to the general public.

Because the Agencies will jointly review all responses submitted, interested parties may send requests and outlines to either Agency and need not submit responses to both Agencies . Respondents are encouraged to use the title "Lifetime Income Joint Hearing" to facilitate the organization and distribution of responses between the Agencies. Interested parties are invited to submit responses to:

Employee Benefits Security Administration, U.S. Department of Labor: To facilitate the receipt and processing of responses, the Department of Labor encourages interested persons to submit their requests and outlines electronically by e-mail to *e-ORI@dol.gov.* Persons submitting requests and outlines electronically should not submit paper copies. Persons submitting requests and outlines on paper should send or deliver their requests and outlines (preferably at least three copies) to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Lifetime Income Joint Hearing, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. All requests and outlines submitted will be available to the public, without charge, online at *http://www.dol.gov/ebsa* and at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Internal Revenue Service. Comments to the IRS, identified by REG–148681–09, by one of the following methods:

• *Mail:* CC:PA:LPD:PR (REG–148681–09), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

• *Hand or courier delivery:* Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–148681–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments (IRS REG–148681–09).

All submissions to the IRS will be open to public inspection and copying in room 1621, 1111 Constitution Avenue, NW., Washington, DC from 9 a.m. to 4 p.m.

The Agencies will prepare an agenda indicating the order of presentation of oral comments and testimony. In the absence of special circumstances, each presenter will be allotted ten (10) minutes in which to complete his or her presentation.

Information about the agenda will be posted on *http://www.dol.gov/ebsa* and *http://www.regulations.gov* on or after August 26, 2010, or may be obtained by contacting Stephanie L. Ward or Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8500. This is not a toll-free number.

Those individuals who make oral comments and testimonies at the hearing should be prepared to answer questions regarding their information and/or comments.

Any individuals with disabilities who may need special accommodations should notify Stephanie L. Ward or Luisa Grillo-Chope on or before August 27, 2010.

Notice of Public Hearing

Notice is hereby given that a public hearing will be held on September 14, 2010, and, if necessary, September 15, 2010, concerning issues related to lifetime income options for participants and beneficiaries in retirement plans. The hearing will be held beginning at 9 a.m. in the plaza auditorium of the U.S. Department of Labor, Frances Perkins Building, at 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, August 4, 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Signed at Washington, DC, August 3, 2010.

Nancy J. Marks,

Division Counsel/Associate Chief Counsel, Tax Exempt and Government Entities, Internal Revenue Service, Department of the Treasury.

Signed at Washington, DC, August 3, 2010.

J. Mark Iwry,

Senior Advisor to the Secretary, Deputy Assistant Secretary for Retirement and Health Benefits, Department of the Treasury.

[FR Doc. 2010–19624 Filed 8–9–10; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Seek Approval To Establish an Information Collection

AGENCY: National Science Foundation.

ACTION: Notice and request for comments.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting that OMB approve clearance of this collection for no longer than 1 year.

DATES: Written comments on this notice must be received by October 12, 2010 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact Leslie Goodyear, Ph.D., National Science Foundation, 885 S 4201 Wilson Boulevard, Arlington, Virginia 22230, 703–292–5115, *lgoodyea@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday. You may obtain a copy of the data collection instruments and instructions from Dr. Goodyear.

SUPPLEMENTARY INFORMATION:

Title of Collection: A Social Network Analysis of the National Science Foundation's Research and Evaluation on Education in Science and Engineering (REESE) and Discovery Research K–12 (DR K–12) Programs.

OMB Number: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of request: New.

Abstract: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the Office of the Director, the National Science Foundation (NSF), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

A Social Network Analysis of the National Science Foundation's Research and Evaluation on Education in Science and Engineering (REESE) and Discovery Research K–12 (DR K–12) programs. Type of Information Collection Request: New collection. Need and Use of Information Collection: This study will assess the linkages, impacts, influences of NSF's REESE and DR K–12 programs. The primary objectives of the study are to conduct a social network analysis of the REESE and DR–K12 programs to understand the impact and influence of each program and whether there are links between the two programs and to other NSF programs. The findings will provide valuable information concerning the impacts and influences of the grant and grantees and whether the REESE and DR K–12 programs influence broader American society.

Frequency of Response: Once.

Affected Public: Individuals.

Type of Respondents: REESE and DR K–12 Grantees and Grantee Lab Members. There are no Capital Costs to report.

Estimated Number of Respondents: 1325; Estimated Number of Responses per Respondent: 1. Average Burden Hours per Response: .33. Estimated Total Annual Burden Hours Requested: 437.25 and the annualized cost to respondents is estimated at $14,534.19.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the NSF, including whether the information shall have practical utility; (b) the accuracy of the NSF's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

Dated: August 4, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–19626 Filed 8–9–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0272]

Biweekly Notice Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 15, 2010 to July 28, 2010. The last biweekly notice was published on July 27, 2010 (75 FR 44020).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the *Code of Federal Regulations* (10 CFR), Section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules, Announcements and Directives Branch (RADB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RADB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Room O1F–21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Carolina Power & Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendment requests: April 29, 2010, as supplemented by letter dated July 22, 2010.

Description of amendment requests: The proposed change will add to Technical Specification 5.6.5.b an additional topical report describing an NRC reviewed and approved analytical method for determining core operating limits. The new analytical method, which is described in AREVA Topical Report ANP–10298PA, ACE/ATRIUM 10XM Critical Power Correlation, Revision 0, March 2010, provides a new correlation for predicting the critical power for boiling water reactors containing ATRIUM 10XM fuel.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods identified in Technical Specification 5.6.5.b that can be used to establish core operating limits. The proposed amendments support the use of the AREVA ATRIUM 10XM fuel design at BSEP [Brunswick Steam Electric Plant]. The addition of an approved analytical methodology in Technical Specification Section 5.6.5 has no effect on any accident initiator or precursor previously evaluated and does not change the manner in which the core is operated. The NRC-approved methodology ensures that the output accurately models core behavior. Since no individual precursors of an accident are affected, the proposed amendments do not increase the probability of a previously analyzed event.

The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods used to establish core operating limits. The addition of the topical report to Technical Specification 5.6.5.b will allow a new analytical methodology to be used to determine critical power ratio limits. Minimum Critical Power Ratio (MCPR) Safety Limit values, which are defined in Technical Specification 2.1.1.2, are calculated to ensure that greater than 99.9 percent of the fuel rods in the reactor core avoid transition boiling during plant operation, if the safety limit is not exceeded. The derivation of MCPR Safety Limit values in the Technical Specifications, using these NRC-accepted methods, will continue to ensure the MCPR Safety Limit is not exceeded during all modes of plant operation and anticipated operational occurrences. The addition of the analytical methodology described in Topical Report ANP–10298PA to Technical Specification 5.6.5.b does not alter the assumptions of accident analyses or the Technical Specification Bases. Based on the above, the proposed amendments do not increase the consequences of a previously analyzed accident.

Therefore, the proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Creation of the possibility of a new or different kind of accident requires creating one or more new accident precursors. New accident precursors may be created by modifications of plant configuration, including changes in allowable modes of operation. The proposed amendments do not involve any plant configuration modifications, do not involve any changes to allowable modes of operation, and do not introduce any new failure mechanisms. The proposed topical report addition to Technical Specification 5.6.5.b provides an analytical methodology for determining core critical power limits that ensures no new accident precursors are created.

Therefore, the proposed amendments do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods identified in Technical Specification 5.6.5.b that can be used to establish core operating limits. This addition to Technical Specification 5.6.5.b will allow a new NRC-accepted analytical methodology to be used to determine critical power ratio limits. The MCPR Safety Limit provides a margin of safety by ensuring that at least 99.9 percent of the fuel rods do not experience transition boiling during normal operation and anticipated operational occurrences if the MCPR Safety Limit is not exceeded. The proposed change will ensure the current level of fuel protection is maintained by continuing to ensure that the fuel design safety criterion (*i.e.*, that no more than 0.1 percent of the rods are expected to be in boiling transition if the MCPR Safety Limit is not exceeded) is met.

Therefore, the proposed amendments do not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, NC 27602.

NRC Branch Chief: Douglas A. Broaddus.

Carolina Power and Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of amendment requests: April 29, 2010, as supplemented by letter dated July 22, 2010.

Description of amendment requests: The proposed change would add, to Technical Specification 5.6.5.b, an additional topical report describing an NRC reviewed and approved analytical method for determining core operating limits. The new analytical method, which is described in AREVA Topical Report BAW–10247PA, Realistic Thermal-Mechanical Fuel Rod Methodology for Boiling Water Reactors, Revision 0, April 2008, provides a new statistical thermal-mechanical evaluation methodology for determining reactor core linear heat generation limits in boiling water reactors.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods identified in Technical Specification 5.6.5.b that can be used to establish core operating limits. The proposed amendments support the use the AREVA ATRIUM 10XM fuel design at BSEP [Brunswick Steam Electric Plant]. The addition of an approved analytical methodology in Technical Specification Section 5.6.5 has no effect on any accident initiator or precursor previously evaluated and does not change the manner in which the core is operated. The NRC-approved methodology ensures that the output accurately models core behavior. Since no individual precursors of an accident are affected, the proposed amendments do not increase the probability of a previously analyzed event.

The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods used to establish core operating limits. The addition of the topical report to Technical Specification 5.6.5.b will allow a new thermal-mechanical methodology, based on the RODEX4 fuel performance code, to be used to determine reactor core linear heat generation rate limits monitored as specified by Technical Specification 3.2.3. The addition of the analytical methodology described in Topical Report BAW–10247PA to Technical Specification 5.6.5.b does not alter the assumptions of accident analyses or the Technical Specification Bases. Based on the above, the proposed amendments do not increase the consequences of a previously analyzed accident.

Therefore, the proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Creation of the possibility of a new or different kind of accident requires creating one or more new accident precursors. New accident precursors may be created by modifications of plant configuration, including changes in allowable modes of operation. The proposed amendments do not involve any plant configuration modifications, do not involve any changes to allowable modes of operation, and do not introduce any new failure mechanisms. The proposed topical report addition to Technical Specification 5.6.5.b provides an analytical methodology for determining reactor core linear heat generation rate limits that ensures no new accident precursors are created.

Therefore, the proposed amendments do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed amendments add an additional analytical methodology to the list of NRC-approved analytical methods identified in Technical Specification 5.6.5.b that can be used to establish core operating limits. This addition to Technical Specification 5.6.5.b will allow a new NRC-accepted analytical methodology to be used to determine reactor core linear heat generation rate limits.

Limits on the linear heat generation rate are specified to ensure that fuel design limits are not exceeded anywhere in the core during normal operation, including anticipated operational occurrences. Exceeding the linear heat generation rate limit could potentially result in fuel damage and subsequent release of radioactive materials. The mechanisms that could cause fuel damage during normal operations and operational transients and that are considered in fuel evaluations are rupture of the fuel rod cladding caused by strain and overheating of the fuel. The proposed change will ensure the current level of fuel protection is maintained (*i.e.*, that the fuel design safety criteria of less than one percent plastic strain of the fuel cladding is met and incipient centerline melting of the fuel does not occur) and thus assure that rupture of the fuel rod cladding caused by strain and overheating of the fuel does not occur.

Therefore, the proposed amendments do not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David T. Conley, Associate General Counsel II—Legal Department, Progress Energy Service Company, LLC, Post Office Box 1551, Raleigh, NC 27602.

NRC Branch Chief: Douglas A. Broaddus.

Detroit Edison Company, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of amendment request: June 10, 2009, supplemented by letters dated September 16, 2009, and July 23, 2010.

Description of amendment request: The proposed amendment would revise Fermi 2 Plant Operating License, Appendix A, Technical Specification (TS) Table 3.3.8.1–1, Function 2 (Degraded Voltage) to identify an additional time delay logic for Loss-of-Coolant Accident (LOCA) concurrent with degraded voltage conditions. Specifically, this proposed amendment adds a new time delay logic associated with Function 2 for a degraded voltage concurrent with a LOCA. This will bring Fermi 2 into compliance with 10 CFR Part 50, Appendix A, General Design Criterion (GDC)—17, "Electric Power Systems." In addition, it would revise the TS maximum and minimum allowable values for the 4.16kV Emergency Bus Undervoltage (Degraded Voltage) and revise the minimum Emergency Diesel Generator (EDG) output voltage acceptance criterion in Surveillance Requirements (SRs) 3.8.1.2, 3.8.1.7, 3.8.1.10, 3.8.1.11, 3.8.1.14, and 3.8.1.17. The additional changes resulted from a reconstitution effort of the electrical design bases calculations to support the backfit modifications, necessary to address issues identified in the Component Design Bases Inspection (CDBI) at Fermi 2. This notice supersedes the notice published in the **Federal Register** on August 11, 2009, (74 FR 40235), in its entirety.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Providing the additional logic ensures the timely transfer of plant safety system loads to the Emergency Diesel Generators in the event a sustained degraded bus voltage is present with a Loss of Coolant Accident (LOCA) signal. This ensures that under these degraded bus voltage conditions, Emergency Core Cooling System (ECCS) equipment is powered from the emergency diesel generators in a timely manner. This change is needed to bring Fermi 2 into full compliance with 10 CFR Part 50, Appendix A, General Design Criterion-17, "Electric Power Systems," and to meet the requirements of NUREG–0800 Rev. 2, Branch Technical Position (BTP) Power Systems Branch (PSB)-1. The time delay supports the time assumed in the accident analysis for water injection into the reactor vessel under LOCA conditions.

The proposed TS change to the maximum and minimum allowable voltages for the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) affects the separation of an Emergency Bus that is experiencing degraded voltage from the offsite power system and the transfer to an emergency diesel generator. While the allowed voltage range is narrower, the function remains the same. The narrower voltage range has been analyzed and is needed to ensure spurious trips are avoided. The proposed change does not affect any accident initiators or precursors. As a result, the probability of any accident previously evaluated is not significantly increased.

The consequences of any accident previously evaluated are not increased since the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) relays will continue to meet their required function to transfer the 4160 volt Emergency Buses to the emergency diesel generators in the event of a degraded voltage condition on the offsite power supply. This transfer ensures that the electrical equipment is capable of performing its intended function to meet the requirements of the accident analyses.

The increase in the minimum EDG output voltage acceptance criterion value in TS 3.8.1 surveillance requirements does not adversely affect any of the parameters in the accident analyses. The change increases the minimum allowed EDG output voltage acceptance criterion to ensure that sufficient voltage is available to operate the required Emergency Safety Feature (ESF) equipment under accident conditions. The increase in the minimum allowed EDG output voltage in the TS surveillance requirements ensures that adequate voltage is available to support the assumptions made in the Design Bases Accident (DBA) analyses. DBA analyses assume that onsite standby emergency power will provide an adequate power source to operate safe shutdown equipment and to mitigate consequences of design bases accidents. This conservative change of the acceptance criterion enhances the testing requirements of the onsite emergency diesel generators and ensures the reliability of this power source. Changing the acceptance criterion does not affect the probability of evaluated accidents and it provides better assurance of EDG reliability in mitigating consequences of accidents.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not affect any of the current degraded voltage logic schemes or any other equipment provided to mitigate accidents. It utilizes existing logic systems to isolate safety buses from the grid and re-power those safety buses using the onsite emergency power system. The change utilizes a narrower voltage range and a shorter time delay to ensure that in the case of a sustained degraded voltage condition concurrent with a LOCA signal, the safety electrical power buses will be transferred from the offsite power system to the onsite power system in a timely manner to ensure water is injected into the reactor vessel in the time assumed and evaluated in the accident analysis.

No new or different accidents result from the proposed change. The proposed TS change to the maximum and minimum allowable voltages for the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) does not affect existing accident precursors or modes of operation nor does it introduce new ones. The relays will continue to detect degraded voltage conditions and transfer the Emergency Buses to their respective emergency diesel generators in time to ensure adequate voltage is available for proper safety equipment performance, and to prevent equipment damage. The function of the relays remains the same.

The change in the value of the minimum EDG output voltage acceptance criterion supports the assumptions in the accident analyses that sufficient voltage will be available to operate ESF equipment on the Class 1E buses when these buses are powered from the onsite emergency diesel generators. The maximum EDG output voltage of 4580 volts is not affected by this change. The change in the minimum EDG output voltage from 3873 to 3950 volts ensures the reliability of the onsite emergency power source.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in the margin of safety.

The proposed change implements a new design for a reduced time delay to isolate safety buses from offsite power if a Loss of Coolant Accident were to occur concurrent with a sustained degraded voltage condition and uses a narrower voltage range for degraded bus undervoltage. This ensures that emergency core cooling system pumps inject water into the reactor vessel within the time assumed and evaluated in the accident analysis, consistent with the requirements of BTP PSB–1 Section B.1.b. and 10 CFR Part 50, Appendix A, General Design Criterion-17, "Electric Power Systems."

The proposed TS change to the maximum and minimum allowable voltages for the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) will allow all safety loads to have sufficient voltage to perform their intended safety functions while ensuring spurious trips are avoided. Thus, the results of the accident analyses will not be affected as the input assumptions are protected.

The proposed TS change for the maximum allowable values for the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) provides a greater margin between the predicted worst case transient voltages and the maximum reset value of the degraded voltage relays. This change increases the probability that the offsite power source remains available and connected to the auxiliary power system during postulated transients. The analytical limit voltage for the safety related 4160 volt buses is unchanged and the proposed TS changes for the minimum allowable values for the 4160 volt Emergency Bus Undervoltage (Degraded Voltage) still ensures that this limit is protected. This is consistent with the requirements of 10 CFR Part 50, Appendix A, General Design Criterion-17, "Electric Power Systems."

The proposed change in the minimum EDG output voltage acceptance criterion in TS 3.8.1 surveillance requirements does not affect the surveillance frequency or different testing requirements, only the acceptance criterion. The change provides a better assurance that the onsite power source is able to satisfy the design requirements assumed in the accident analyses to mitigate the consequences of design bases accidents.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: David G. Pettinari, Legal Department, 688 WCB, Detroit Edison Company, 2000 2nd Avenue, Detroit, Michigan 48226–1279.

NRC Branch Chief: Robert J. Pascarelli.

Dominion Energy Kewaunee, Inc. Docket No. 50–305, Kewaunee Power Station, Kewaunee County, Wisconsin

Date of amendment request: June 1, 2010.

Description of amendment request: The licensee proposed to revise the Kewaunee licensing basis, approving the licensee to operate the load tap changers (LTCs) on two new transformers to operate in the automatic mode. The LTCs are subcomponents of the two new transformers, one has already been installed and one to be installed. The LTCs are designed to compensate for potential offsite power voltage variations and will provide added assurance that acceptable voltage is maintained for safety-related equipment.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC). The NRC staff reviewed the licensee's NSHC analysis and has prepared its own as follows:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The function of the LTCs is to ensure that acceptable voltage is maintained for safety-related equipment. The only postulated accident previously evaluated where the probability of occurrence may be potentially affected by operating the LTCs in automatic mode is the loss of offsite power (LOOP) accident. However, the licensee's analysis shows that, as a result of availability of backup equipment and systems, the probability of a LOOP would not be increased by operation of the LTCs in the automatic mode. Furthermore, operation of the LTCs in the automatic mode is not likely to degrade the Kewaunee electrical system; thus, the electrical system will continue to fulfill its design functions during normal and accident conditions. As a result, operating the LTCs in automatic mode will not be a factor to increase the consequences of previously evaluated accidents. In summary, the probability of occurrence and the consequences of the previously analyzed accidents would not be affected in any way by the proposed licensing basis change.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Other than the installation of the two new transformers (which is not the subject of the proposed amendment), the proposed change of licensing basis to allow the LTCs to be operated in the automatic mode does not involve any physical alteration of the plant, nor does it change methods and procedures governing plant operation. The proposed change will not impose any new or eliminate any old safety requirements on the plant electrical system.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change has no effect on any safety analysis methods, scenarios, or assumptions involving the electrical system.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., Counsel for Dominion Energy Kewaunee, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Branch Chief: Robert J. Pascarelli.

Duke Energy Carolinas, LLC, et al., Docket Nos. 50–413 and 50–414, Catawba Nuclear Station, Units 1 and 2 (Catawba), York County, South Carolina; Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2 (McGuire), Mecklenburg County, North Carolina

Date of amendment request: December 14, 2009.

Description of amendment request: The amendments would revise the Technical Specifications Section 3.8.4 "DC [Direct Current] Sources—Operating" Surveillance Requirements 3.8.4.2 and 3.8.4.5 for McGuire and 3.8.4.3 and 3.8.4.6 for Catawba.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Performing the battery Surveillances is not an initiator to any accident sequence previously evaluated in the Updated Final Safety Analysis Report. The Batteries are still required to be operable, meet the Surveillance Requirements, and be capable of performing any mitigation function as designed. Revising the battery Surveillance resistance values and adding the total average resistance limit, as supported by calculations, will help ensure that the voltage and capacity of the Batteries remain within the design basis.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

This amendment does not involve a modification to the plant or a change in how the plant is operated. No new accident causal mechanisms are created as a result of this proposed amendment. No changes are being made to any structure, system, or component which will introduce any new accident causal mechanisms. This amendment request does not impact any plant systems that are accident initiators and does not impact any safety analysis.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

Margin of safety is related to the confidence in the ability of the fission product barriers to perform their design functions during and following an accident situation. These barriers include the fuel cladding, the reactor coolant system, and the containment system. The performance of the fuel cladding, reactor coolant and containment systems will not be impacted by the proposed change. The proposed McGuire and Catawba battery connection resistance limits ensure the continued availability and operability of the Batteries. As such, sufficient DC capacity to support operation of mitigation equipment remains within the design basis.

Therefore, it is concluded that the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lara S. Nichols, Associate General Counsel, Duke Energy Corporation, 526 South Church Street, EC07H, Charlotte, NC 28202.

NRC Branch Chief: Gloria Kulesa.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of amendment request: June 23, 2010.

Description of amendment request: The current Arkansas Nuclear One, Unit No. 2 Technical Specification (TS) 6.5.8, "Inservice Testing Program," contains references to the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code, Section XI as the source of requirements for the inservice testing (IST) of ASME Code Class 1, 2, and 3 pumps and valves. The proposed amendment would delete the references to Section XI of the ASME Code and incorporate references to the ASME Code for Operation and Maintenance of Nuclear Power Plants (ASME OM Code). The proposed amendment would also correct some nonstandard frequencies utilized in the IST Program in which the provisions of Surveillance Requirement 3.0.2 are applicable. The proposed changes are consistent with Technical Specification Task Force (TSTF) Technical Change Travelers 479–A, "Changes to Reflect Revision to 10 CFR 50.55a," and 497–A, "Limit Inservice Testing Program SR 3.0.2 Application to Frequencies of 2 Years or Less."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change revises TS 6.5.8, "Inservice Testing Program," for consistency with the requirements of 10 CFR 50.55a(f)(4) for pumps and valves which are classified as American Society of Mechanical Engineers (ASME) Code Class 1, Class 2 and Class 3. The proposed change incorporates revisions to the ASME Code which are consistent with the expectations of 10 CFR 50.55a.

The proposed change does not impact any accident initiators or analyzed events or assumed mitigation of accident or transient events. The proposed change does not involve the addition or removal of any equipment, or any design changes to the facility.

Therefore, this proposed change does not represent a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a modification to the physical configuration of the plant (*i.e.*, no new equipment will be installed) or change in the methods governing normal plant operation. The proposed change does not introduce a new accident initiator, accident precursor, or malfunction mechanism.

Therefore, this proposed change does not create the possibility of an accident or a different kind than previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change revises TS 6.5.8, "Inservice Testing Program," for consistency with the requirements of 10 CFR 50.55a(f)(4) for pumps and valves which are classified as ASME Code Class 1, Class 2 and Class 3. The proposed change incorporates revisions to the ASME Code, which are consistent with the expectations of 10 CFR 50.55a. The safety function of the affected pumps and valves are maintained.

Therefore, this proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Joseph A. Aluise, Associate General Counsel—Nuclear, Entergy Services, Inc., 639 Loyola Avenue, New Orleans, Louisiana 70113.

NRC Branch Chief: Michael T. Markley.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Nuclear Power Plant, Units 1 and 2, Somervell County, Texas

Date of amendment request: May 27, 2010.

Brief description of amendments: The proposed amendments would revise the Comanche Peak Nuclear Power Plant (CPNPP), Units 1 and 2, Technical Specification (TS) 3.8.3, "Diesel Fuel Oil, Lube Oil, and Starting Air," by relocating the current stored diesel fuel oil and lube oil numerical volume requirements from the TS to the TS Bases so that it may be modified under licensee control. The TS would be modified so that the stored diesel fuel oil and lube oil inventory will require that a 7-day supply be available for each diesel generator. Condition A and Condition B in the Action table and Surveillance Requirements (SRs) 3.8.3.1 and 3.8.3.2 would also be revised to reflect the above change. The proposed changes are consistent with U.S. Nuclear Regulatory Commission (NRC)-approved Revision 1 to Technical Specification Task Force (TSTF) Improved Standard Technical Specification Change Traveler 501, "Relocate Stored Fuel Oil and Lube Oil Volume Values to Licensee Control."

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change relocates the volume of diesel fuel oil and lube oil required to support 7-day operation of the onsite diesel generators, and the volume equivalent to a 6-day supply for fuel oil and, for lube oil, a 2-day supply to licensee control. The specific volume of fuel oil equivalent to a 7- and 6-day supply is calculated using the NRC-approved methodology described in Regulatory Guide 1.137, Revision 1, "Fuel-Oil Systems for Standby Diesel Generators" and ANSI [American National Standards Institute] N195 1976, "Fuel Oil Systems for Standby Diesel-Generators." The CPNPP specific volumetric requirements for lube oil were originally based on the manufacturer's consumption values; however, the volumetric requirements have been refined over time based on actual plant data and engine performance. As approved in CPNPP TS License Amendment 75, the current lube oil volumetric requirements are based on the diesel generator lube oil consumption rate, avoidance of vortexing, static versus run lube oil level changes, and volume versus tank level data.

Therefore, this proposed change is consistent with TSTF–501 as approved by the NRC. Because the requirement to maintain a 7-day supply of diesel fuel oil and lube oil is not changed and is consistent with the assumptions in the accident analyses, and the actions taken when the volume of fuel oil and lube oil are less than a 6-day and 2-day supply have not changed, neither the probability or the consequences of any accident previously evaluated will be affected.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change does not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The change does not alter assumptions made in the safety analysis but ensures that the diesel generator operates as assumed in the accident analysis. The proposed change is consistent with the safety analysis assumptions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change relocates the volume of diesel fuel oil and lube oil required to support 7-day operation of the onsite diesel generators, and the volume equivalent to a 6- and 2- (for fuel oil and lube oil, respectively) day supply to licensee control. As the bases for the existing limits on diesel fuel oil and lube oil are not changed, no change is made to the accident analysis assumptions and no margin of safety is reduced as part of this change.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Branch Chief: Michael T. Markley.

Tennessee Valley Authority, Docket Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of amendment request: November 23, 2009, as supplemented on December 11 and December 18, 2009, and July 23, 2010 (TS 09–06).

Description of amendment request: On March 27, 2009, the **Federal Register** Notice 74 FR 13926 issued the final rule that amended Title 10 of the *Code of Federal Regulations* (10 CFR), Part 73, "Physical Protection of Plants and Materials." Specifically, the regulations in 10 CFR 73.54 "Protection of Digital Computer and Communication Systems and Networks" establish the requirements for a cyber security program to protect digital computer and communication systems and networks against cyber attacks. The proposed amendment would include the proposed Cyber Security Plan, its implementation schedule, and a revised Physical Protection license condition for Sequoyah Nuclear Plant, Units 1 and 2 to fully implement and maintain in effect all provisions of the Nuclear Regulatory Commission approved Cyber Security Plan as required by 10 CFR 73.54.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1: The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Neither the proposed additional license condition nor the Cyber Security Plan directly impacts the physical configuration or function of plant structures, systems, or components (SSCs). Likewise, they do not change the manner in which SSCs are operated, maintained, modified, tested, or inspected. Neither the proposed additional license condition nor the Cyber Security Plan introduces any initiator of any accident previously evaluated. Any modifications to the physical configuration or function of SSCs or the manner in which SSCs are operated, maintained, modified, tested, or inspected that might result from the implementation of the Cyber Security Plan will be fully evaluated by existing regulatory processes (*e.g.,* 10 CFR 50.59) prior to their implementation to ensure that they do not result in the probability or consequences of an accident previously evaluated.

Therefore, it is concluded that this amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2: The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

This proposed amendment is intended to provide high assurance that safety-related SSCs are protected from cyber attacks. Inclusion of the additional condition in the Facility Operating License to implement the Cyber Security Plan does not directly alter the plant configuration, require new plant equipment to be installed, alter or create new accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3: The proposed amendment does not involve a significant reduction in a margin of safety.

The proposed amendment does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. Adding a license condition to require implementation of Cyber Security Plan will not reduce a margin of safety because the requirements of the Plan are designed to provide high assurance that safety-related SSCs are protected from cyber attacks.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

NRC Branch Chief: Douglas A. Broaddus.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia

Date of amendment request: March 30, 2010.

Description of amendment request: This amendment request involves the adoption of approved changes to the Standard Technical Specifications (STSs) for Westinghouse Pressurized Water Reactors (NUREG–1431), to allow relocation of specific TS surveillance frequencies to a licensee-controlled program. The proposed changes are described in Technical Specification Task Force (TSTF) Traveler, TSTF–425, Revision 3 (ADAMS Accession No. ML090850642) related to the "Relocation of Surveillance Frequencies to Licensee Control—Risk Informed Technical Specification Task Force (RITSTF) Initiative 5b," and are described in the Notice of Availability published in the **Federal Register** on July 6, 2009 (74 FR 31996). The proposed changes are consistent with NRC-approved Industry/TSTF Traveler, TSTF–425, Revision 3, "Relocate Surveillance Frequencies to Licensee Control-[RITSTF] Initiative 5b." The proposed changes relocate surveillance frequencies to a licensee-controlled program, the Surveillance Frequency Control Program (SFCP). The changes are applicable to licensees using probabilistic risk guidelines contained in NRC-approved NEI 04–10, "Risk-Informed Technical Specifications Initiative 5b, Risk Informed Method for Control of Surveillance Frequencies," (ADAMS Accession No. 071360456). In addition, administrative/editorial deviations of the TSTF–425 inserts and the existing TS wording are being proposed to fit the custom TS format.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of any accident previously evaluated?

Response: No.

The proposed changes relocate the specified frequencies for periodic surveillance requirements to licensee control under a new Surveillance Frequency Control Program. Surveillance frequencies are not an initiator to any accident previously evaluated. As a result, the probability of any accident previously evaluated is not significantly increased. The systems and components required by the technical specifications for which the surveillance frequencies are relocated are still required to be operable, meet the acceptance criteria for the surveillance requirements, and be capable of performing any mitigation function assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly increased.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

No new or different accidents result from utilizing the proposed changes. The changes do not involve a physical alteration of the plant (*i.e.*, no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. In addition, the changes do not impose any new or different requirements. The changes do not alter assumptions made in the safety analysis. The proposed changes are consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Do the proposed changes involve a significant reduction in [a] margin of safety?

Response: No.

The design, operation, testing methods, and acceptance criteria for systems, structures, and components (SSCs), specified in applicable codes and standards (or alternatives approved for use by the NRC) will continue to be met as described in the plant licensing basis (including the final safety analysis report and bases to TS), since these are not affected by changes to the surveillance frequencies. Similarly, there is no impact to safety analysis acceptance criteria as described in the plant licensing basis. To evaluate a change in the relocated surveillance frequency, Dominion will perform a probabilistic risk evaluation using the guidance contained in NRC approved NEI 04–10, Rev. 1 in accordance with the TS SFCP. NEI 04–10, Rev. 1, methodology provides reasonable acceptance guidelines and methods for evaluating the risk increase of proposed changes to surveillance frequencies consistent with Regulatory Guide 1.177.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219.

NRC Branch Chief: Gloria Kulesa.

Notice of Issuance of Amendments To Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action, see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

Carolina Power and Light Company, Docket Nos. 50–325 and 50–324, Brunswick Steam Electric Plant, Units 1 and 2, Brunswick County, North Carolina

Date of application for amendments: October 27, 2009.

Brief Description of amendments: The proposed amendments modified technical specifications (TSs) requirements related to primary containment isolation instrumentation in accordance with the Nuclear Regulatory Commission-approved Technical Specification Task Force (TSTF), Standard Technical Specifications Change Traveler, TSTF–306, Revision 2, "Add action to LCO [Limiting Condition for Operation] 3.3.6.1 to give option to isolate the penetration." The proposed amendment would revise TS Section 3.3.6.1, "Primary Containment Isolation Instrumentation," by adding an ACTIONS note allowing intermittent opening, under administrative control, of penetration flow paths that are isolated. Additionally, the traversing in-core probe system would be added as a separate isolation function with an associated Required Action to isolate the penetration within 24 hours rather than immediately initiating a unit shutdown.

Date of issuance: July 23, 2010.

Effective date: Date of issuance, to be implemented within 60 days.

Amendment Nos.: 255 and 283.

Facility Operating License Nos. DPR–71 and DPR–62: Amendments changed the Technical Specifications.

Date of initial notice in ***Federal Register****:* January 26, 2010 (75 FR 4114).

The Commission's related evaluation of the amendments is contained in the Safety Evaluation dated July 23, 2010.

No significant hazards consideration comments received: No.

Carolina Power and Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of application for amendment: January 27, 2010, as supplemented by letter dated March 22, 2010.

Brief description of amendment: The amendment revises a Limiting Condition for Operation (LCO) in Technical Specifications (TS) Section 3.6.2.2.a to incorporate an expanded range of eductor flow rates for the Containment Spray Additive System as a result of the use of a new chemical model and new boric acid equilibrium data, revised sump pH limits, and changes to the Containment Spray Additive Tank concentration and volume limits.

Date of issuance: July 16, 2010.

Effective date: Effective as of the date of issuance and shall be implemented within 30 days.

Amendment No. 134.

Renewed Facility Operating License No. NPF–63: The amendment revises the technical specifications and facility operating license.

Date of initial notice in ***Federal Register***: March 23, 2010 (75 FR 13788). The supplement dated March 22, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register** on March 23, 2010 (75 FR 13788).

The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 16, 2010.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of application of amendments: August 6, 2009, as supplemented by letter dated February 23, 2010.

Brief description of amendments: The amendments revised the Technical Specifications (TSs) by changing the surveillance requirement frequency for TS 3.4.12, "Low Temperature Overpressure Protection System," from 6 months to 18 months.

Date of Issuance: July 21, 2010.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 368, 370, and 369.

Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55: Amendments revised the licenses and the TSs.

*Date of initial notice in **Federal Register***: March 9, 2010 (75 FR 10827). The supplement dated February 23, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 21, 2010.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant, Oswego County, New York

Date of application for amendment: November 23, 2009, as superseded on March 18, 2010, as supplemented on May 11 and June 3, 2010.

Brief description of amendment: The amendment revises TS Surveillance Requirements (SRs) 3.4.3.2 and 3.5.1.13 by deleting the current requirement to manually actuate each main steam safety/relief valve (SRV) during plant startup. SRs 3.4.3.2 and 3.5.1.13 have been modified to require that the SRVs be tested in accordance with the inservice test program that meets the requirements of American Society of Mechanical Engineers Code for Operation and Maintenance of Nuclear Power Plants.

Date of issuance: July 21, 2010.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 297.

Renewed Facility Operating License No. DPR–59: The amendment revised the License and the Technical Specifications.

*Date of initial notice in **Federal Register:*** April 20, 2010 (75 FR 20631). The May 11 and June 3, 2010, supplements provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2010.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant (JAFNPP), Oswego County, New York

Date of application for amendment: July 31, 2009, as supplemented by letters dated March 5 and June 17, 2010.

Brief description of amendment: The change revised the JAFNPP Technical Specifications (TSs) Surveillance Requirements (SRs) for testing of the Residual Heat Removal System Shutdown Cooling (SDC) mode Containment Isolation, Reactor Pressure—High Function by replacing the current requirement to perform TS SR 3.3.6.1.3, Perform Channel Calibration, with TS SR 3.3.6.1.1 Perform Channel Check, SR 3.3.6.1.2, Perform Channel Functional Test, SR 3.3.6.1.4, Calibrate the Trip Units, and SR 3.3.6.1.5, Perform Channel Calibration. These changes are to support a proposed plant modification to increase the reliability of SDC isolation logic by changing the source of the reactor high pressure input signal.

Date of issuance: July 21, 2010.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 298.

Renewed Facility Operating License No. DPR–59: The amendment revised the License and the Technical Specifications.

*Date of initial notice in **Federal Register***: October 6, 2009 (74 FR 51239).

The supplements dated March 5 and June 17, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2010.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, and PSEG Nuclear, LLC, Docket Nos. 50–277, Peach Bottom Atomic Power Station (PBAPS), Units 2, York and Lancaster Counties, Pennsylvania

Date of application for amendments: August 28, 2009, as supplemented on February 25, 2010, and May 24, 2010.

Brief description of amendments: The amendment modifies the PBAPS Unit 2 Technical Specification (TS) Section 5.5.12 to reflect a one-time extension of the Type A containment Integrated Leak Rate Test (ILRT) to no later than October 2015. The TS revision allows a one-time extension of 5 years to the 10-year frequency of the performance-based leakage rate testing program for the PBAPS Unit 2 containment Type A ILRT test.

Date of issuance: July 20, 2010.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment Nos.: 276.

Renewed Facility Operating License Nos. DPR–44: Amendment revised the Technical Specifications.

*Date of Initial Notice in **Federal Register***: May 18, 2010 (75 FR 27830).

The supplements dated February 25, 2010, and May 24, 2010, clarified the application, did not expand the scope of the application as originally noticed, and did not change the initial proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 20, 2010.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–220, Nine Mile Point Nuclear Station, Unit No. 1 (NMP1), Oswego County, New York

Date of application for amendment: September 18, 2009, as supplemented on October 15, 2009, and April 14, 2010.

Brief description of amendment: The amendment revises the Technical Specifications (TSs) by modifying TS

Section 3.2.7.1 and 4.2.7.1, "Primary Coolant System Pressure Isolation Valves," to incorporate requirements that are consistent with Section 3.4.5 of the Improved Standard Technical Specifications, NUREG–1433, Revision 3.0, "Standard Technical Specifications General Electric Plants, BWR/4."

Date of issuance: July 26, 2010.

Effective date: As of the date of issuance to be implemented within 60 days.

Amendment No.: 206.

Renewed Facility Operating License No. DPR–63: The amendment revises the License and TSs.

*Date of initial notice in **Federal Register:*** October 14, 2009 (74 FR 52824). The supplemental letters dated October 15, 2009, and April 14, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the Nuclear Regulatory Commission (NRC) staff's original proposed no significant hazards consideration determination noticed in the **Federal Register** on October 14, 2009 (74 FR 52824).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 26, 2010.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket No. 50–133, Humboldt Bay Power Plant, Unit 3, Humboldt County, California

Date of application for amendment: April 9, 2010, and supplemented May 7, 2010.

Brief description of amendment: The amendment Request deletes Technical Specification 3.1.3, "Fuel Storage Pool Liner Water Level." Additional conforming and administrative changes are also made.

Date of issuance: July 23, 2010.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 44.

Facility Operating License No. DPR–7: This amendment revises the License.

*Date of initial notice in **Federal Register***: June 15, 2010 (75 FR 33842).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 23, 2010.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: September 9, 2009.

Brief description of amendment: The amendment changes the frequency of control rod notch testing, as specified in Technical Specification (TS) surveillance requirement 4.1.3.1.2.a, from at least once per 7 days to at least once per 31 days. The amendment also adds the word "fully" to the Action for TS Limiting Condition for Operation 3.9.2 to clarify the requirement to fully insert all insertable control rods when the required source range monitor (SRM) instrumentation is inoperable. The proposed amendment is based on TS Task Force (TSTF) change, TSTF–475, Revision 1, "Control Rod Notch Testing Frequency and SRM Insert Control Rod Action."

Date of issuance: July 21, 2010.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 182.

Facility Operating License No. NPF–57: The amendment revised the TSs and the License.

*Date of initial notice in **Federal Register***: December 1, 2009 (74 FR 62836).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 21, 2010.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company et al., Docket No. 52–011, Vogtle Electric Generating Plant ESP Site, Burke County, Georgia

Date of amendment request: May 24, 2010, as supplemented June 2 and 22, 2010.

Description of amendment request: This amendment revises the Vogtle Electric Generating Plant ESP Site Safety Analysis Report (SSAR) to change the classification of backfill over the slopes of the Units 3 and 4 excavations from Category 1 and 2 backfill to engineered granular backfill (EGB).

Date of issuance: July 9, 2010.

Effective date: As of date of issuance and shall be implemented within 15 days from the date of issuance.

Amendment No.: 3.

Early Site Permit No. ESP–004: Amendment revised the VEGP ESP SSAR.

Public comments requested as to proposed no significant hazards consideration (NSHC): Yes. June 3, 2010 (75 FR 31477). The supplements dated June 2 and 22, 2010 provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination. The June 3, 2010 notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received. The June 3, 2010 notice also provided an opportunity to request a hearing by August 2, 2010, but indicated that if the Commission makes a final NSHC determination, any such hearing would take place after issuance of the amendment.

The Commission's related evaluation of the requested amendment, state consultation, and final NSHC determination are contained in a safety evaluation dated July 9, 2010. The NRC staff prepared an environmental assessment (75 FR 39284) and determined that the requested amendment will not have a significant effect on the quality of the human environment.

Attorney for licensee: M. Stanford Blanton, Balch & Bingham, LLP.

NRC Branch Chief: Jeffrey Cruz.

Southern Nuclear Operating Company et al., Docket No. 52–011, Vogtle Electric Generating Plant ESP Site, Burke County, Georgia

Date of amendment request: April 20, 2010, as supplemented April 23 and 28, May 5, 10, 13, 20, and 24, 2010.

Description of amendment request: The amendment revised the Vogtle Electric Plant (VEGP) ESP Site Safety Analysis Report (SSAR) to allow the use of Category 1 and 2 backfill material from additional onsite areas that were not specifically identified in the VEGP ESP SSAR as backfill sources for the activities approved under the ESP and Limited Work Authorization.

Date of issuance: June 25, 2010.

Effective date: As of date of issuance and shall be implemented within 15 days from the date of issuance.

Amendment No.: 2.

Early Site Permit No. ESP–004: Amendment revised the VEGP ESP SSAR.

Public comments requested as to proposed no significant hazards consideration (NSHC): Yes. May 6, 2010 (75 FR 24993). The supplements dated May 5, 10, 13, 20, and 24, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination. The May 6, 2010 notice provided an opportunity to submit comments on the Commission's proposed NSHC determination. No comments have been received. The May 6, 2010 notice also provided an opportunity to request a hearing by July 6, 2010, but indicated that if the Commission makes a final

NSHC determination, any such hearing would take place after issuance of the amendment.

The Commission's related evaluation of the requested amendment, state consultation, and final NSHC determination are contained in a safety evaluation dated June 25, 2010. The NRC staff prepared an environmental assessment (75 FR 36446) and determined that the requested amendment will not have a significant effect on the quality of the human environment.

Attorney for licensee: M. Stanford Blanton, Balch & Bingham, LLP.

NRC Branch Chief: Jeffrey Cruz.

Wolf Creek Nuclear Operating Corporation, Docket No. 50–482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: October 10, 2010, as supplemented by letter dated March 8, 2010.

Brief description of amendment: The amendment revised Technical Specification (TS) 3.1.7, "Rod Position Indication," TS 3.2.1, "Heat Flux Hot Channel Factor ($F_Q(Z)$) (F_Q Methodology)," TS 3.2.2, "Nuclear Enthalpy Rise Hot Channel Factor ($F^N\Delta H$)," TS 3.2.4, "Quadrant Power Tilt Ratio (QPTR)," and TS 3.3.1, "Reactor Trip System (RTS) Instrumentation," for use of the Best Estimate Analyzer for Core Operations—Nuclear (BEACON) Power Distribution Monitoring System (PDMS), as described in WCAP–12472–P–A, "BEACON Core Monitoring and Operations Support System," to perform power distribution surveillances.

Date of issuance: July 23, 2010.

Effective date: As the date of issuance and shall be implemented by December 29, 2010.

Amendment No.: 188.

Renewed Facility Operating License No. NPF–42. The amendment revised the Operating License and Technical Specifications.

Date of initial notice in ***Federal Register***: January 26, 2010 (75 FR 4120). The supplemental letter dated March 8, 2010, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 23, 2010.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 30th day of July, 2010.

For The Nuclear Regulatory Commission.

Robert A. Nelson,

Acting Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–19678 Filed 8–9–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0002]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 9, 16, 23, 30, and September 6, 13, 2010.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

Week of August 9, 2010

Thursday, August 12, 2010

9:25 a.m. Affirmation Session (Public Meeting) (Tentative).
   a. U.S. *Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), Appeal of Isaac D. Harp (Tentative).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

9:30 a.m. Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Cindy Flannery, 301–415–0223).

This meeting will be Webcast live at the Web address—*http://www.nrc.gov.*

Week of August 16, 2010—Tentative

There are no meetings scheduled for the week of August 16, 2010.

Week of August 23, 2010—Tentative

There are no meetings scheduled for the week of August 23, 2010.

Week of August 30, 2010—Tentative

There are no meetings scheduled for the week of August 30, 2010.

Week of September 6, 2010—Tentative

There are no meetings scheduled for the week of September 6, 2010.

Week of September 13, 2010—Tentative

There are no meetings scheduled for the week of September 13, 2010.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Angela Bolduc, Chief, Employee/Labor Relations and Work Life Branch, at 301–492–2230, TDD: 301–415–2100, or by e-mail at *angela.bolduc@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: August 5, 2010.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2010–19806 Filed 8–6–10; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0274]

Final Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of issuance and availability of Regulatory Guide, RG 1.216, "Containment Structural Integrity Evaluation for Internal Pressure Loadings Above Design-Basis Pressure."

FOR FURTHER INFORMATION CONTACT: Robert G. Roche, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* (301) 251–7645 or e-mail *Robert.Roche@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is issuing a new guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 1.216, "Containment Structural Integrity Evaluation for Internal Pressure Loadings Above Design-Basis Pressure," was issued with a temporary identification as Draft Regulatory Guide, DG–1203. This guide describes methods that the NRC staff considers acceptable for (1) predicting the internal pressure capacity for containment structures above the design-basis accident pressure, (2) demonstrating containment structural integrity related to combustible gas control, and (3) demonstrating containment structural integrity to meet the Commission's performance goals related to the prevention and mitigation of severe accidents. It provides guidance on methods for satisfying requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants." Requirements in 10 CFR 52.47, "Contents of Applications: Technical Information," and in 10 CFR 52.79, "Contents of Applications; Technical Information in Final Safety Analysis Report [FSAR]," relate to the structural integrity of containments under internal pressurization that pertain to the containment structural capacity above design-basis pressures, to combustible gas control, and to the prevention and mitigation of severe accidents. This guidance is intended to be consistent with the Commission's goals and other related guidance, as discussed in the remainder of this section. This regulatory guide does not address requirements and guidance for the structural evaluation of containments for design-basis pressure.

II. Further Information

In December 2008, DG–1203 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on February 9, 2009. The staff's responses to the public comments received are located in the NRC's Agencywide Documents Access and Management System under Accession Number ML092800554. The regulatory analysis may be found in ADAMS under Accession No. ML101890047. Electronic copies of RG 1.216 are available through the NRC's public Web site under "Regulatory Guides" at *http://www.nrc.gov/reading-rm/doc-collections/*.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 3rd day of August, 2010.

For the Nuclear Regulatory Commission.

Harriet Karagiannis,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2010–19676 Filed 8–9–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0275]

Draft Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Draft Regulatory Guide, DG–1228, "Standard Format and Content of License Termination Plans for Nuclear Power Reactors."

FOR FURTHER INFORMATION CONTACT: James C. Shepherd, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* (301) 415–6712 or e-mail *James.Shepherd@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft guide in the agency's "Regulatory Guide" series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide (DG) is temporarily identified by its task number, DG–1228, which should be mentioned in all related correspondence. DG–1228 is proposed Revision 1 of Regulatory Guide 1.179, dated January 1999. This guide provides general procedures for the preparation of license termination plans for nuclear power reactors. Use of this regulatory guide will help to ensure the completeness of the information provided in a license termination plan, assist the staff of the NRC and others in locating pertinent information, and facilitate the review process. However, the NRC does not require conformance with the procedures, which are provided for guidance only.

II. Further Information

The NRC staff is soliciting comments on DG–1228. Comments may be accompanied by relevant information or supporting data and should mention DG–1228 in the subject line. Comments submitted in writing or in electronic form will be made available to the public in their entirety through the NRC's Agencywide Documents Access and Management System (ADAMS).

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0275 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC website and on the Federal rulemaking website Regulations.gov. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0275. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

Mail comments to: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RAD), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. or by fax to RDB at (301) 492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Room O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to pdr.resource@nrc.gov. DG–1228 is available electronically under ADAMS Accession Number ML100840408. In addition, electronic copies of DG–1228 are available through the NRC's public Web site under Draft Regulatory Guides in the "Regulatory Guides" collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* The regulatory analysis may be found in ADAMS under Accession No. ML101740327.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2010–0275.

Comments would be most helpful if received by October 11, 2010. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 2nd day of August, 2010.

For the Nuclear Regulatory Commission.

Harriet Karagiannis,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2010–19677 Filed 8–9–10; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Ombudsman Request for Assistance Information Collection, 3206–NEW

AGENCY: U.S. Office of Personnel Management.

ACTION: 60–Day Notice and request for comments.

SUMMARY: The Executive Secretariat and Ombudsman, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a new information collection request (ICR) 3206–NEW, Ombudsman Request for Assistance. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35), as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until October 12, 2010. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESS: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415 Attention: Barbara Malebranche, Ombudsman or sent via electronic mail to *Barbara.malebranche@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415 Attention: Barbara Malebranche, Ombudsman, or sent via electronic mail to *Barbara.malebranche@opm.gov.*

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) established the Executive Secretariat and Ombudsman January 4, 2010. OPM established the Ombudsman to provide a neutral, independent and confidential resource to review, identify, facilitate and timely resolve individual claims, concerns or complaints by OPM customers and employees. In order to provide the best service to OPM's customers, one form is required and two forms are optional. The mandatory form, Privacy Release, enables representatives of the Ombudsman to obtain any information requested, examine and/or copy any records related to a request for assistance to identify, facilitate and timely resolve individuals' claims, concerns or complaints by OPM customers and employees. This allows OPM's representatives to properly perform their role and not violate customer privacy without the proper authorization. The second form, Third Party Authorization, allows customers of the Ombudsman to designate someone in addition to themselves, or other than themselves, to give and receive information about their request for assistance. The Third Party Authorization will not be used in every request for assistance. The third form, Request for Assistance, is web-enabled and provides customers a useful tool to provide OPM information it needs to expediently gather the facts and resolve the concern brought before the Ombudsman.

Analysis

Agency: Executive Secretariat and Ombudsman, Office of Personnel Management.

Title: Ombudsman Request for Assistance.

OMB Number: 3206–NEW.

Frequency: Annually.

Affected Public: Federal Employees, Retired Federal Employees, Individuals and Households.

Number of Respondents: 4,000.

Estimated Time Per Respondent: Privacy Release form will take approximately 5 minutes; the Third Party Authorization form will take approximately 10 minutes and the web-enabled Request for Assistance will take approximately 15 minutes to complete. If all three forms are used it is estimated to take an average of 30 minutes to complete.

Total Burden Hours: 2,000 hours

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2010–19705 Filed 8–9–10; 8:45 am]

BILLING CODE 6325–39–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12268 and #12269]

Texas Disaster #TX–00362

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of TEXAS (FEMA–1931–DR), dated 08/03/2010.

Incident: Hurricane Alex.

Incident Period: 06/30/2010 and continuing.

DATES: *Effective Date:* 08/03/2010.

Physical Loan Application Deadline Date: 10/04/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 05/03/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/03/2010, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Cameron, Hidalgo, Jim Hogg, Jim Wells, Maverick, Starr, Webb, Willacy, Zapata.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	3.625
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 122688 and for economic injury is 122698.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–19635 Filed 8–9–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12233 and #12234]

Montana Disaster Number MT–00056

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Montana (FEMA–1922–DR), dated 07/10/2010.

Incident: Severe Storms and Flooding.

Incident Period: 06/15/2010 through 07/30/2010.

Effective Date: 07/30/2010.

Physical Loan Application Deadline Date: 09/08/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 04/11/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Montana, dated 07/10/2010, is hereby amended to establish the incident period for this disaster as beginning 06/15/2010 and continuing through 07/30/2010.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–19706 Filed 8–9–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12266 and #12267]

Texas Disaster #TX–00361

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–1931–DR), dated 08/03/2010.

Incident: Hurricane Alex.

Incident Period: 06/30/2010 and continuing.

DATES: *Effective Date:* 08/03/2010.

Physical Loan Application Deadline Date: 10/04/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 05/03/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 08/03/2010, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Cameron, Hidalgo, Jim Hogg, Maverick, Starr, Val Verde, Webb, Zapata.

Contiguous Counties (Economic Injury Loans Only): Texas: Brooks, Crockett, Dimmit Duval, Edwards, Kenedy, Kinney La Salle Mcmullen, Sutton, Terrell, Uvalde, Willacy, Zavala.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	5.500
Homeowners Without Credit Available Elsewhere	2.750
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	3.625
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	

	Percent
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 122668 and for economic injury is 122670.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–19636 Filed 8–9–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12236 and #12237]

Wyoming Disaster Number WY–00014

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Wyoming (FEMA–1923–DR), dated 07/14/2010.

Incident: Flooding.

Incident Period: 06/04/2010 through 06/18/2010.

DATES: *Effective Date:* 08/04/2010.

Physical Loan Application Deadline Date: 09/13/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 04/14/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Wyoming, dated 07/14/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Platte.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Roger B. Garland,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–19708 Filed 8–9–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62625; File No. SR–NYSEArca–2010–70]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding 75 Options Classes to the Penny Pilot Program

August 2, 2010.

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 20, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to designate 75 options classes to be added to the Penny Pilot Program for Options ("Penny Pilot" or "Pilot") on August 2, 2010. The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form.[3] A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca proposes to identify the next 75 options classes to be added to the Penny Pilot effective August 2, 2010. The Exchange recently received approval to extend and expand the Pilot through December 31, 2010.[4] In that filing, the Exchange had proposed expanding the Pilot on a quarterly basis to add the next 75 most actively traded multiply listed options classes based on national average daily volume for the six months prior to selection, closing under $200 per share on the Expiration Friday prior to expansion, except that the month immediately preceding their addition to the Penny Pilot will not be used for the purpose of the six month analysis.[5]

NYSE Arca proposes adding the following 75 options classes to the Penny Pilot on August 2, 2010, based on national average daily volume from January 1, 2010 through June 30, 2010:

Nat'l ranking	Symbol	Security name	Nat'l ranking	Symbol	Security name
199	MBI	MBIA Inc	316	CB	Chubb Corp.
205	MA	Mastercard Inc	320	ADM	Archer-Daniels-Midland Co.
224	ATPG	ATP Oil & Gas Corp/United States	322	HSY	Hershey Co/The.
226	YUM	Yum! Brands Inc	323	TXT	Textron Inc.
232	RCL	Royal Caribbean Cruises Ltd	324	GGP	General Growth Properties Inc.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that there are no changes to the rule text and no exhibit 5 was attached to the form 19b–4.

[4] *See* Exchange Act Release No. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009) (order approving SR–NYSEArca–2009–44).

[5] Index products would be included in the expansion if the underlying index level was under 200.

Nat'l ranking	Symbol	Security name	Nat'l ranking	Symbol	Security name
238	BPOP	Popular Inc	325	NOV	National Oilwell Varco Inc.
248	EK	Eastman Kodak Co	326	TWX	Time Warner Inc.
252	CNX	Consol Energy Inc	327	XOP	SPDR S&P Oil & Gas Exploration & Production ETF.
260	DCTH	Delcath Systems Inc	328	MYL	Mylan Inc/PA.
274	MTG	MGIC Investment Corp	329	TSO	Tesoro Corp.
277	PXP	Plains Exploration & Production Co	330	CI	CIGNA Corp.
278	GPS	Gap Inc/The	331	ESI	ITT Educational Services Inc.
280	TSL	Trina Solar Ltd	332	NKE	NIKE Inc.
282	EWW	iShares MSCI Mexico Investable Market Index Fund.	335	FIS	Fidelity National Information Services Inc.
283	CRM	Salesforce.com Inc	336	SUN	Sunoco Inc.
286	SWN	Southwestern Energy Co	338	BBBY	Bed Bath & Beyond Inc.
287	HBAN	Huntington Bancshares Inc/OH	340	APWR	A–Power Energy Generation Systems Ltd.
288	EOG	EOG Resources Inc	341	FWLT	Foster Wheeler AG.
290	APA	Apache Corp	342	LNC	Lincoln National Corp.
291	VVUS	Vivus Inc	343	RSH	RadioShack Corp.
292	JDSU	JDS Uniphase Corp	344	TYC	Tyco International Ltd.
293	ACI	Arch Coal Inc	345	CL	Colgate-Palmolive Co.
294	NE	Noble Corp	346	FXP	ProShares UltraShort FTSE/Xinhua China 25.
296	BAX	Baxter International Inc	347	NTAP	NetApp Inc.
297	ADSK	Autodesk Inc	348	SO	Southern Co.
299	KRE	SPDR KBW Regional Banking ETF	349	PHM	Pulte Group Inc.
300	XL	XL Group Plc	350	HOT	Starwood Hotels & Resorts Worldwide Inc.
302	WLT	Walter Energy Inc	351	QLD	ProShares Ultra QQQ.
303	IBN	ICICI Bank Ltd	352	VRSN	VeriSign Inc.
305	EWY	iShares MSCI South Korea Index Fund.	353	PCL	Plum Creek Timber Co Inc.
306	WHR	Whirlpool Corp	354	NBR	Nabors Industries Ltd.
307	BHI	Baker Hughes Inc	355	ESRX	Express Scripts Inc.
308	KMP	Kinder Morgan Energy Partners LP	356	ACAS	American Capital Ltd.
309	MRO	Marathon Oil Corp	357	XLNX	Xilinx Inc.
310	AGO	Assured Guaranty Ltd	358	DO	Diamond Offshore Drilling Inc.
311	GIS	General Mills Inc	359	CMA	Comerica Inc.
312	ANR	Alpha Natural Resources Inc	360	KEY	KeyCorp.
314	GENZ	Genzyme Corp.			

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest, by identifying the options classes to be added to the Pilot in a manner consistent with prior approvals and filings.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A)(i)[6] of the Act and Rule 19b–4(f)(1)[7] thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[6] 15 U.S.C. 78s(b)(3)(A)(i).

[7] 17 CFR 240.19b–4(f)(1).

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–NYSEArca–2010–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–70. 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 Web viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at NYSE Arca's principal office and on its Web site at *http://www.nyse.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 No. SR–NYSEArca–2010–70 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19603 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62637; File No. SR–CBOE–2010–072]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to PULSe Fees

August 4, 2010.

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 30, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by CBOE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its fees schedule. The text of the proposed rule change is available on the Exchange's Web site *http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE 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. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to extend waivers of certain fees relating to the use of the PULSe order entry workstation and to make a technical correction to the numbering of the text in the fees schedule.

The PULSe workstation is a front-end order entry system designed for use with respect to orders that may be sent to the trading systems of CBOE and CBOE Stock Exchange ("CBSX").[5] In conjunction with the launch of the PULSe workstation, the Exchange waived various fees. To continue to encourage users, the Exchange has now determined to extend the waivers of certain fees. In particular, currently the monthly PULSe workstation fee to members—$350 per workstation per month for the first 10 PULSe workstations and $100 per workstation per month for each additional PULSe workstation—has been waived through July 30, 2010. The Exchange is proposing to extend the waiver of this monthly fee through September 30, 2010. Thus, this fee will be assessed beginning October 1, 2010. Currently the Exchange has also waived the away-market routing fee to the entering member—$0.10 per executed options contract (or equivalent share amount in the case of stock) for away-market routing of orders through the PULSe workstation—through July 30, 2010. The Exchange is proposing to extend this waiver through September 15, 2010. Thus this fee will be assessed beginning September 16, 2010.

Finally, the Exchange is proposing to make a technical change to its fees schedule. The paragraph in the fees schedule pertaining to the PULSe workstation was unintentionally numbered as subparagraph G), when there already exists a subparagraph G). To correct that numbering error, the PULSe workstation subparagraph is being renumbered as subparagraph H).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(4)[7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE

[5] *See* Securities Exchange Act Release No. 62286 (June 11, 2010), 75 FR 34799 (June 18, 2010) (SR–CBOE–2010–051).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

and CBSX members and trading permit holders in that the same fees and fee waivers are applicable to all users of the PULSe workstation.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and subparagraph (f)(2) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–CBOE–2010–072 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–072. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–072 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19646 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62628; File No. SR–Phlx-2010–107]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Making Permanent the Sponsored Access Pilot Program

August 3, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1], and Rule 19b–4 [2] thereunder, notice is hereby given that on July 28, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent its sponsored access rule, Rule 1094. The current pilot expires on September 15, 2010.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to attract additional business by making permanent its sponsored access rule, which is similar to that of other exchanges. Since the inception of the rule as a pilot, many member organizations have now availed themselves of the program. The Exchange believes that making the program permanent should help attract even more users, especially because other exchanges' similar rules are not pilot programs.

A Sponsored Participant is a non-member of the Exchange, such as an institutional investor, that gains access to the Exchange and trades under a Sponsoring Member's execution and clearing identity pursuant to a sponsorship arrangement between such non-member and a member organization. Specifically, the Exchange proposes to permit Sponsored Participants to be sponsored by

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Sponsoring Member Organizations, and thereby access the Exchange, subject to certain requirements. These requirements are intended to confirm that the Sponsored Participant is required to and had procedures in place to comply with Exchange rules, and that the Sponsoring Member Organization takes responsibility for the Sponsored Participant's activity on the Exchange.

First, the Sponsored Participant and its Sponsoring Member Organization must have entered into and maintained an Access Agreement with the Exchange. The Sponsoring Member Organization must designate the Sponsored Participant by name in an addendum to the Access Agreement.

Second, there must be a Sponsored Participant Agreement between the Sponsoring Member Organization and the Sponsored Participant that contains the following sponsorship provisions, enumerated in full in Rule 1094(b)(ii):

(i) The orders of the Sponsored Participant are binding in all respects on the Sponsoring Member Organization;

(ii) The Sponsoring Member Organization is responsible for the actions of the Sponsored Participant;

(iii) In addition to the Sponsoring Member Organization being required to comply with the Exchange Certificate of Incorporation, By-laws, Rules and procedures of the Exchange, the Sponsored Participant shall do so as if such Sponsored Participant were an Exchange member organization;

(iv) The Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member Organization a list of individuals authorized to obtain access to the Exchange on behalf of the Sponsored Participant;

(v) The Sponsored Participant shall familiarize its authorized individuals with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the Exchange;

(vi) The Sponsored Participant may not permit anyone other than authorized individuals to use or obtain access to the Exchange; [3]

(vii) The Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the Exchange, including unauthorized entry of information into the Exchange, and agrees that it is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of authorized individuals, and for the trading and other consequences thereof;

(viii) The Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and Participants' use and access to the Exchange for compliance with the terms of this agreement;

(ix) The Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member Organization, the Exchange, or any other third parties that arise from the Sponsored Participant's access to and use of the Exchange. Such amounts include, but are not limited to applicable exchange and regulatory fees.

Third, the Sponsoring Member Organization must provide the Exchange with a Sponsored Participant Addendum to its Access Agreement acknowledging its responsibility for the orders, executions and actions of its Sponsored Participant at issue.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [4] in general, and furthers the objectives of Section 6(b)(5) of the Act [5] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest by helping market participants seeking access to a marketplace. Given that it is substantially similar to the rules of several other exchanges and has been in effect for several prior pilot periods,[6] the proposal to make permanent this pilot program does not appear to raise any novel regulatory issues.[7] Because the sponsored access rule has been relied upon by many member organizations, the Exchange believes that the changes proposed herein should serve to help market participants seeking access to its marketplace.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [8] and Rule 19b–4(f)(6) [9] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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

[3] If the Exchange determines that an authorized individual has caused a Member Organization to violate the Exchange's Rules, the Exchange could direct the Member Organization to suspend or withdraw the person's status as an authorized individual.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *See* Securities Exchange Release Nos. 59362 (February 5, 2009), 74 FR 6931 (February 11, 2009) (SR–Phlx-2009–10); 60456 (August 7, 2009), 74 FR 40862 (August 13, 2009) (SR–Phlx-2009–63); 60942 (November 4, 2009), 74 FR 58350 (November 12, 2009) (SR–Phlx-2009–93); 61372 (January 15, 2010), 75 FR 4132 (January 26, 2010) (SR–Phlx-2010–04); and 61776 (March 24, 2010), 75 FR 16219 (March 31, 2010) (SR–Phlx-2010–44).

[7] The Exchange understands that the Commission has proposed for comment new Rule 15c3–5 under the Exchange Act that would govern access to trading venues. Securities Exchange Act Release No. 61379 (January 19, 2010), 75 FR 4007 (January 26, 2010) (File No. S7–03–10). Of course, once such a rule becomes effective, the Exchange would comply with it and modify its rules accordingly. In the interim, the Exchange believes that making its Rule 1094 permanent sends a message to its users that the Exchange's sponsored access program is thriving, especially because other exchanges' similar programs are not pilot programs.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx-2010–107 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx-2010–107. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–Phlx-2010–107 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19605 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62638; File No. SR–BX–2010–043]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving a Proposed Rule Change Relating to Pricing for Direct Circuit Connections

August 4, 2010.

On June 24, 2010, NASDAQ OMX BX, Inc. ("BX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish pricing for 10Gb direct circuit connections and codify pricing for 1Gb direct circuit connections for customers who are not co-located in BX's datacenter. The proposed rule change was published for comment in the **Federal Register** on July 2, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

In its proposal, BX proposed to establish fees for direct 10Gb circuit connections, and codify fees for direct circuit connections capable of supporting up to 1Gb, for customers who are not co-located at the Exchange's datacenter. BX represented that it already makes available to co-located customers a 10Gb circuit connection and charges for each a $1000 initial installation charge as well as an ongoing monthly fee of $5000. The Exchange proposed to establish the same fees for non-co-located customers with a 10Gb circuit connection.[4]

BX represented that it also already makes available to both co-located and non-co-located customers direct connections capable of supporting up to 1Gb, with per connection monthly fees of $500 for co-located customers and $1000 for non co-located customers. According to the Exchange, monthly fees are higher for non-co-located customers because direct connections require BX to provide cabinet space and middleware for those customers' third-party vendors to connect into the datacenter and, ultimately, to the trading system. Finally, the Exchange represented that for non-co-located customers, it charges an optional installation fee of $925 if the customer chooses to use an on-site router.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[7] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed fees for 10Gb and 1Gb direct circuit connections are reasonable and equitably allocated insofar as they are applied on the same terms to similarly situated market participants. In addition, the Commission believes that the connectivity options described in the proposed rule change are not unfairly discriminatory because BX makes the 10Gb and 1Gb direct circuit connections uniformly available to all non-co-located customers who voluntarily request them and pay the fees as detailed in the proposal. As represented by BX, these fees are uniform for all such customers and are either the same as fees charged to co-located customers, or vary due to different costs incurred by BX associated with providing service to the two different customer types. Finally, the Commission believes that the proposal will further the protection of investors and the public interest because it will provide greater transparency regarding the connectivity options available to market participants.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62393 (July 2, 2010), 75 FR 38571 ("Notice").

[4] According to the Exchange, BX provides an additional 1Gb copper connection option for co-located customers. BX represented that, given the technological constraints of copper connections over longer distances, it does not offer a copper connection option to users outside of its datacenter.

[5] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

proposed rule change (SR–BX–2010–043) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19649 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62639; File No. SR–Phlx–2010–89]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Approving a Proposed Rule Change Relating to Pricing for Direct Circuit Connections

August 4, 2010.

On June 24, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish pricing for 10Gb direct circuit connections and codify pricing for 10Gb direct circuit connections for customers who are not co-located in Phlx's datacenter. The proposed rule change was published for comment in the **Federal Register** on July 2, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

In its proposal, Phlx proposed to establish fees for direct 10Gb circuit connections, and codify fees for direct circuit connections capable of supporting up to 1Gb, for customers who are not co-located at the Exchange's datacenter. Phlx represented that it already makes available to co-located customers a 10Gb circuit connection and charges for each a $1,000 initial installation charge as well as an ongoing monthly fee of $5,000. The Exchange proposed to establish the same fees for non-co-located customers with a 10Gb circuit connection.[4]

Phlx represented that it also already makes available to both co-located and non-co-located customers direct connections capable of supporting up to 1Gb, with per connection monthly fees of $500 for co-located customers and $1000 for non co-located customers. According to the Exchange, monthly fees are higher for non-co-located customers because direct connections require Phlx to provide cabinet space and middleware for those customers' third-party vendors to connect into the datacenter and, ultimately, to the trading system. Finally, the Exchange represented that for non-co-located customers, it charges an optional installation fee of $925 if the customer chooses to use an on-site router.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,[6] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and with Section 6(b)(5) of the Act,[7] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed fees for 10Gb and 1Gb direct circuit connections are reasonable and equitably allocated insofar as they are applied on the same terms to similarly-situated market participants. In addition, the Commission believes that the connectivity options described in the proposed rule change are not unfairly discriminatory because Phlx makes the 10Gb and 1Gb direct circuit connections uniformly available to all non-co-located customers who voluntarily request them and pay the fees as detailed in the proposal. As represented by Phlx, these fees are uniform for all such customers and are either the same as fees charged to co-located customers, or vary due to different costs incurred by Phlx associated with providing service to the two different customer types. Finally, the Commission believes that the proposal will further the protection of investors and the public interest because it will provide greater transparency regarding the connectivity options available to market participants.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–Phlx–2010–89) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19650 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 62394 (July 2, 2010), 75 FR 38583 ("Notice").

[4] According to the Exchange, Phlx provides an additional 1Gb copper connection option for co-located customers. Phlx represented that, given the technological constraints of copper connections over longer distances, it does not offer a copper connection option to users outside of its datacenter.

[5] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62631; File No. SR–Phlx–2010–102]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

August 3, 2010.

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 21, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its fees governing pricing for Exchange members using the Phlx XL II system,[3] for routing standardized equity and index option customer and professional orders to away markets for execution.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For a complete description of Phlx XL II, *see* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32). The instant proposed fees will apply only to option orders entered into, and routed by, the Phlx XL II system.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to recoup costs that the Exchange incurs for routing and executing customer and professional orders in equity and index options to away markets.

In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC ("NOS"), a member of the Exchange, as the Exchange's exclusive order router.[4] NOS is utilized by the Phlx XL II system solely to route orders in options listed and open for trading on the Phlx XL II system to destination markets.

Currently, the Exchange's Fee Schedule includes Routing Fees for both customer and professional orders. The Exchange proposes to assess a Routing Fee of $.26 per contract in customer option orders that are routed to the International Securities Exchange LLC ("ISE") and subject to the ISE's Rebates and Fees for Adding and Removing Liquidity in Select Symbols to apply only for orders of 100 contracts or more. The Exchange proposes to assess a Routing Fee of $.31 per contract in professional option orders that are routed to the International Securities Exchange LLC ("ISE") and subject to the ISE's Rebates and Fees for Adding and Removing Liquidity in Select Symbols.

The Exchange would continue to assess $.06 for all other customer orders routed to ISE and $0.24 per contract for all other professional orders routed to ISE, where those orders are not subject to the ISE's Rebates and Fees for Adding and Removing Liquidity in Select Symbols or the customer orders are for less than 100 contracts. The Exchange is proposing to name these proposed fees "ISE Select Symbols." The Exchange also proposes to add a note to the Fee Schedule to indicate that the fee for customer orders in ISE Select Symbols applies to orders of 100 or more contracts. The Exchange is proposing this amendment in order to recoup clearing and transaction charges incurred by the Exchange when orders are routed to ISE in the ISE Select Symbols, and in the case of customer orders for 100 or more contracts. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange. The Exchange proposes this fee change to account for an increase in cost for routing to ISE relative to the fees in the ISE Select Symbols.[5]

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(4) of the Act[7] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that this fee is reasonable because it seeks to recoup costs that are incurred by the Exchange when routing customer and professional orders to ISE in the select symbols, and for customer orders when the orders are for 100 or more contracts, on behalf of its members. The Exchange also believes that the proposed fee change to both customers and professionals is equitable because it will be uniformly applied to all customers and professionals.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and paragraph (f)(2) of Rule 19b–4[9] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*), or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2010–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2010–102. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

[4] *See* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32).

[5] ISE assesses a taker fee of $0.20 for priority customer orders of 100 or more contracts and taker fee of $.25 for Customer (Professional) orders in its rebates and fees for adding and removing liquidity in select symbols. *See* Securities Exchange Act Release No. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR–ISE–2010–25).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 No. SR–Phlx–2010–102 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19716 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62651; File No. SR–NFA–2010–03]

Self-Regulatory Organizations; National Futures Association; Notice of Filing and Immediate Effectiveness of Proposed Change to Compliance Rule 2–30 and the Related Interpretive Notice Regarding Customer Information and Risk Disclosure

August 4, 2010.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on July 13, 2010, National Futures Association ("NFA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change described in Items I, II, and III below, which Items have been substantially prepared by the NFA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. On March 8, 2010, NFA also filed this proposed rule change with the Commodity Futures Trading Commission ("CFTC") requesting that it review and approve the proposed rule change. On June 28, 2010, the CFTC notified the NFA that the CFTC had approved the rule change.[3]

I. Self-Regulatory Organization's Description and Text of the Proposed Rule Change

The amendments to NFA Compliance Rule 2–30 and the Related Interpretive Notice expand the customers covered by the rule to reach not just individuals, but all non-Eligible Contract Participants ("ECPs"); require futures commission merchants ("FCMs") Members to request at least annually that active customers update information obtained from the customer pursuant to NFA Compliance Rule 2–30(c), if there are any material changes to the information, and require the FCM, introducing broker ("IB"), or commodity trading advisor ("CTA") Member, or one of their Associates, that currently solicits and communicates with the customer to determine if additional risk disclosure is required to be provided based on any changed information; and prohibit Members and Associates from making individualized recommendations to those customers whom the Member or Associate has or should have advised that futures trading is too risky for them.

The text of the proposed rule change is available on NFA's Web site at *http://www.nfa.futures.org,* at the principal office of NFA 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, NFA 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. NFA 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

Section 15A(k) of the Act[4] makes NFA a national securities association for the limited purpose of regulating the activities of NFA Members ("Members") who are registered as brokers or dealers under Section 15(b)(11) of the Act.[5] NFA Compliance Rule 2–30(c) and the related Interpretive Notice apply to all Members, including those who are registered as security futures brokers or dealers under Section 15(b)(11).

In early September 2009, the CFTC and SEC held joint public meetings to discuss regulatory harmonization. At these meetings, one of the many issues discussed related to the similarities and differences between the futures industry's know-your-customer requirements and the securities industry's suitability requirements.

Due, in part, to these harmonization discussions and in light of changes in the futures industry, NFA's Executive Committee asked NFA's Member Advisory Committees to consider whether NFA Compliance Rule 2–30 could be amended to further enhance customer protection. In their review, the Executive and Advisory Committees noted that the futures industry differs from the securities industry in several crucial ways. Most importantly, futures contracts in general are recognized as highly volatile instruments. It therefore makes little sense to presume that a certain futures trade may be appropriate for a customer while others are not. An appreciation of the risks of futures trading and its appropriateness for a particular customer must be made at the time the customer makes a decision to trade futures in the first place. Therefore, the Committees fully supported maintaining the essential character of NFA Compliance Rule 2–30's know-your-customer requirement as a customer-by-customer determination.

The Committees also generally agreed that NFA Compliance Rule 2–30 currently works well and provides strong customer protection. Further, they believed that NFA's know-your-customer requirements and FINRA's suitability rules address the same concerns and achieve substantially the same results and any differences between them are largely semantic. The Committees noted, however, that certain modifications would provide increased customer protection and, therefore, they supported the following changes.

The amendments to NFA Compliance Rule 2–30 and its related Interpretive Notice will: (1) Expand the customers covered by the rule to reach not just individuals but all non-ECPs; (2) require FCM Members to request at least annually that active customers update information obtained from the customer pursuant to NFA Compliance

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[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] *See* letter from David A. Stawick, Secretary, U.S. Commodity Futures Trading Commission to Thomas W. Sexton, III, General Counsel, National Futures Association dated June 28, 2010.

[4] 15 U.S.C. 78o–3(k).

[5] 15 U.S.C. 78o(b)(11).

Rule 2–30(c) if there are any material changes to the information, and require the FCM, IB, or CTA Member, or one of their Associates, that currently solicits and communicates with the customer to determine if additional risk disclosure is required to be provided based on any changed information; and (3) prohibit Members and Associates from making individualized recommendations to those customers whom the Member or Associate has or should have advised that futures trading is too risky for them.

The burden of the update process will fall on the FCM Member that carries the customer account to request updated information at least annually. FCM Members may satisfy this requirement by contacting the customer in writing (by electronic or any other means reasonably designed to reach the customer) and requesting that the customer notify the Member of any material changes to the information previously provided. If the customer informs the FCM that he/she cannot verify the information because the information previously provided to the carrying FCM is not currently available to the customer, then the carrying FCM shall promptly provide any necessary information to the customer. Absent advice to the contrary from the customer, the information previously provided is deemed verified.

Whenever the customer notifies the FCM Member carrying the customer's account of any material changes to the information (whether through the update process or through the customer's own initiative), a determination must be made as to whether additional risk disclosure is required to be provided to the customer based on the changed information. If another FCM or IB introduces the customer's account on a fully disclosed basis or a CTA directs trading in the account, then the carrying FCM must notify that Member of the changes to the customer's information. The Member or Associate who currently solicits and communicates with the customer is responsible for determining if additional risk disclosure is required to be provided based on the changed information. In some cases, this may be the Member introducing or controlling the account; in other cases, it may be the carrying FCM.

Amendments to NFA Compliance Rule 2–30 and the related Interpretive Notice regarding Customer Information and Risk Disclosure were previously filed with the SEC in SR–NFA–2001–01, SR–NFA–2002–06 and SR–NFA–2007–07.

2. Statutory Basis

The rule change is authorized by, and consistent with, Section 15A(k)(2)(B) of the Act.[6] That section requires NFA to have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, including rules governing sales practices of security futures products. NFA believes the proposed rule change accomplishes this by requiring Members to request updated information from customers and, where appropriate, provide additional disclosures based on the updated information. The proposed rule change also prohibits making individualized recommendations for certain customers for whom futures trading is too risky.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will require FCMs to request updated information from customers at least annually. The Member Advisory Committees sought to minimize any burden this requirement might have by permitting the request to be made by electronic or any other means reasonably designed to reach the customer. Additionally, if a customer receiving the request for updated information does not indicate to the contrary, the information previously provided is deemed verified. Another burden imposed regards a determination of whether additional disclosure should be provided to a customer that notifies the FCM of any material changes. The rule change places this burden with the Member or Associate that currently solicits and communicates with the customer, and therefore, knows the customer best. The burdens imposed by the rule change are necessary and appropriate to ensure that customers have full and appropriate disclosures of the risks of futures trading.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NFA worked with its Member Advisory Committees in developing the rule change. NFA did not, however, publish the rule change to the membership for comment. NFA did not receive comment letters concerning the rule change.

[6] 15 U.S.C. 78o–3(k)(2)(B).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

On June 28, 2010, the CFTC notified NFA that it had approved the rule change, and therefore, NFA is permitted to make the amendments effective as of this date.

At any time within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) 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–NFA–2010–03.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NFA–2010–03. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NFA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NFA–2010–03 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62644; File No. SR–ISE–2010–61]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Crossing Mechanisms

August 4, 2010.

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 30, 2010, the International Securities Exchange, LLC ("ISE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt changes to its crossing mechanisms to adopt an auto-match feature. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

[7] 17 CFR 200.30–3(a)(73).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Price Improvement Mechanism ("PIM") and Facilitation Mechanism allow members to enter two-sided orders for execution with the possibility of the agency order receiving price improvement.[3] In both mechanisms, an agency order is submitted to the ISE by the initiating member with a matching guaranteed contra-side order equal to the full size of the agency order. The agency side of this two-sided order is then exposed to market participants during a one-second auction to give them an opportunity to compete so that they may participate in the execution of the agency order. Currently, in both mechanisms, the contra-side order must represent a single price.

The purpose of the proposal is to add step-up-and-match functionality (the "auto-match feature") to both mechanisms for an initiating member to submit a contra-side order that will automatically match both the price and size of all competing interest (*i.e.*, auction responses, quotes and orders) at any price level achieved during the auction or only up to a designated limit price. As is currently the case with both mechanisms, the contra-side order specifies the auction start price. With the auto-match feature, the contra-side order will automatically match the prices set forth by the competing interest from other market participants up to a specified limit price (the "auto-match limit") if a limit is specified. After the commencement of the auction, the initiating participant would not be able to cancel or modify the auto-match instruction. Currently, there is no ability for members to match better prices in the Facilitation Mechanism.[4] With respect to PIM, currently members can match better prices received during the auction by sending an additional message.[5] With the auto-match feature, initiating members will not respond in the PIM auction at all, but instead must honor the prices set forth by the competing interest. Thus, with respect to both mechanisms, the initiating member would not have control over the prices at which it receives an allocation at the conclusion of the auction.

[3] ISE Rule 716(d) (Facilitation Mechanism); and ISE Rule 723 (Price Improvement Mechanism).

Under the proposal, at the conclusion of a Facilitation Mechanism or PIM auction, if an initiating member elects to use the auto-match feature, the contra-side of the agency order will be allocated its full size at each price level where there are competing quotes or orders, up to the auto-match limit if one is specified, until a price level is reached where the balance of the agency order can be fully executed. At such price level, the contra-side order will be allocated the greater of one contract or 40% of the size of the agency order. The following examples illustrate how the proposed auto-match feature will operate in the Facilitation and PIM auctions.

Assume the NBBO is $10.60 bid and $10.70 offered. An agency order to sell 50 contracts at $10.65 is entered into the Facilitation Mechanism or PIM by the initiating member with a contra-side buy order that has an auto-match limit of $10.70:

- If one response is received for 10 contracts to buy at $10.70, the agency order will receive 20 contracts at $10.70 (10 against the response and 10 against the contra-side order) and 30 contracts at $10.65 (against the contra-side order).
- If there is one response for 10 contracts to buy at $10.70 and two responses each for 5 contracts to buy at $10.65, the agency order will receive 20 contracts at $10.70 (10 against the response and 10 against the contra-side order), and then the balance of the 30 contracts will be allocated between the contra-side order and the two responses at $10.65 as follows: 20 contracts would be allocated to the contra-side order (40% of the initial order); and 5

[4] The Facilitation Mechanism conducts blind auctions. This is also the case with the actions conducted through the CBOE's Automated Improvement Mechanism ("AIM"). CBOE Rule 6.74A; Exchange Act Release No. 53222 (February 3, 2006), 71 FR 7089 (February 10, 2006) (Order approving SR–CBOE–2005–60) ("AIM Approval Order").

[5] Responses received during a PIM auction are broadcast to all market participants. This is also the case with the Boston Stock Exchange's Price Improvement Period. NASDAQ OMX BX Rules, Chapter V., Sec. 18.

contracts would be allocated to each of the responding participants.

• Under the current rules, the agency order in both examples would sell 10 contracts at $10.70 and 40 contracts at $10.65. Thus, the proposed auto-match feature benefits the agency order because it sells an additional 10 contracts at the better price.

Both mechanisms allow for broad participation in their competitive auctions by all types of market participants (*e.g.*, public customers, broker-dealers and market makers). All market participants are able to receive the auction broadcast and may respond by submitting competing interest (*i.e.*, responses, orders and quotes). All agency orders entered into the mechanisms will continue to be broadly exposed in the auction before the initiating member can execute against the agency order via the auto-match feature.

The Exchange notes that when the initiating member selects the auto-match feature prior to the start of an auction, the available liquidity at improved prices is increased and competitive final pricing is out of the initiating member's control. The Exchange believes that the proposal, if approved, will increase competition in the auctions, will provide more options contracts with price improvement and incent market participants to initiate more auctions with the auto-match feature. Increases in the number of auctions initiated on the Exchange using the mechanisms will directly correlate with an increase in the number of agency orders that are provided with the opportunity to receive price improvement over the NBBO.

The Exchange also notes that this auto-match feature has been implemented by two other options exchanges with respect to their automated price-improvement auction facilities,[6] and that these automated price improvement auction facilities are substantially similar to the ISE's mechanisms. The ISE has separately defined mechanisms, rather than one crossing rule like the Chicago Board Options Exchange's Automated Price Improvement Mechanism ("AIM") because the Exchange developed the electronic auction functionalities over time since its launch in 2000.[7] The CBOE's AIM rule was first adopted in 2006 and currently includes characteristics of the ISE's Facilitation Mechanism and PIM, with provisions applying to orders under 50 contracts similar to the ISE's PIM and provisions applying to orders over 50 contracts similar to the ISE's Facilitation Mechanism.[8] The AIM auctions are blind like the ISE's Facilitation, whereas the BOX Price Improvement Period broadcasts responses received during the auctions as does the ISE's PIM. While there are variations among all of these crossing facilities, they all operate on the same fundamental principles that crossing orders are broadcast to all (or in the case of AIM, a sub-set of) market participants to give them an opportunity to participate in the trade and to provide the agency order that is being executed an opportunity for price improvement. An auto-match feature has the same effect of increasing the opportunity for price improvement within all of these auction facilities regardless of the variations in functionality.

The CBOE's AIM was approved with the auto-match feature, which applies regardless of the size of the order. In the approval order for AIM, the Commission discussed this functionality specifically and found that the auto-match feature would not unfairly discriminate against other AIM participants, and that the blind auction would not necessarily deprive auction participants with information necessary to participate in the auctions.[9] Subsequently, the BOX added an auto-match feature to its Price Improvement Period.[10] Even though the BOX Price Improvement Period functionality has variations from the AIM functionality (such as the auctions not being blind like AIM), the Commission permitted the rule change to become effective on filing indicating that the variations between AIM and PIP were not relevant to the approval of the auto-match feature. In the same fashion, ISE's proposal to add an auto-match feature to its crossing mechanisms does not raise any new or unique policy issues that were not considered at the time the Commission approved AIM.

The Exchange will provide the Commission with the following data: (1) The percentage of trades in which the entering member submitted a step-up instruction with a limit price and the percentage submitted without a limit price; and (2) the average amount of price improvement provided to orders when the entering member designated a step-up limit and the average amount of price improvement provided to orders when the entering member submitted a step-up instruction without a limit versus the average versus the average amount of price improvement provided to orders when the entering member did not choose to use the step-up feature.[11]

After effectiveness of the proposal, and at least one week prior to implementation of the rule change, ISE will issue a notice to members informing them of the implementation date of the auto-match feature. This will give ISE members an opportunity to make any necessary modifications to coincide with the implementation date.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b),[12] in general, and Section 6(b)(5)[13] in particular, that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and in

[6] AIM Approval Order, *supra* note 4; NASDAQ OMX BX Rules, Chapter V., Sec. 18 (The Price Improvement Period ("PIP")); Securities Exchange Act Release No. 61805 (March 31, 2010), 75 FR 17454 (April 6, 2010) (Notice of Filing and Immediate Effectiveness of SR–BX–2010–22) ("BOX Auto-Match Release").

[7] The ISE adopted the Facilitation Mechanism in 2000 at the time it gained approval of its exchange registration. Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11401 (March 2, 2000) (File No. 10–127) (Order Granting Registration as a National Securities Exchange); Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (Findings and Opinion of the Commission). The Facilitation Mechanism is a facility for crossing block-size orders (i.e., greater than 50 contracts) in the standard trading increments. The ISE subsequently gained approval of the PIM at the end of 2004. Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (Approving SR–ISE–2003–06). The PIM allows for the execution of orders at penny increments even when the standard minimum trading increment is greater than one penny and for the inclusion of orders that are less than 50 contracts.

[8] CBOE Rule 6.74A.

[9] AIM Approval Order, *supra* note 4.

[10] BOX Auto-Match Release, *supra* note 6.

[11] Certain aspects of the PIM were approved on as a pilot, which has been extended annually since its initial approval in late 2004. Securities Exchange Act Release No. 52027 (July 13, 2005), 70 FR 41804 (July 20, 2005) (SR–ISE–2005–30) (Extending PIM Pilot Through July 18, 2006); Securities Exchange Act Release No. 54146 (July 14, 2006), 71 FR 41490 (July 21, 2006) (SR–ISE–2006–39) (Extending PIM Pilot through July 18, 2007); Securities Exchange Act Release No. 56106 (July 19, 2007), 72 FR 40914 (July 25, 2007) (SR–ISE–2007–62) (Extending PIM Pilot Through July 25, 2007); Securities Exchange Act Release No. 56156 (July 27, 2007), 72 FR 43305 (August 3, 2007) (SR–ISE–2007–66) (Extending PIM Pilot through July 18, 2008); and Securities Exchange Act Release No. 58197 (July 18, 2008), 73 FR 43810 (July 28, 2008) (SR–ISE–2008–60) (Extending PIM Pilot through July 17, 2009); and Securities Exchange Act Release No. 60333 (July 17, 2009), 74 FR 36792 (July 24, 2009) (SR–ISE–2009–52) (Extending PIM Pilot through July 17, 2009 [sic]). The Commission notes that the PIM pilot was recently extended again through July 17, 2011. Securities Exchange Act Release No. 62513 (July 16, 2010), 75 FR 43221 (July 23, 2010) (SR–ISE–2010–75). The Exchange has provided the Commission with monthly data reports related to the execution of orders in the PIM since its approval in 2004.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest. In particular, the Exchange believes that the proposal, if approved, will result in additional liquidity available at improved prices with competitive final pricing out of the initiating member's control, thus increasing competition in the crossing auctions and providing more options contracts with price improvement. As a result of the increased opportunity for price improvement, the Exchange believes that market participants will be incented to initiate more crossing actions. Increases in the number of auctions will directly correlate with an increase in the number of customer orders that are provided with the opportunity to receive price improvement over the NBBO.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [16] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay because the proposed changes will allow immediate increases in the liquidity available at improved prices. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.[18]

At any time within the 60-day period beginning on the date of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2010–61 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–61. 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,[19] 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–61 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19657 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6).

[18] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/ules/sro.shtml.*

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62650; File No. SR–CHX–2010–18]

Self-Regulatory Organizations; The Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Alter its Tiered Schedule of Fees and Rebates for Participants for Trade Executions of Single-Sided Orders in Securities Priced Over One Dollar

August 4, 2010.

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 30, 2010, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. CHX has filed the proposal pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The CHX proposes to amend its Schedule of Participant Fees and Assessments (the "Fee Schedule"), effective August 1, 2010, to alter its tiered schedule of fees and rebates for Participants for trade executions of single-sided orders in securities priced over one dollar that occur within the Exchange's Matching System. The text of this proposed rule change is available on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm* and in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549.

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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

Through this filing, the Exchange is proposing to amend its Fee Schedule, effective August 1, 2010, to alter its tiered schedule of fees and rebates for Participants for trade executions of single-sided orders in securities priced over one dollar. The fee imposed on Participants for removing liquidity from the Matching System (the "take fee") or credit given to Participants which display orders in the Matching System which result in trade executions (the "provide credit") currently varies depending on the executing Participant's Average Daily Volume ("ADV").[5] A Participant's ADV is determined by the number of shares it has executed as a liquidity provider in any and all trading sessions on average per trading day (excluding partial trading days) across all tapes on the trading facilities of the CHX (excluding all cross transactions) for the calendar month in which the executions occurred. There are three volume-based Tiers and the rate of applicable take fees and provide credits vary based upon the Tier into which a Participant falls.

According to this proposal, the Exchange would delete those provisions of the Fee Schedule which vary the take fee based upon the Participant's ADV. In its place, the Exchange proposes to impose a flat take fee of $0.003/share across all Tapes. The Exchange is also proposing to reduce the provide credit for executions in Tape A & C securities from $0.0026/share to $0.0025/share for the lowest Tier of activity, from $0.0028/share to $0.0027/share in the middle Tier and from $0.003/share to $0.0029/share in the highest Tier. For Tape B securities, the provide credit is being reduced from $0.0028/share to $0.0026/share in the lowest Tier, from $0.003/share to $0.0028/share in the middle Tier and from $0.0032/share to $0.0031/share in the highest Tier. The flat provide credit paid to CHX-registered Institutional Brokers when they represent agency orders which execute in the CHX Matching System in Tape B securities will be reduced from $0.0032 to $0.0031/share.

Furthermore, the Exchange proposes to alter the ADV requirements for Participants to qualify for the escalating Tiers and associated provide credits. The ADV requirement for the lowest Tier of activity would be increased from 500,000 shares or less daily to 1,000,000 shares or less daily. The middle Tier would be changed from an ADV which is greater than 500,000 and up to and including 5,000,000 shares to an ADV which is greater than 1,000,000 and up to and including 5,000,000 shares. The ADV for the highest Tier will remain at its current level of greater than 5,000,000 shares.

Finally, we propose to remove the exclusion of trade activity in securities priced under $1 in the ADV calculation. Going forward, executions in such securities would count towards the determination of a Participant's monthly ADV.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(4) of the Act[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members. Among other things, the Exchange believes that these changes better tailor the existing tiered fee structure to the amount and type of volume which order sending Participants direct to the Exchange and may attract additional orders to be displayed and executed on our trading facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(B)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4 thereunder[9] because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60-days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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

[5] Through its filing on January 4, 2010, the Exchange instituted a tiered fee and rebate structure based on a Participant's ADV. *See* Securities Exchange Act Release No. 61322 (Jan. 11, 2010), 75 FR 2914 (Jan. 19, 2010) (SR–CHX–2010–01).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

Number SR–CHX–2010–18 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2010–18. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–CHX–2010–18 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19656 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62648; File No. SR–CBOE–2010–071]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Fees Schedule

August 4, 2010.

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 30, 2010, Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by CBOE under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule to make changes related to its Marketing Fee Program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

CBOE proposes to amend its Marketing Fee Program to increase the amount of the fee that is assessed in options on the SPDR S&P 500 (SPY) and options on the iShares Russell 2000 Index (IWM). Currently, the marketing fee is assessed at the rate of $0.10 per contract in SPY options and $0.00 per contract in IWM options. CBOE proposes to assess the marketing fee at the rate of $0.25 per contract in SPY options and IWM options, which is consistent with the marketing fee that CBOE assesses in nearly all of the option classes participating in the Penny Pilot Program. CBOE also notes that it would be consistent with the fee NYSE Amex assesses for its payment for order flow program in option classes participating in the Penny Pilot Program.

CBOE proposes to implement this change to the marketing fee program beginning on August 1, 2010. CBOE is not amending its Marketing Fee Program in any other respects.

(b) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4)[6] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE Trading Permit Holders and other persons using its facilities. The Exchange believes the fee change proposed by this filing is equitable and reasonable in that it will allow the Exchange to be competitive with the fees assessed by the NYSE Amex in its payment for order flow program.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and subparagraph (f)(2) of Rule 19b–4 [8] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–CBOE–2010–071 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–071. 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,[9] 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 Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–071 and should be submitted on or before August 31, 2010.

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov*.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19655 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62647; File No. SR–BX–2010–053]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Rules of the Boston Options Exchange Group, LLC To Enable the Listing and Trading of Options on the Sprott Physical Gold Trust

August 4, 2010.

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, 2010, NASDAQ OMX BX, Inc. (the "Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[9] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov*.

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ OMX BX, Inc. (the "Exchange") proposes to amend the Rules of the Boston Options Exchange Group, LLC ("BOX") to enable the listing and trading of options on the Sprott Physical Gold Trust. A copy of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Recently, the U.S. Securities and Exchange Commission ("SEC" or "Commission") authorized the listing and trading on BOX of options on the SPDR Gold Trust,[5] the iShares COMEX Gold Trust,[6] the iShares Silver Trust,[7] the ETFS Gold Trust,[8] the ETFS Silver Trust,[9] the ETFS Palladium Trust [10] and the ETFS Platinum Trust.[11] Now, the Exchange proposes that BOX list and trade options on PHYS.

Under Chapter IV, Section 3(i) of the BOX Rules, Exchange-Traded Fund Shares ("ETFs") must meet the following

[5] *See* Securities Exchange Act Release No. 58136 (July 10, 2008), 73 FR 40884 (July 16, 2008) (SR–BSE–2008–41).

[6] *See* Securities Exchange Act Release No. 59055 (December 4, 2008), 73 FR 75148 (December 10, 2008) (SR–BSE–2008–51).

[7] *Id.*

[8] *See* Securities Exchange Act Release No. 62464 (July 7, 2010), 75 FR 40007 (July 13, 2010) (SR–BX–2010–045).

[9] *Id.*

[10] *Id.*

[11] *Id.*

criteria to be eligible as underlying securities for options traded on BOX: The ETFs must (i) be traded on a national securities exchange; (ii) be defined as an "NMS" stock under Rule 600 of Regulation NMS; and (iii)(a) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments, including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in broad based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); (b) represent interests in a trust that holds a specified non-U.S. currency or currencies deposited with the trust or similar entity when aggregated in some specified minimum number that may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust ("Currency Trust Shares"); (c) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool ETFs"); or (d) represent interests in the SPDR® Gold Trust, iShares COMEX Gold Trust, iShares Silver Trust, ETFS Gold Trust, ETFS Silver Trust, ETFS Palladium Trust or the ETFS Platinum Trust.[12] This rule change proposes to expand the types of ETFs that may be approved for options trading on BOX to include PHYS.

Apart from allowing PHYS to be an underlying security for options traded on BOX as described above, the listing standards for ETFs will remain unchanged from those that apply under current BOX rules. ETFs on which options may be listed and traded must still be listed and traded on a national securities exchange and must satisfy the other listing standards set forth in Chapter IV, Section 3(i) of the BOX Rules.

Specifically, in addition to satisfying the aforementioned listing requirements, ETFs must either (1) meet the criteria and guidelines set forth in paragraphs (a) and (b) of Chapter IV, Section 3 of the BOX Rules or (2) be available for creation or redemption each business day from or through the issuing trust, investment company, commodity pool or other entity in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue ETF shares in a specified aggregate number even if some or all of the investment assets and/or cash required to be deposited have not been received by the issuer, subject to the condition that the person obligated to deposit the investment assets has undertaken to deliver them as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer of the ETF, all as provided in the ETF's prospectus.

The current continued listing standards for options on ETFs will apply to options on PHYS. Specifically, under Chapter IV, Section 4(h) of the BOX Rules, options on ETFs may be subject to the suspension of opening transactions as follows: (i) In the case of options covering ETFs approved pursuant to Section 3(i)(A)(1), in accordance with the terms of subparagraphs (b)(i), (ii) and (iii) of Chapter IV, Section 4 of the BOX Rules; (ii) in the case of options covering ETFs approved pursuant to Chapter IV, Section 3(i)(A)(2) of the BOX Rules, following the initial twelve-month period beginning upon the commencement of trading in the ETF on a national securities exchange,[13] if there are fewer than 50 record and/or beneficial holders of the ETF for 30 or more consecutive trading days; (iii) the value of the index, portfolio of securities, non-U.S. currency, or portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or Financial Instruments and Money Market Instruments on which the ETF is based is no longer calculated or available; or (iv) an event occurs or condition exists that in the opinion of BOXR makes further dealing in such options on BOX inadvisable.

Additionally, PHYS shall not be deemed to meet the requirements for continued approval, and BOX shall not open for trading any additional series of option contracts of the class covering PHYS, if PHYS ceases to be an "NMS stock" as provided for in Chapter IV, Section 4(b)(vi) of the BOX Rules or PHYS is halted from trading on its primary market.

The addition of PHYS to Chapter IV, Section 3(i) of the BOX Rules will not have any effect on the rules pertaining to position and exercise limits[14] or margin requirements.[15]

The Exchange represents that its surveillance procedures applicable to trading in options on PHYS will be similar to those applicable to all other options on other ETFs currently traded on BOX. Also, the Exchange may obtain information from the New York Mercantile Exchange, Inc. ("NYMEX") (a member of the Intermarket Surveillance Group) related to any financial instrument that is based, in whole or in part, upon an interest in or performance of gold.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[16] in general, and Section 6(b)(5) of the Act,[17] in particular, in that it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the Exchange believes that amending the BOX Rules to accommodate the listing and trading of options on PHYS will benefit investors by providing them with valuable risk management tools.

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 not necessary or appropriate in furtherance of the purposes of the Act.

[12] *See* Chapter IV, Section 3(i) of the BOX Rules.

[13] The ETF must also be defined as an NMS Stock under Rule 600 of Regulation NMS.

[14] *See* Chapter III, Sections 7 and 9 of the BOX Rules.

[15] *See* Chapter XIII of the BOX Rules.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the Exchange can list and trade options on the Sprott Physical Gold Trust immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest to permit the Exchange to list and trade options on the Sprott Physical Gold Trust without delay.[20] The Commission notes the proposal is substantively identical to proposals that were recently approved by the Commission, and does not raise any new regulatory issues.[21] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–BX–2010–053 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2010–053. 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,[22] 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the 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–BX–2010–053 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19654 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

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[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[20] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] *See* Securities Exchange Act Release No. 62463 (July 7, 2010), 75 FR 40005 (July 13, 2010) (SR–CBOE–2010–043).

[22] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov*.

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62643; File No. SR–NSX–2010–10]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Post Regular Trading Hours Trading Session

August 4, 2010.

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 30, 2010, National Stock Exchange, Inc. ("NSX®" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NSX proposes to extend the Exchange's post regular trading hours session.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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[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).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

With this rule change, the Exchange is proposing to extend the Exchange's post regular trading hours trading session from 6:30 p.m. Eastern Time ("ET") until 8 p.m. ET.

Currently, the Exchange's Regular Trading Hours, as such term is defined in NSX Rule 1(R)(1), are from 9:30 a.m. until 4 p.m. ET. The pre-Regular Trading Hours trading session is from 8 a.m. until 9:30 a.m. ET, and the post-Regular Trading Hours trading session is from 4 p.m. until 6:30 p.m. ET. Pursuant to Rule 11.1(a), the Board of Directors of the Exchange has determined to extend the post-Regular Trading Hours trading session until 8 p.m. ET.[5] Pursuant to Rule 11.1(a), the Board's determination to extend the Exchange's post-Regular Trading Hours to 8:00 p.m. ET will be noticed to ETP Holders pursuant to Regulatory Circular. In addition, the text of Rule 11.1(a) is supplemented to reflect proposed Exchange business hours.

The Exchange's surveillance programs and resources presently in force with respect to the Exchange's current post-Regular Trading Hours trading session, which (prior to the proposed operative date of August 2, 2010 of the instant rule filing) closes at 6:30 p.m. ET, will be utilized to effectively surveil activities on the Exchange during the additional hour and a half of post-Regular Trading Hours proposed under the instant rule filing. The Exchange believes that its current surveillance and other regulatory programs are sufficiently robust and capable of fulfilling the Exchange's regulatory obligations with respect to the proposed extended post-Regular Trading Hours. The Exchange will continue to monitor its market to identify any need for, and to implement, such regulatory enhancements and additional actions as may be necessary from time to time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed, among other things, to promote clarity, transparency and full disclosure, in so doing, to prevent fraudulent and manipulative acts and practices, 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. Moreover, the proposed rule change is not discriminatory in that all ETP Holders are eligible to participate (or elect to not participate) in effectuating transactions on the Exchange outside of Regular Trading Hours on the same terms and conditions.

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 Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[10] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that the Exchange's proposal is substantially similar to the rules of other national securities exchanges and does not raise any new substantive issues.[11] Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and hereby designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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.[13]

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

[5] Each of Nasdaq, Arca, ISE, and DirectEdge (A and X) operate extended trading sessions until 8 p.m. ET.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See supra* note 5. The Commission previously has waived the operative delay for similar rule change proposals of other exchanges under Rule 19b–4(f)(6) on the same basis. *See, e.g.*, Securities Exchange Act Release No. 59136 (December 22, 2008), 73 FR 80484 (December 31, 2008) (SR–ISE–2008–95) (wherein the Commission waived the 30-day operative delay of a rule filing extending ISE's post regular trading hours from 5 p.m. to 8:00 p.m. ET). *See also* Securities Exchange Act Release No. 59963 (May 21, 2009), 74 FR 25787 (May 29, 2009) (SR–BATS–2009–012) and Securities Exchange Act Release No. 58685 (September 30, 2008), 73 FR 58277 (October 6, 2008) (SR–ISE–2008–73) (in each case, the Commission waived the 30-day operative delay of rule filings establishing post-regular trading hours sessions until 5 p.m. ET).

[12] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(3)(C).

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSX–2010–10 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2010–10. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSX–2010–10 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19652 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62642; File No. SR–CHX–2010–19]

Self-Regulatory Organizations; The Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Order Cancellation Fee

August 4, 2010.

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 30, 2010, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. CHX has filed the proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The CHX proposes to amend its Schedule of Participant Fees and Assessments (the "Fee Schedule"), effective August 1, 2010, to amend its order cancellation fee for Participants entering and subsequently cancelling orders under certain circumstances. The text of this proposed rule change is available on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm* and in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549.

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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX 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

Through this proposal, the Exchange is seeking to amend its Fee Schedule to exempt from its existing Order Cancellation Fee all orders, transactions and cancellation activity in Exchange Traded Funds ("ETFs"), Exchange Traded Notes ("ETNs") or Exchange Traded Vehicles ("ETVs"), collectively referred to as Exchange Traded Products ("ETPs"). The Order Cancellation Fee would continue in its current form and effect with respect to all other securities.

Beginning in January 2010, the Exchange's published Fee Schedule imposed a charge for order cancellations submitted by Participants whose orders rarely are at or near the National Best Bid or Offering ("NBBO").[5] The application of the order cancellation fee depends on a calculation (done on a Participant-by-Participant basis) involving the number of wide orders (defined as display-eligible orders in the Matching System which are 2 or more cents away from the NBBO), quotable orders (all other display-eligible orders), the number of trades executed and number of cancellations submitted by a Participant in a month.[6] The purpose of the order cancellation fee was to incent Participants to submit orders which are close to the NBBO (and are therefore more likely to be executed) or compensate the Exchange for the systems and operational costs and burdens associated with handling and recording orders which rarely execute.

Since the imposition of the order cancellation fee, however, the Exchange has observed that the number of unexecuted and displayed orders has actually increased for certain Participants. In order to avoid application of the cancellation fee, certain Participants are submitting Quotable orders (*i.e.*, those within 2 cents of the NBBO) to the CHX's Matching System, but for an extremely short duration (*e.g.*, 20 milliseconds). Due to the short duration of the order, the amount of trade activity generated by such orders is negligible. This

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 61392 (Jan. 21, 2010), 75 FR 4436 (Jan. 27, 2010) (SR–CHX–2010–02).

[6] The activity also must have occurred in our Regular Trading Session and be in securities priced $1 per share or more. Cancellations arising from Immediate or Cancel or Fill or Kill order types are excluded from the calculation. Executions of cross orders are also excluded.

quotation activity also tends to exacerbate the operational costs which the Exchange was seeking to avoid in creating the order cancellation fee.

In order to better target the wide quotations which originally were causing the problems which led to the creation of the order cancellation fee, we are proposing to exempt ETP activity from the cancellation fee. The Exchange has observed that those firms entering the limited durational orders described above conduct much of their business on our trading facilities in ETP securities. By exempting ETP securities from the order cancellation fee, we would remove much of their incentive to submit quotable orders with a very limited lifespan. The fee would continue to apply to activity in all other securities where it appears to have the intended impact. The Exchange considered other alternatives, such as imposing a minimum duration on orders to qualify as "quotable" for purposes of the fee computation. The Exchange believes, however, that such a requirement would introduce an excessive amount of complexity to the determination of whether the order cancellation fee applies and could have the effect of discouraging Participants from sending any orders to the Exchange for display and execution. The proposed changes to the Cancellation Fee would go into effect on August 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(4) of the Act[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members. Among other things, the Exchange believes that the exclusion of ETP securities from the existing order cancellation fee should help the Exchange to better address the operational costs and burdens associated with the processing and storage of orders well outside the NBBO.

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 Regarding the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(B)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder[10] because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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–CHX–2010–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2010–19. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the 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 publicly available. All submissions should refer to File Number SR–CHX–2010–19 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19651 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62626; File No. SR–NYSEAmex–2010–73]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding 75 Options Classes to the Penny Pilot Program

August 2, 2010.

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 20, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4)

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend [sic] identify the next 75 options classes to be added to the Penny Pilot Program for Options ("Penny Pilot" or "Pilot") on August 2, 2010. The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form.[3] A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Amex proposes to identify the next 75 options classes to be added to the Penny Pilot effective August 2, 2010. The Exchange recently filed to extend and expand the Pilot through December 31, 2010.[4] In that filing, the Exchange had proposed expanding the Pilot on a quarterly basis to add the next 75 most actively traded multiply listed options classes based on national average daily volume for the six months prior to selection, closing under $200 per share on the Expiration Friday prior to expansion, except that the month immediately preceding their addition to the Penny Pilot will not be used for the purpose of the six month analysis.[5]

NYSE Amex proposes adding the following 75 options classes to the Penny Pilot on August 2, 2010, based on national average daily volume from January 1, 2010 through June 30, 2010:

Nat'l Ranking	Symbol	Security name	Nat'l Ranking	Symbol	Security name
199	MBI	MBIA Inc	316	CB	Chubb Corp.
205	MA	Mastercard Inc	320	ADM	Archer-Daniels-Midland Co.
224	ATPG	ATP Oil & Gas Corp/United States	322	HSY	Hershey Co/The.
226	YUM	Yum! Brands Inc	323	TXT	Textron Inc.
232	RCL	Royal Caribbean Cruises Ltd	324	GGP	General Growth Properties Inc.
238	BPOP	Popular Inc	325	NOV	National Oilwell Varco Inc.
248	EK	Eastman Kodak Co	326	TWX	Time Warner Inc.
252	CNX	Consol Energy Inc	327	XOP	SPDR S&P Oil & Gas Exploration & Production ETF.
260	DCTH	Delcath Systems Inc	328	MYL	Mylan Inc/PA.
274	MTG	MGIC Investment Corp	329	TSO	Tesoro Corp.
277	PXP	Plains Exploration & Production Co	330	CI	CIGNA Corp.
278	GPS	Gap Inc/The	331	ESI	ITT Educational Services Inc.
280	TSL	Trina Solar Ltd	332	NKE	NIKE Inc.
282	EWW	iShares MSCI Mexico Investable Market Index Fund.	335	FIS	Fidelity National Information Services Inc.
283	CRM	Salesforce.com Inc	336	SUN	Sunoco Inc.
286	SWN	Southwestern Energy Co	338	BBBY	Bed Bath & Beyond Inc.
287	HBAN	Huntington Bancshares Inc/OH	340	APWR	A–Power Energy Generation Systems Ltd.
288	EOG	EOG Resources Inc	341	FWLT	Foster Wheeler AG.
290	APA	Apache Corp	342	LNC	Lincoln National Corp.
291	VVUS	Vivus Inc	343	RSH	RadioShack Corp.
292	JDSU	JDS Uniphase Corp	344	TYC	Tyco International Ltd.
293	ACI	Arch Coal Inc	345	CL	Colgate-Palmolive Co.
294	NE	Noble Corp	346	FXP	ProShares UltraShort FTSE/Xinhua China 25.
296	BAX	Baxter International Inc	347	NTAP	NetApp Inc.
297	ADSK	Autodesk Inc	348	SO	Southern Co.
299	KRE	SPDR KBW Regional Banking ETF	349	PHM	Pulte Group Inc.
300	XL	XL Group Plc	350	HOT	Starwood Hotels & Resorts Worldwide Inc.
302	WLT	Walter Energy Inc	351	QLD	ProShares Ultra QQQ.
303	IBN	ICICI Bank Ltd	352	VRSN	VeriSign Inc.
305	EWY	iShares MSCI South Korea Index Fund.	353	PCL	Plum Creek Timber Co Inc.
306	WHR	Whirlpool Corp	354	NBR	Nabors Industries Ltd.
307	BHI	Baker Hughes Inc	355	ESRX	Express Scripts Inc.
308	KMP	Kinder Morgan Energy Partners LP	356	ACAS	American Capital Ltd.
309	MRO	Marathon Oil Corp	357	XLNX	Xilinx Inc.
310	AGO	Assured Guaranty Ltd	358	DO	Diamond Offshore Drilling Inc.

[3] The Commission notes that there are no changes to the rule text and no exhibit 5 was attached to the form 19b–4.

[4] *See* Exchange Act Release No. 61106 (December 3, 2009) FR 74–65193 (December 9, 2009).

[5] Index products would be included in the expansion if the underlying index level was under 200.

Nat'l Ranking	Symbol	Security name	Nat'l Ranking	Symbol	Security name
311	GIS	General Mills Inc	359	CMA	Comerica Inc.
312	ANR	Alpha Natural Resources Inc	360	KEY	KeyCorp.
314	GENZ	Genzyme Corp			

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest, by identifying the options classes to be added to the Pilot in a manner consistent with prior approvals and filings.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A)(i) [6] of the Act and Rule 19b–4(f)(1) [7] thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEAmex–2010–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2010–73. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the NYSE Amex's principal office and on its Web site at *http://www.nyse.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 No. SR–NYSEAmex–2010–73 and should be submitted on or before August 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–19604 Filed 8–9–10; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78s(b)(3)(A)(i).

[7] 17 CFR 240.19b–4(f)(1).

[8] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2010–0049]

Notice of Senior Executive Service Performance Review Board Membership

AGENCY: Social Security Administration.

ACTION: Notice of Senior Executive Service Performance Review Board Membership.

Title 5, U.S. Code, 4314(c)(4), requires that the appointment of Performance Review Board members be published in the **Federal Register** before service on said Board begins.

The following persons will serve on the Performance Review Board which oversees the evaluation of performance appraisals of Senior Executive Service members of the Social Security Administration:

Sean Brune

JoEllen Felice

Brad Flick*

Alan Heim

Pete Herrera

Bonnie Kind

Eileen McDaniel

Steven Patrick

Roy Snyder

Tina Waddell

Daryl Wise

Sheryll Ziporkin*

*New member.

Dated: August 4, 2010.

Reginald F. Wells,

Deputy Commissioner for Human Resources.

[FR Doc. 2010–19639 Filed 8–9–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 7115]

Issuance of a Presidential Permit Authorizing the Construction, Operation, and Maintenance of the San Diego-Tijuana Airport Cross Border Facility Near San Diego, California, at the International Boundary Between the United States and Mexico

SUMMARY: The Department of State issued a Presidential permit, effective August 3, 2010, authorizing Otay-Tijuana Venture, L.L.C., to construct, operate, and maintain an international pedestrian bridge called San Diego-Tijuana Airport Cross Border Facility near San Diego, California, at the international boundary between the United States and Mexico. In making this determination, the Department consulted with other federal agencies, as required by Executive Order 11423, as amended.

FOR FURTHER INFORMATION CONTACT: Stewart Tuttle, U.S.-Mexico Border Affairs Coordinator, via e-mail at *WHA–BorderAffairs@state.gov;* by phone at 202–647–9894; or by mail at Office of Mexican Affairs—Room 3909, Department of State, 2201 C St., NW., Washington, DC 20520. Information about Presidential permits is available on the Internet at *http://www.state.gov/p/wha/rt/permit/.*

SUPPLEMENTARY INFORMATION: Following is the text of the issued permit:

By virtue of the authority vested in me as Under Secretary of State for Economic, Energy, and Agricultural Affairs, including those authorities under Executive Order 11423, 33 FR 11741, as amended by Executive Order 12847 of May 17, 1993, 58 FR 29511, Executive Order 13284 of January 23, 2003, 68 FR 4075, and Executive Order 13337 of April 30, 2004, 69 FR 25299; and Department of State Delegation of Authority 118–2 of January 26, 2006; having considered the environmental effects of the proposed action in accordance with the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321 *et seq.*) and other statutes relating to environmental concerns; having considered the proposed action in accordance with the National Historic Preservation Act (80 Stat. 917, 16 U.S.C. 470f *et seq.*); and having requested and received the views of various of the federal departments and other interested persons; I hereby grant permission, subject to the conditions herein set forth, to Otay-Tijuana Venture, LLC (hereinafter referred to as "permittee") to construct, operate, and maintain a new international pedestrian bridge (the proposed San Diego-Tijuana Airport Cross Border Facility) connecting in Mexico to the Tijuana International Airport.

The term "facilities" as used in this permit means the bridge and any land, structure, or installations appurtenant thereto.

The term "United States facilities" as used in this permit means that part of the facilities in the United States.

This permit is subject to the following conditions:

Article 1. The United States facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any amendment thereof. This permit may be terminated at the will of the Secretary of State or the Secretary's delegate or may be amended by the Secretary of State or the Secretary's delegate at will or upon proper application therefore. The permittee shall make no substantial change in the location of the United States facilities or in the operation authorized by this permit until such changes have been approved by the Secretary of State or the Secretary's delegate.

Article 2. The standards for, and the manner of, the construction, operation, and maintenance of the United States facilities shall be subject to inspection and approval by the representatives of appropriate federal, state and local agencies. The permittee shall allow duly authorized officers and employees of such agencies free and unrestricted access to said facilities in the performance of their official duties.

Article 3. The permittee shall comply with all applicable federal, state, and local laws and regulations regarding the construction, operation, and maintenance of the United States facilities and with all applicable industrial codes. The permittee shall obtain the requisite permits from state and local government entities and relevant federal agencies.

Article 4. Upon the termination, revocation, or surrender of this permit, and unless otherwise agreed by the Secretary of State or the Secretary's delegate, the United States facilities in the immediate vicinity of the international boundary shall be removed by and at the expense of the permittee within such time as the Secretary of State or the Secretary's delegate may specify, and upon failure of the permittee to remove this portion of the United States facilities as ordered, the Secretary of State or the Secretary's delegate may direct that possession of such facilities be taken and that they be removed at the expense of the permittee; and the permittee shall have no claim for damages by reason of such possession or removal.

Article 5. This permit and the operation of the United States facilities hereunder shall be subject to the limitations, terms, and conditions issued by any competent agency of the United States Government, including but not limited to the Department Of Homeland Security (DHS) and the United States Section of the International Boundary and Water Commission (USIBWC). This permit shall continue in force and effect only so long as the permittee shall continue the operations hereby authorized in exact accordance with such limitations, terms, and conditions.

Article 6. When, in the opinion of the President of the United States, the national security of the United States demands it, due notice being given by the Secretary of State or the Secretary's delegate, the United States shall have the right to enter upon and take possession of any of the United States facilities or parts thereof; to retain possession, management, or control thereof for such length of time as may appear to the President to be necessary; and thereafter to restore possession and control to the permittee. In the event that the United States shall exercise such right, it shall pay to the permittee just and fair compensation for the use of such United States facilities upon the basis of a reasonable profit in normal conditions, and the cost of restoring said facilities to as good condition as existed at the time of entering and taking over the same, less the reasonable value of any improvements that may have been made by the United States.

Article 7. Any transfer of ownership or control of the United States facilities or any part thereof shall be immediately notified in writing to the United States Department of State, including the submission of information identifying the transferee. This permit shall remain in force subject to all the conditions, permissions and requirements of this permit and any amendments thereto unless subsequently terminated or amended by the Secretary of State or the Secretary's delegate.

Article 8. (1) The permittee shall acquire such right-of-way grants or easements, permits, and other authorizations as may become necessary and appropriate.

(2) The permittee shall save harmless and indemnify the United States from any claimed or adjudged liability arising out of the construction, operation, or maintenance of the facilities.

(3) The permittee shall maintain the United States facilities and every part thereof in a condition of good repair for their safe operation.

Article 9. The permittee shall reach agreement with U.S. Customs and Border Protection (CBP) on the provision of suitable facilities for the CBP officers to perform their duties at the Cross Border Facility. Such facilities must meet the latest CBP design standards -and-operational requirements which-could-include, but are not limited to, inspection and office space, CBP personnel parking and restrooms, an access road, kennels, and other operationally required components.

Article 10. (1) The permittee shall take all appropriate measures to prevent or mitigate adverse environmental impacts or disruption of significant archeological resources in connection with the construction, operation, and maintenance of the United States facilities, including those mitigation measures set forth in the Final Environmental Assessment and in the Department's Finding of No Significant Impact (FONSI) dated June 22, 2010.

(2) Before beginning construction, the permittee shall obtain the concurrence of the Commissioner of the USIBWC that the project is consistent with the terms of boundary and water treaties between the United States and Mexico and other relevant international agreements in force.

Article 11. The permittee shall file with the appropriate agencies of the United States Government such statements or reports under oath with respect to the United States facilities, and/or permittee's actions in connection therewith, as are now or may hereafter be required under any laws or regulations of the United States Government or its agencies.

Article 12. The permittee shall not begin construction until it has obtained authorization for such construction from the Government of the United States and from the Government of Mexico through the exchange of diplomatic notes. The permittee shall provide written notice to the Department of State at such time as the construction authorized by this permit is begun, and again at such time as construction is completed, interrupted, or discontinued.

Article 13. This permit shall expire ten years from the date of issuance in the event that the permittee has not commenced construction of the United States facilities by that deadline.

In witness whereof, I, Robert D. Hormats, Under Secretary of State for Economic, Energy, and Agricultural Affairs, have hereunto set my hand this 15th day of July 2010 in the City of Washington, District of Columbia.

End Permit text.

Dated: August 4, 2010.

Alex Lee,

Director, Office of Mexican Affairs, Department of State.

[FR Doc. 2010–19725 Filed 8–9–10; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 698]

Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee

AGENCY: Surface Transportation Board.

ACTION: Notice of establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee.

SUMMARY: As required by § 9(a)(2) of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., the Surface Transportation Board hereby gives notice that, following consultation with the General Services Administration, the Board will create the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC), to provide independent advice and policy suggestions to the Board on issues related to the common carrier obligation with respect to the rail transportation of toxic by inhalation hazards (TIH), and specifically, to outline what is a railroad's reasonable response to a shipper's request that it transport TIH cargo. The TIHCCTAC will convene for a two-year period during which the Board anticipates it will produce a report that will include a recommended policy statement for further consideration by the Board. The Board may renew the TIHCCTAC charter if the Board deems it advisable. This notice seeks comments on the proposed TIHCCTAC structure, as outlined below. It also requests nominations for members of the TIHCCTAC.

In the context of its proposed structure, outlined below, the Board seeks input from interested persons on a number of issues, including: (1) What should be the appropriate scope of such a committee's mandate? (2) How would the scope of the committee's mandate affect its utility? (3) What would be the optimum size of such a committee? and (4) How should the committee's membership be allocated among various stakeholder groups to achieve a fairly balanced "cross section of those directly affected, interested, and qualified," as required under FACA, 41 CFR 102–3.60(b)(3).

DATES: Comments regarding the proposed TIHCCTAC structure and scope must be received by 5 p.m. E.D.T., Friday, September 24, 2010. Nominations for members must be received by 5 p.m. E.D.T., Monday, October 25, 2010.

ADDRESSES: All comments and nominations should be submitted to the Board, and may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a nomination in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 698, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Ronald Molteni, Office of the General Counsel, at 202–245–0267. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board, created by Congress in 1996 to take over many of the functions previously performed by the Interstate Commerce Commission, exercises broad authority over transportation by rail carriers, including regulation of railroad rates and service (49 U.S.C. 10701–10747, 11101–11124), as well as the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. 10901–10907) and railroad line sales, consolidations, mergers, and common control arrangements (49 U.S.C. 10902, 11323–11327). As part of its regulatory function, the Board oversees the common carrier obligation.

The common carrier obligation refers to the statutory duty of railroads to provide "transportation or service on reasonable request." 49 U.S.C. 11101(a). A railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable. *G.S. Roofing Prods. Co.* v. *STB,* 143 F.3d 387, 391 (8th Cir. 1998). The common carrier obligation, however, is not absolute, and service requests must be reasonable. *Id.* In recent years, the Board has seen an increasing number of questions arising, both formally and informally, regarding the extent of a railroad's common carrier obligation. As a result, in its docket styled, *Common Carrier Obligation of Railroads,* EP 677, the Board held a hearing on April 24–25, 2008, to hear comments from interested parties on the common carrier obligation and to provide a forum for discussion of that obligation.

That hearing raised issues involving the obligation of railroads to haul hazardous materials, including toxic by inhalation hazards. For many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation. But, according to the railroads, the transportation of these materials subjects them to the potential for extremely high liability in the event of an accident.

Consequently, to allow a more detailed discussion, the Board opened another docket styled, *Common Carrier Obligation of Railroads—Transportation of Hazardous Materials,* EP 677 (Sub-No. 1), and held a hearing on July 22, 2008, to further explore the issues surrounding the transportation of hazardous materials by rail. At that hearing, the Board heard testimony that touched on, among other things, specific potential policy solutions to the liability concern.

In EP 677 (Sub-No. 1), the Board invited parties to comment on what constitutes a reasonable request for service involving the movement of TIH, as well as whether there are unique costs associated with the transportation of hazardous materials, and if so, how railroads recover those costs.

The American Association of Railroads (AAR) suggested that the Board adopt the following policy statement:

> It would not be an unreasonable practice for a rail carrier, under the provisions of 49 U.S.C. 11101(a) and 49 U.S.C. 10702, to require (if it elected to), as a condition of providing common carrier transportation

services, that a TIH materials shipper indemnify and hold harmless the railroad against liability arising from a release of such materials in excess of (1) the maximum amount of insurance that the railroad carries for TIH transport or (2) $500 million for Class I railroads, whichever is greater; and to provide reasonable assurances in the form of insurance or other means to support such indemnity.[1]

Other commentators, particularly those representing TIH shippers' interests, urged the Board to reject this proposed policy statement. But some, while lamenting escalating rates they believe are priced to drive TIH off the railroads, expressed a willingness to explore allocations of excess liability insurance to cover a limited scope of occurrences while not reducing a railroad's incentive to prudently and safely handle and transport TIH.

While the Board views the safe transportation of hazardous materials as crucial to this nation's economic and national security, and the transportation by rail of hazardous materials as vital to our nation's industrial production, the Board is an economic regulator, and, as such, seeks to address the economic component of TIH transport. It hopes to facilitate dialogue regarding and resolution of those economic concerns between and among TIH shippers and the railroads.

The Board believes that an industry-derived solution to the question of what constitutes a reasonable response to a shipper's request that a railroad transport TIH cargo might be a better and potentially more economically sustainable solution than a Board-imposed solution, though the latter remains a lawful alternative in the absence of industry-wide consensus. Accordingly, the Board will place in abeyance docket EP 677 (Sub-No. 1) and will not rule on the railroad industry's proposed policy statement at this time. Instead, the Board proposes to establish the TIHCCTAC to provide independent advice and policy recommendations to the Board. TIHCCTAC will be directed to provide advice on issues pertaining to the common carrier obligation with respect to the rail transportation of TIH, and specifically, the question of what is a railroad's reasonable response to such a request.

The Board anticipates that the TIHCCTAC will consist of a balanced cross-section of members at the general counsel or vice president level of stakeholders involved in the rail transportation of TIH, including but not limited to railroads, TIH shippers, insurers or underwriters, and tank car owners, lessors, or manufacturers.

[1] AAR Comments, EP 677 (Sub-No. 1) at 24.

The TIHCCTAC will be tasked with producing a report and recommendations on how the Board should balance the common carrier obligation to transport this commodity with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo. The TIHCCTAC's focus and its solution to the question presented above should revolve around the amount of economic responsibility for liability that railroads can reasonably ask TIH shippers to assume before the carrier will transport TIH cargo. The TIHCCTAC shall function solely as an advisory body and will comply with the provisions of FACA and its implementing regulations.

For the purpose of soliciting comments, the Board proposes the following structure. The TIHCCTAC shall consist of up to 27 voting members, including its chair. Members of the TIHCCTAC will be chosen by the Chairman of the STB and shall include at a minimum: 7 representatives from the Class I and II railroads; 3 representatives from Class III railroads; 5 representatives from chlorine shippers; 5 representatives from anhydrous ammonia shippers; 4 representatives currently engaged in academia or policy analysis; 2 representatives with an insurance or underwriting background; and 1 representative from tank car owners, car lessors, or car manufacturers. The 3 members of the Board shall serve as *ex officio* (non-voting) members of the Committee. In addition to the members described above, the Chairman of the STB may invite representatives from the U.S. Departments of Homeland Security and Transportation (including their affiliated agencies) to serve the TIHCCTAC in advisory capacities as *ex officio* (non-voting) members. The Chairman of the STB will appoint the TIHCCTAC's chair. The Chairman of the STB may constitute an executive committee and subcommittees as necessary for the TIHCCTAC to discharge its responsibilities. The Board contemplates a voting structure that will provide each voting member with a vote. But, for any proposal to become a recommendation of the TIHCCTAC, a majority vote of the railroad interests and a majority vote of the shipping interests will be required.

The TIHCCTAC will meet monthly with an anticipatory commencement in the final quarter of 2010, after it has been established in compliance with FACA. No honoraria, salaries, travel or per diem are available to members of the TIHCCTAC; however, reimbursement for travel expenses may be sought from the Board in cases of hardship.

Chairman Elliott will appoint Ronald Molteni of the Board's Office of General Counsel to serve as the Designated Federal Official—the agency's liaison to the TIHCCTAC.

Suggestions for members of the TIHCCTAC should be submitted in letter form, identifying the name of the candidate; evidence of the interests the candidate will represent; and a representation that the candidate is willing to serve a two-year term as a member of the TIHCCTAC, with the possible charter renewal leading to a potential second term.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 721, 49 U.S.C. 11101; 49 U.S.C. 11121.

Decided: July 30, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

Kulunie L. Cannon,

Clearance Clerk.

[FR Doc. 2010–19645 Filed 8–9–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

Advisory Board; Notice of Meeting

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Advisory Board of the Saint Lawrence Seaway Development Corporation (SLSDC), to be held from 10 a.m. to 11:30 a.m. (EDT) on Monday, August 23, 2010, via conference call at the Corporation's Administration Headquarters, Suite W32–300, 1200 New Jersey Avenue, SE., Washington, DC. The agenda for this meeting will be as follows: Opening Remarks; Consideration of Minutes of Past Meeting; Quarterly Report; Old and New Business; Closing Discussion; Adjournment.

Attendance at the meeting is open to the interested public but limited to the space available. With the approval of the Administrator, members of the public may present oral statements at the meeting. Persons wishing further information should contact, not later than Wednesday, August 18, 2010, Anita K. Blackman, Chief of Staff, Saint Lawrence Seaway Development Corporation, 1200 New Jersey Avenue, SE., Washington, DC 20590; 202–366–0091.

Any member of the public may present a written statement to the Advisory Board at any time.

Issued at Washington, DC, on August 4, 2010.

Collister Johnson, Jr.,

Administrator.

[FR Doc. 2010–19634 Filed 8–9–10; 8:45 am]

BILLING CODE 4910–61–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Research, Engineering and Development Advisory Committee; Notice of Meeting

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of Meeting.

Pursuant to section 10(A)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. 2), notice is hereby given of a meeting of the FAA Research, Engineering and Development (R, E&D) Advisory Committee.

Name: Research, Engineering & Development Advisory Committee.

Time and Date: September 22, 2010—9:30 a.m. to 4 p.m.

Place: BAE Systems Conference Center, 80 M Street, SE., Washington, DC 20003.

Purpose: The meeting agenda will include receiving from the Committee guidance for FAA's research and development investments in the areas of air traffic services, airports, aircraft safety, human factors and environment and energy. Attendance is open to the interested public but seating is limited. Persons wishing to attend the meeting or obtain information should contact Gloria Dunderman at (202) 267–8937 or *gloria.dunderman@faa.gov*. Attendees will have to present picture ID at the security desk.

Members of the public may present a written statement to the Committee at any time.

Issued in Washington, DC, on July 30, 2010.

Barry Scott,

Director, Research & Technology Development.

[FR Doc. 2010–19478 Filed 8–9–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Compatibility Program Notice; Fort Worth Alliance Airport, Fort Worth, TX

AGENCY: Federal Aviation Administration.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces that it is reviewing a proposed noise compatibility program that was submitted for Fort Worth Alliance Airport under the provisions of 49 U.S.C. 47501 *et seq.* (the Aviation Safety and Noise Abatement Act, hereinafter referred to as "the Act") and 14 CFR Part 150 by the city of Fort Worth, Texas. This program was submitted subsequent to a determination by FAA that associated noise exposure maps submitted under 14 CFR Part 150 for Fort Worth Alliance Airport were in compliance with applicable requirements, effective May 5, 2009, and published in the **Federal Register** on May 14, 2009 (Volume 74, Number 92, Page 22802). The proposed noise compatibility program will be approved or disapproved on or before January 25, 2011.

DATES: *Effective Date:* The effective date of the start of FAA's review of the noise compatibility program is July 30, 2010. The public comment period ends September 28, 2010.

FOR FURTHER INFORMATION CONTACT: DOT/FAA Southwest Region, Mr. Paul Blackford, ASW–650, 2601 Meacham Boulevard, Fort Worth, Texas 76137, (817) 222–5607. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed noise compatibility program for Fort Worth Alliance Airport which will be approved or disapproved on or before January 25, 2011. This notice also announces the availability of this program for public review and comment.

An airport operator who has submitted noise exposure maps that are found by FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) Part 150, promulgated pursuant to the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses.

The FAA has formally received the noise compatibility program for Fort Worth Alliance Airport, effective on July 28, 2010. The airport operator has requested that the FAA review this material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under Section 47504 of the Act. Preliminary review of the submitted material indicates that it conforms to FAR Part 150 requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before January 25, 2011.

The FAA's detailed evaluation will be conducted under the provisions of 14 CFR Part 150, Section 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety or create an undue burden on interstate or foreign commerce, and whether they are reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments relating to these factors, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps and the proposed noise compatibility program are available for examination at the following locations:

1. Federal Aviation Administration, 2601 Meacham Boulevard, Fort Worth, Texas.

2. Mr. Kent Penney, Airport Systems Director, City of Fort Worth, Aviation Department, 4201 N. Main Street, Suite 200, Fort Worth, Texas.

Questions may be directed to the individual named above under the heading, **FOR FURTHER INFORMATION CONTACT.**

Issued in Fort Worth, Texas, July 30, 2010.

Kelvin L. Solco,

Manager, Airports Division.

[FR Doc. 2010–19480 Filed 8–9–10; 8:45 am]

BILLING CODE 4910–13–M

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Meetings To Prepare 2010 Report to Congress

AGENCY: Advisory Committee: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open meetings to prepare 2010 Annual Report to Congress—August 11–12, 2010, September 14–15, 2010, September 29–30, 2010, and October 12–14, 2010 in Washington, DC.

SUMMARY: Notice is hereby given of meetings of the U.S.-China Economic and Security Review Commission.

Name: Daniel Slane, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, evaluate and report to Congress annually on the U.S.-China economic and security relationship. The mandate specifically charges the Commission to prepare a report to Congress "regarding the national security implications and impact of the bilateral trade and economic relationship between the United States and the People's Republic of China [that] shall include a full analysis, along with conclusions and recommendations for legislative and administrative actions * * *".

Purpose of Meetings: Pursuant to this mandate, the Commission will meet in Washington, DC on August 11–12, 2010, September 14–15, 2010, September 29–30, 2010, and October 12–14, 2010, to consider the first and later rounds of drafts of material for its 2010 Annual Report to Congress that have been prepared for its consideration by the Commission staff, and to make modifications to those drafts that Commission members believe are needed.

Topics to be Discussed: The Commissioners will be considering draft report sections addressing the following topics:

- The United States-China trade and economic relationship, including the relationship's current status; the implications of U.S. debt to China; the effect of China's energy and environmental policies; and China's role in the World Trade Organization.
- The implications of China's green technology policies and their impact in Ohio.
- China's activities directly affecting U.S. security interests, including its expansion security activities abroad, recent military modernization, and the expansion of its aviation and aerospace industries.
- China's foreign and regional activities and relationships in East Asia, including those pertaining to Southeast Asia, Taiwan, and to its own special administrative region of Hong Kong.
- China's control of information and its impact on the United States, including China's "state secret" laws, the extent and transparency of information available for investors in China, and China's internet censorship.

Dates and Times (Eastern Daylight Time):*

—Wednesday and Thursday, August 11–12, 2010 (10 a.m. to 4 p.m.)

—Tuesday and Wednesday, September 14–15, 2010 (10 a.m. to 4 p.m.)

—Wednesday and Thursday, September 29–30, 2010 (10 a.m. to 4 p.m.)

—Tuesday and Wednesday, October 12–14, 2010 (10 a.m. to 4 p.m.)

*Please check the U.S.-China Commission Web site (*http://www.uscc.gov*) for any updates or changes in meeting times.

ADDRESSES: All meetings will be held in Conference Room 233 (2nd Floor), except the meetings on October 12–14 that will be held in Conference Room 231, of The Hall of States located at 444 North Capitol Street, NW., Washington, DC 20001. Public seating is limited and will be available on a "first-come, first-served" basis. Advanced reservations are not required. All participants must register at the front desk of the lobby.

Required Accessibility Statement: The entirety of these Commission editorial and drafting meetings will be open to the public. The Commission may recess the public editorial/drafting meetings to address administrative issues in closed session.

FOR FURTHER INFORMATION CONTACT: Michael Danis, Executive Director, U.S.-China Economic and Security Review Commission, 444 North Capitol Street, NW., Suite 602, Washington, DC 20001; *Phone:* (202) 624–1407; *E-mail: contact@uscc.gov.*

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: August 4, 2010.

Michael Danis,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2010–19625 Filed 8–9–10; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (VA Form 10–0487)]

Proposed Information Collection (Six-Month Post-Exit Focus Interview of Former VHA Employees) Activities; Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 9, 2010.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–New (VA Form 10–0487)" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov.* Please refer to "OMB Control No. 2900–New (VA Form 10–0487)."

SUPPLEMENTARY INFORMATION: *Title:* Six-Month Post-Exit Focus Interview of Former VHA Employees, VA Form 10–0487.

OMB Control Number: 2900–New (VA Form 10–0487).

Type of Review: New collection.

Abstract: VHA will survey former employees as to why they decided to leave the Agency. The data collected will be used to develop strategic objectives that will increase workforce recruitment and retention throughout VHA, training programs and tests were approved, disapproved or suspended.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 2, 2010, at pages 30914–30915.

Affected Public: Individuals or Households.

Estimated Annual Burden: 375.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 1,500.

Dated: August 5, 2010.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–19648 Filed 8–9–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0144]

Agency Information Collection (HUD/VA Addendum to Uniform Residential Loan Application) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 9, 2010.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0144" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@va.gov*. Please refer to "OMB Control No. 2900–0144."

SUPPLEMENTARY INFORMATION:

Title: HUD/VA Addendum to Uniform Residential Loan Application, VA Form 26–1802a.

OMB Control Number: 2900–0144.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–1802a serves as a joint loan application for both VA and the Department of Housing and Urban Development (HUD). Lenders and veterans use the form to apply for home loans.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 2, 2010, at page 30915.

Affected Public: Individuals or households.

Estimated Annual Burden: 20,000 hours.

Estimated Average Burden per Respondent: 6 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 200,000.

Dated: August 5, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–19647 Filed 8–9–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Tuesday,
August 10, 2010

Part II

Department of Labor

Office of Labor-Management Standards

29 CFR Part 404
Labor Organization Officer and Employee Reports; Proposed Rule

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Part 404

RIN 1215–AB74
RIN 1245–AA01

Labor Organization Officer and Employee Reports

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Office of Labor-Management Standards of the Department of Labor (Department) is proposing to revise the Form LM–30 and its instructions. The Form LM–30 implements section 202 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act), 29 U.S.C. 432, the purpose of which is to require officers and employees of labor organizations to publicly disclose possible conflicts between their personal financial interests and their duty to the labor union and its members. The proposed rule would revise the Form LM–30 and its instructions, based on an examination of the policy and legal justifications for, and utility of, changes enacted in the Form LM–30 Final Rule (2007 rule), published on July 2, 2007. 72 FR 36105. Following promulgation of the 2007 rule, fundamental questions remain regarding the complexity of the form and its instructions, as well as the scope and extent of the LM–30 reporting obligations. These questions include the coverage of union stewards and others representing the union in similar positions; the reporting of certain loans and union leave and "no docking" payments; the reporting of payments from certain trusts, unions, and employers in competition with employers whose employees are represented by an official's union; and the reporting of certain interests held and payments received by higher level union officials. The Department proposes revisions to the 2007 form, its instructions, and the regulatory text concerning such reporting obligations. The Department invites general and specific comment on any aspect of this proposed rule.

DATES: Comments must be received on or before October 12, 2010.

ADDRESSES: You may submit comments, identified by RIN 1215–AB74 or RIN 1245–AA01. (The Regulatory Information Number (RIN) identified for this rulemaking changed with publication of the Spring Regulatory Agenda due to an organizational restructuring. The old RIN (1215–AB74) was assigned to the Employment Standards Administration, which no longer exists; a new RIN (1245–AB01) has been assigned to the Office of Labor-Management Standards.) The comments can be submitted only by the following methods:

Internet: Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.* To locate the proposed rule, use the RIN numbers shown above. Follow the instructions for submitting comments.

Delivery: Comments should be sent to: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210. Because of security precautions the Department continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments.

The Office of Labor-Management Standards (OLMS) recommends that you confirm receipt of your delivered comments by contacting (202) 693–0123 (this is not a toll-free number). Individuals with hearing impairments may call (800) 877–8339 (TTY/TDD). Only those comments submitted through *http://www.regulations.gov*, hand-delivered, or mailed will be accepted. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours at the above address.

The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director of the Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, *olms-public@dol.gov*, (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

The proposal to revise the Form LM–30 and its instructions is part of the Department's continuing effort to effectively administer the reporting requirements of the LMRDA. The LMRDA's various reporting provisions are designed to empower labor organizations, their members, and the public by providing certain information about the finances of labor organizations and union officers and employees. A fair and transparent government regulatory regime must consider and balance the interests of labor organizations, their members, and the public, including the benefits served by disclosure, the burden placed on reporting entities, and preserving the independence of unions and their officials from unnecessary government regulation.

The Form LM–30 implements section 202 of the LMRDA, 29 U.S.C. 432. Under section 202,[1] union officers and employees are required to file reports if they, or their spouses or minor children, engage in certain transactions, or have financial holdings, which may constitute a conflict of interest with their union responsibilities. The Act requires public disclosure of certain financial interests held, transactions engaged in, and income received. Subject to certain exclusions, these interests, transactions, and incomes include:

1. Payments or benefits with monetary value from, or interests in, an employer whose employees the filer's union represents or is actively seeking to represent;

2. Transactions involving any stock, bond, security or loan to or from, or other interest in, an employer whose employees the filer's union represents or is actively seeking to represent;

3. Business transactions or arrangements with an employer whose employees the filer's union represents or is actively seeking to represent;

[1] Unless otherwise stated all references to statutory provisions, *e.g.*, "section 202," are to provisions in the LMRDA.

4. Income or any other benefit with monetary value from, or other interest in, a business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with an employer whose employees the filer's union represents or is actively seeking to represent;

5. Income or any other benefit with monetary value from, or other interest in, a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with the filer's union or a trust in which the filer's union is interested; and

6. Payment of money or other thing of value from any employer not covered under the above categories, or payment of money or other thing of value from a person who acts as a labor relations consultant to an employer.

The Form LM–30 had remained essentially unchanged from 1963 until 2007. In 2005 the Department published a Notice of Proposed Rulemaking (NPRM) that proposed far-reaching changes to the form. 70 FR 51165 (Aug. 29, 2005). After a notice and comment period, the Department issued the 2007 final rule. 72 FR 36105 (July 2, 2007). The 2007 rule brought significant changes to the LM–30 and its instructions and represented, in some instances, a sharp departure from the Department's previous interpretations of section 202. The rule completely revised the layout and overall structure of the Form LM–30, lengthening the form from two to nine pages with the creation of five schedules, continuation pages, and various sections consisting of instructions and examples. (The 2007 form and instructions are available at *http://www.dol.gov/olms*.) Upon review of the 2007 rule, and input from the regulated community, the Department believes that many of the objectives sought to be met by the 2007 rule—including simplification of the reporting requirements and adherence to the reporting scheme intended by Congress—were not accomplished. The 2007 rule left unresolved fundamental questions about the reporting obligations of union officials, questions raising policy and legal issues warranting reexamination by the Department. These fundamental questions regarding the Form LM–30 reporting requirements include—the coverage of stewards and other union representatives serving in similar positions; the reporting of certain loans and union leave and "no docking" payments; the reporting of payments from certain trusts and unions; the reporting of payments from businesses that compete with an employer whose employees are represented by an official's union or whose employees the union is actively seeking to represent; and reporting by higher level union officials about relationships with businesses and employers that pose conflicts concerning subordinate affiliates of their union. In addition, there are questions as to whether the layout of the 2007 Form LM–30 and instructions provides useful and adequate assistance to filers.

As further discussed in later sections of this notice, these questions prompted the Department, on March 19, 2009, to issue a non-enforcement policy regarding the 2007 Form LM–30 reporting requirements, allowing filers to use either the pre-2007 or 2007 Form LM–30 report. Further, the Department held a stakeholder meeting on July 21, 2009 to solicit comments regarding the 2007 Form LM–30 and potential revisions to the Form LM–30. The Department invites comment on the proposed changes with respect to their benefits, the ease or difficulty with which labor organization officers and employees will be able to comply with these changes, and whether the changes would better implement the LMRDA. Information about specific union provisions relating to conflict of interest standards for union officials is also invited. Interested parties and the public are invited to draw upon their experience with similar conflict and disclosure standards in other settings such as government employment, accounting, corporate governance, legal and judicial practice, medicine, and journalism. The Department invites general and specific comments on any aspect of this proposal; it also invites comment on specific points, as noted throughout the text of this notice.

B. History of the LMRDA's Reporting Requirements

In enacting the LMRDA in 1959, a bipartisan Congress expressed the conclusion that in the labor and management fields "there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives." Section 2(b), 29 U.S.C. 401(b).

The LMRDA was the direct outgrowth of a Congressional investigation conducted by the Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee. The LMRDA addressed various ills through a set of integrated provisions aimed at labor-management relations governance and management. These provisions include financial reporting and disclosure requirements for labor organizations, their officers and employees, employers, labor relations consultants, and surety companies. *See* 29 U.S.C. 431–36, 441.

To highlight the potential conflicts of interest to which union officers and employees could be susceptible, the Senate Committee Report presented the following illumination of section 202:

> [This section] requires a union officer or employee to disclose any securities or other interest which he has in a business whose employees his labor union represents or "seeks to represent" in collective bargaining. When a prominent union official has an interest in the business with which the union is bargaining, he sits on both sides of the table. He is under temptation to negotiate a soft contract or to refrain from enforcing working rules so as to increase the company's profits. This is unfair to both union members and competing businesses.

Senate Report No. 187 (1959) (Senate Report) at 15, reprinted in NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (2 volumes) (Leg. History), 1 Leg. History, at 411.

In explaining the purpose of the disclosure rules for union officers and employees, the Senate Report presented "three reasons for relying upon the milder sanction of reporting and disclosure [relative to establishing criminal penalties] to eliminate improper conflicts of interest," which can be summarized as follows:

> Disclosure discourages questionable practices. "The searchlight of publicity is a strong deterrent." Disclosure rules should be tried before more severe methods are employed.
>
> Disclosure aids union governance. Reporting and publication will enable unions "to better regulate their own affairs. The members may vote out of office any individual whose personal financial interests conflict with his duties to the members," and reporting and disclosure would facilitate legal action by members against "officers who violate their duty of loyalty to the members."
>
> Disclosure creates a record. The reports will furnish a "sound factual basis for further action in the event that other legislation is required."

Senate Report, at 16, reprinted in 1 Leg. History, at 412.

The Report further stated:

> The committee bill attacks the problem [of conflicts of interest] by requiring union officers and employees to file reports with

the Secretary of Labor disclosing to union members and the general public any investments or transactions in which their personal financial interests may conflict with their duties to the members. The bill requires only the disclosure of conflicts of interest as defined therein. The other investments of union officials and their other sources of income are left private because they are not matters of public concern. No union officer or employee is obliged to file a report unless he holds a questionable interest in or has engaged in a questionable transaction. The bill is drawn broadly enough, however, to require disclosure of any personal gain which an officer or employee may be securing at the expense of the union members.

Senate Report, at 14–15, reprinted in 1 Leg. History, at 410–11.

Both the Senate and House Reports recognize that a reportable interest is not necessarily an illegal practice. As the House Report stated:

In some instances matters to be reported are not illegal and may not be improper but may serve to disclose conflicts of interest. Even in such instances disclosure will enable the persons whose rights are affected, the public, and the Government, to determine whether the arrangements or activities are justifiable, ethical, and legal.

House Report No. 741 (House Report), at 4, reprinted in 1 Leg. History, at 762. *See* Senate Report, at 38, reprinted in 1 Leg. History, at 434 ("By requiring reports * * *, the committee is not to be construed as necessarily condemning the matters to be reported if they are not specifically declared to be improper or made illegal under other provisions of the bill or other laws").

Conflict of interest standards, including disclosure obligations of individuals and entities occupying positions of trust, are well grounded in U.S. law. As stated in the House Report, repeating almost verbatim the same point in the Senate Report:

For centuries the law of fiduciaries has forbidden any person in a position of trust subject to such law to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom he serves. * * * The same principle * * * should be equally applicable to union officers and employees [quoting the AFL–CIO's ethical practices code]: "[A] basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a worker's representative."

House Report, at 10–11, reprinted at 1 Leg. History, at 768–69. Senate Report, at 14, reprinted in 1 Leg. History, at 410. *See* generally Restatement (Second) of Trusts (1959) §§ 170, 173; Restatement (Second) of Agency (1958) §§ 381, 387–98.

The reporting provisions of the Act represent, in part, an effort to codify various requirements contained in an extensive code of ethics voluntarily adopted by the AFL–CIO in 1957 and applied to its affiliated unions and officials. *See* Senate Report, at 12–16, reprinted in 1 Leg. History, at 408–12; House Report, at 9–12, reprinted in 1 Leg. History, at 767–70. *See* also Archibald Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 824–29 (1960). The following excerpts from this code demonstrate the similarities between a union official's fiduciary duty and the disclosure requirements of section 202.

[A] basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative.

[U]nion officers and agents should not be prohibited from investing their personal funds in their own way in the American free enterprise system so long as they are scrupulously careful to avoid any actual or potential conflict of interest.

In a sense, a trade union official holds a position comparable to that of a public servant. Like a public servant, he has a high fiduciary duty not only to serve the members of his union honestly and faithfully, but also to avoid personal economic interest which may conflict or appear to conflict with the full performance of his responsibility to those whom he serves.

There is nothing in the essential ethical principles of the trade union movement which should prevent a trade union official, at any level, from investing personal funds in the publicly traded securities of corporate enterprises unrelated to the industry or area in which the official has a particular trade union responsibility.

[These principles] apply not only where the investments are made by union officials, but also where third persons are used as blinds or covers to conceal the financial interests of union officials.

Ethical Practices Code IV: Investments and Business Interests of Union, 105 Cong. Rec.*16379 (daily ed. Sept. 3, 1959), reprinted in 2 Leg. History, at 1407–08. *See also* Ethical Practices Code II: Health and Welfare Funds, id., 2 Leg. History, at 1406–07.

The Act was crafted with particular regard for the unique function and status of labor unions. Then Senator John F. Kennedy, who was the chief sponsor of the Senate bill, S. 505, which served as the foundation for the LMRDA, stated that the legislation was "designed to permit responsible unionism to operate without being undermined by either racketeering tactics or bureaucratic controls. It is designed to strike a balance between the dangers of to [sic] much and too little legislation in this field." 105 Cong. Rec. S816 (daily ed. Jan. 20, 1959), reprinted in 1 Leg. History, at 969.

As noted by Senator Kennedy above, a balance of these interests was central to the bipartisan enactment of the LMRDA. Congress sought to address legitimate concerns about illegal and undemocratic behaviors without permitting that concern to be used as an excuse for undermining organized labor. Further, Congress sought to address the importance of balancing necessary disclosure and regulation with undue intrusion on union operations and the protection of union officer's privacy interests. As stated in the Senate Report, "[t]he committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization * * * in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents." Senate Report, at p. 7, reprinted in 2 Leg. History, at 403, Professor Archibald Cox played a pivotal role in drafting the legislation that ultimately became the LMRDA. His testimony before the Senate subcommittee that was considering this legislation presaged the language in the Senate Report, describing the reporting obligation as a limited one. He testified: "The bill is narrowly drawn to meet a specific evil. It requires only the disclosure of conflicts of interest. The other investments of union officials and their other sources of income are left private because they are not matters of public concern." Hearings on S. 505 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (1959) (Senate Hearings), at 123; *see* Senate Report, at 15, reprinted in 1 Leg. History, at 411. Professor Cox additionally noted that because the reporting requirements were based, in part, upon the Ethical Practices Code formulated by the AFL–CIO, union officials who adhered to this code would have "virtually nothing to disclose in his report to the public." Senate Hearings, at 123.

C. Statutory Language

Section 202 provides in its entirety:

SEC. 202. (a) Every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services) shall file with the Secretary a signed report listing and describing for his preceding fiscal year—

(1) Any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child derived directly or indirectly from, an employer whose employees such labor organization represents or is actively seeking to represent, except payments and other benefits received as a bona fide employee of such employer;

(2) Any transaction in which he or his spouse or minor child engaged, directly or indirectly, involving any stock, bond, security, or loan to or from, or other legal or equitable interest in the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(3) Any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(4) Any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with such labor organization;

(5) Any direct or indirect business transaction or arrangement between him or his spouse or minor child and any employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer and except purchases and sales of goods or services in the regular course of business at prices generally available to any employee of such employer; and

(6) Any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or indirectly from any employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended.

(b) The provisions of paragraphs (1), (2), (3), (4), and (5) of subsection (a) shall not be construed to require any such officer or employee to report his bona fide investments in securities traded on a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934, in shares in an investment company registered under the Investment Company Act or in securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, or to report any income derived therefrom.

(c) Nothing contained in this section shall be construed to require any officer or employee of a labor organization to file a report under subsection (a) unless he or his spouse or minor child holds or has held an interest, has received income or any other benefit with monetary value or a loan, or has engaged in a transaction described therein. 29 U.S.C. 432.

D. Rationale for Proposing Rulemaking on Form LM–30

The Department is proposing modifications to the Form LM–30 for the following reasons:

(1) The 2007 Form LM–30 rule continues to create uncertainty for the regulated community, which continues to have questions regarding the rule's reporting requirements and has raised strong objections to key aspects of the rule, such as the reporting of certain loans, including mortgages and student loans, the reporting of union leave and "no docking" payments (*i.e.,* payments made by a represented employer to employees engaged in union representational or other activities), and reporting by individuals serving as union stewards or in similar positions representing the union.

(2) Upon review, we now believe that the revisions we are proposing better balance the disclosure of information and the burden imposed on union officials.

(3) Upon review, we now believe that the revisions we are proposing better clarify the form and instructions, and organize the information in a useful format.

The Department fully recognizes and supports the importance of union officer and employee reporting and the disclosure of pertinent financial information to union members and the public. However, the LMRDA requires a balancing of transparency with the need to maintain union autonomy and to avoid overburdening unions and their officials with unnecessary reporting requirements. Because the 2007 rule did not adequately consider this balance, it did not succeed in properly implementing the LMRDA.

Following promulgation of the 2007 Form LM–30, the Department received numerous comments from the regulated public regarding the difficulty entailed in reading and understanding the 2007 form and instructions. Many commenters asserted that the 2007 rule was legally flawed and some aspects of the rule have been challenged in a lawsuit, *AFL–CIO* v. *Chao,* No. 1:08-cv-0069 (CKK) (D.D.C.) (stayed on March 26, 2009). In the Department's view, the following issues warranted particular attention: the reporting of union leave and "no docking" payments, the coverage of union stewards as officials required to file the Form LM–30, and the reporting of loans. In an effort to clarify the reporting requirements associated with the 2007 Form LM–30, the Department created a Frequently Asked Questions (FAQs) section on its Web site (*http://www.dol.gov/olms/regs/compliance/RevisedLM30_FAQ.htm*). The confusion about the new reporting requirements also prompted the Department to issue written guidance on its Web site, on March 19, 2009, announcing a non-enforcement policy under which it will accept either the pre-2007 Form LM–30 or the 2007 Form LM–30 (*http://www.dol.gov/olms/regs/compliance/GPEA_Forms/blanklmforms.htm*). The Department there announced its intention to revise the Form LM–30 in order to review questions of policy and law surrounding these reporting requirements. The Department explained that the 2007 rule left unanswered fundamental questions regarding the scope and extent of the reporting obligations and that litigation challenging some aspects of the form remained pending. Given these considerations, the Department determined that it would not be a good use of resources to bring enforcement actions based upon a failure to use a specific form to comply with the statutory reporting obligation. Accordingly, the Department has refrained from initiating enforcement actions against union officers and union employees based solely on the failure to file the report prescribed by the 2007 rule, as long as individuals meet their statutorily-required filing obligation in some manner. This non-enforcement posture remains in effect.

On July 21, 2009, OLMS held a stakeholder meeting to solicit comments regarding the 2007 rule. OLMS received a number of comments on several significant issues. These comments included the following —

- The Department should revert to the old (pre-2007) Form LM–30 and instructions because they were less confusing than the new (2007) form and instructions, which are "overwhelmingly complicated."
- The current interpretations of "labor organization employee" and the "bona fide employee exception," which require reporting by union stewards and others of "no docking" and union leave payments, are beyond the Department's

statutory authority, are overly burdensome, and capture transactions that do not pose conflicts of interest; they also discourage union members from serving as union stewards.

- The reporting of bona fide loans is not beneficial to the public and requiring the reporting of home mortgages is invasive.

- While the reporting of extra-market loans from businesses is defensible, the reporting of market-term loans is unreasonable and overbearing.

- The Department should not have required union officials to report payments and interests from employers or businesses with relationships to other levels of the union hierarchy other than the official's own. If there is any "look down" reporting, it should be restricted to officials with oversight authority.

- The Department should retain the $250 de minimis threshold for reporting, as well as the related $20 threshold for recordkeeping and the "widely-attended gathering" exception.

- The Department should not have required officials to report payments by trusts, unions, and others; reports should have been limited to payments by entities that are organizing targets of the official's union.

The Department has considered the comments received at the stakeholder meeting in reviewing the 2007 rule and proposing changes to that rule.

II. Authority

A. Legal Authority

The legal authority for the notice of proposed rulemaking is set forth in sections 202 and 208 of the LMRDA, 29 U.S.C. 432, 438. Section 208 of the LMRDA provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under Title II of the Act and such other reasonable rules and regulations as she may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438.

B. Departmental Authorization

Secretary's Order 08–2009, issued November 6, 2009, contains the delegation of authority and assignment of responsibility for the Secretary's functions under the LMRDA to the Director of the Office of Labor-Management Standards and permits re-delegation of such authority. *See* 74 FR 58835 (Nov. 13, 2009).

III. Reasons for Proposed Revisions to the 2007 Form LM–30 Reporting Requirements

The Department proposes changes to five areas of the Form LM–30 reporting requirements: (1) The reporting of union leave and "no docking" payments, and, more broadly, the bona fide employee exception; (2) the coverage of individuals serving as union stewards or in similar positions representing the union, such as a member of a safety committee or a bargaining committee; (3) the reporting of bona fide loans; (4) the reporting of payments from employers competitive to the represented employer, certain trusts, and unions; and (5) the reporting by national, international, and intermediate union officers and employees.

First, the Department proposes to return to the historical practice whereby union officers and employees were not required to report compensation they received under union leave and "no docking" policies established under collective bargaining agreements or by custom and practice of the workplace. The requirement in the 2007 rule that union officials must report "no docking" and union leave payments has been strongly criticized as unduly burdensome. The Department agrees that this reporting requirement imposes undue burden and may impede individuals from running for union office and otherwise serving in important union roles. The 2007 rule was based on the premise that such payments are for work performed on the union's behalf, rather than the employer's, and thus not payments made under the "bona fide employee" exception of section 202 of the LMRDA. The Department now believes that the term "bona fide employee," as used in that section, is most naturally read to distinguish between, on the one hand, payments that are made to a union official by virtue of his or her employment by the company making the payment, and, on the other hand, payments that are made to union officials without regard to such employment. This interpretation better accords with the purposes of the statute than the interpretation embodied in the 2007 rule that focuses on whether the union or the employer making the payment exercises primary control over an individual's discrete, temporal activities as a union official.

Second, the Department proposes to return to the historical practice of excluding union stewards and similar union representatives from Form LM–30 reporting. The Department believes that this practice comports with the language of section 202 and better effectuates labor-management relations than the interpretation embodied in the 2007 rule.

Third, the Department also proposes an administrative exemption whereby union officials generally need only report loans from bona fide credit institutions if the terms of such loans are on terms more favorable than those available to the public. The 2007 rule required more extensive reporting and made distinctions among various relationships and credit institutions that were difficult to understand and apply. The proposed rule also incorporates the Department's clarification, as set forth in Frequently Asked Questions (FAQs), that union officials as a general rule are not required to report on savings accounts, CD, credit cards, *etc.* where such instruments contain the same terms offered to other customers without regard to an individual's status as a union official.

Fourth, the Department also proposes to limit the reporting obligation with respect to interests in and payments from employers that compete against employers represented by the official's union or that the union actively seeks to represent. It is the Department's view that disclosure of such payments is important, but only where an official is involved with the organizing, collective bargaining, or contract administration activities related to a particular represented employer or possesses significant authority or influence over such activities. This ensures that meaningful information will be provided to union members without imposing undue burden on officials who do not occupy positions of influence over the union's organizing, collective bargaining, or contract administration activities related to the represented employer. Similarly, the Department proposes to modify the scope of reporting insofar as payments from certain trusts and unions are concerned. The Department proposes to return to its historical practice of not requiring officials to report on payments they receive from trusts or, as a general rule, from unions. The Department, however, will continue to require officials of a staff union to report any payments they receive from the union-employer whose employees the staff union represents.

Finally, the Department is proposing to revise and clarify the scope of reporting for officials of international, national, and intermediate unions. The proposed rule states that officers and employees of these higher level unions must look at payments they receive from employers and businesses with relationships with lower levels of the official's union (*e.g.*, a local or other subordinate body), as well as with the official's own level of the union, when applying the Form LM–30 reporting requirements. The 2007 rule excepted employees, as distinct from officers, from this "top-down" reporting obligation. In the Department's view, the LMRDA does not support that distinction for LM–30 reporting purposes. Officers and employees of the union are held to the same reporting obligations under the Act. The 2007 rule also established confusing exceptions to the "top-down" reporting obligations for officers. Payments from businesses that dealt with represented employers were exempt, while the instructions did not specify the reportability of payments from businesses that dealt with lower level unions. Further, union officers were not required to report any payments or other financial benefits received by their spouses and minor children from employers and businesses involved with a lower level union. The Department is proposing to remove these exceptions.

In developing the proposed changes, the Department has reviewed the reporting examples utilized in the 2007 rule and the substantial guidance issued after the rule's publication as answers to FAQs in order to identify the extent to which, if at all, reporting will be changed under the Department's proposals if adopted in a final rule. A final rule will supersede any inconsistent interpretation or other guidance. The Department identifies in the margin those instances where the proposed rule, if adopted, would not change the reporting obligations under the examples and FAQs.[2] As discussed later in the text, examples will generally not be included in the proposed instructions.

A. The Bona Fide Employee Reporting Exception Under Section 202

Sections 202(a)(1) and (5) of the LMRDA require a labor organization officer or employee to report payments that the official, his or her spouse, or minor children receive from an employer whose employees the labor organization represents or is actively seeking to represent, "*except payments and other benefits received as a bona fide employee of such employer.*" 29 U.S.C. 432(a)(1) & (5) (Emphasis added).

The 2007 revisions to the Form LM–30 narrowed the Department's longstanding reading of this "bona fide employee" exception, significantly extending the reporting requirements of section 202 beyond union officers and employees to union stewards and others. The 2007 rule required them to report compensation paid to them by their employers for time spent representing the union on labor-management relations matters in accordance with a union leave or "no docking" policy. Under a union leave policy, the employer continues the pay and benefits of an individual who works full time on such matters. Under a "no docking" policy, the employer permits individuals to devote portions of their work day or work week to labor-management relations business, such as processing grievances, with no loss of pay.

Until regulatory changes to the Form LM–30 were adopted in 2007, the Department's policy, as established in 1963 to implement Form LM–30 reporting (28 FR 14384 (Dec. 27, 1963)), excepted from reporting payments and other benefits received for certain activities other than productive work directed by the employer making the payment. Specifically, the instructions to the 1963 Form LM–30 stated that the following payments and benefits were exempt from Form LM–30 reporting:

> [p]ayments and benefits received as a bona fide employee of the employer for past or present services, including wages, payments or benefits received under a bona fide health, welfare, pension, vacation, training or other benefit plan; and payments for periods in which such employee engaged in activities other than productive work, if the payments for such period of time are: (a) Required by law or a bona-fide collective bargaining agreement, or (b) made pursuant to a custom or practice under such collective bargaining agreement, or (c) made pursuant to a policy, custom or practice which the employer has adopted without regard to any holding by such employee of a position with a labor organization.

Pre-2007 Form LM–30 Instructions, Part A (Items 6 and 7) at (iv).

Thus, before the 2007 rule, persons receiving payments for service under a union leave or "no docking" policy were not required to report such payments. For example, where a union officer was excused from his regular work to handle grievances and was paid his regular wages while doing so, the payments were exempted from reporting. Similarly, union officers or employees who continued to participate in employer group insurance and pension plans while they served the union were not required to report such benefits. The Department explained the basis of the policy in the LMRDA Interpretive Manual: "the employee officer is being paid for work performed of value to the employer who is interested in seeing to it that grievances are immediately adjusted." LMRDA Interpretative Manual, section 248.005. This reporting exception was based on the presumption that union leave and "no docking" arrangements operating either pursuant to a collective bargaining agreement or in accordance with custom or practice are ordinary and transparent, not requiring their reporting under section 202.

Based largely on the policy choice, evident in the 2007 rule, to promote fuller disclosure to union members and the public, even where there might be considerable burden associated with such reporting, the Department determined to require union officials, including stewards, to report "no docking" and union leave payments. As stated in the preamble to the rule:

> Payments received by union officials from employers for work done on the union's behalf are reportable because such payments are not received as a bona fide employee of the employer making the payment. The Department explained in its proposal that union officials must report any payments for other than "productive work" for the employer, including union leave and "no docking" payments.

72 FR at 36109. To achieve this result, the Department utilized a new definition of "bona fide employee," a term not defined in the pre-2007 Form LM–30 or its instructions. This new definition is incorporated in the 2007 Form LM–30 Instructions (Definition D4, page 10).[3] 72 FR at 36125.

[2] Most of the examples in the 2007 instructions will continue to accurately reflect reporting requirements if the Department's proposal is adopted in a final rule. Thus, the following will continue to accurately reflect reporting requirements: examples 2–15, at pp. 3–4 of the instructions; examples 1–5, at p. 6 of the instructions; examples 1 and 2, at p. 7 of the instructions; and examples 1, 3–15, and 17, at pp. 8–9 of the instructions. Several of the FAQs are based on requirements that the Department proposes to change. The following FAQs, however, will continue to accurately reflect reporting requirements if the Department's proposal is adopted in a final rule: 2–10, 12–26, 28, 30–37, 39, 44, 47, 49–50, 54, 56–69, 72–76, and 79–88. It should be noted, however, that some of the comments and FAQs, such as FAQs 49 and 73, while remaining accurate, were intended to illustrate issues that are less likely to arise under the proposed rule. Others, such as FAQs 1 and 77, while largely accurate, contain some statements that are based on or refer to interpretations that will be superseded if the Department's proposal is adopted in a final rule.

[3] The instructions provide:

Bona fide employee is an individual who performs work for, and subject to the control of, the employer.

Note: A payment received as a bona fide employee includes wages and employment benefits received for work performed for, and subject to the control of, the employer making the payment, as

Continued

The Department justified this new reporting requirement upon its reading of section 202(a)(1). 72 FR at 36126. This section establishes a general obligation to report payments received by a union officer or employee whose employees are represented by the official's union or the union actively seeks to represent. This section, however, also excepts from this requirement "payments received as a bona fide employee of such employer." In the 2007 rule, the Department interpreted this exception to apply only where the payment was made for time expended solely on the employer's behalf. 72 FR at 36109, 36124, 36126. Thus, under the reasoning of the 2007 rule, where a union official serving as an officer or as a steward was performing work on behalf of the union, he or she was not being paid for services rendered as a "bona fide employee" of the employer making the payment. Because the individual was acting on behalf of the union and thus subject to its control while performing these union-related activities, the Department reasoned that the official was not a bona fide employee of the employer during the time for which such remuneration was paid. *See* 72 FR at 36126; *see also* 70 FR at 51183 (proposed rule).

The Department proposes to return to its longstanding interpretation of the "bona fide employee" reporting exception. Under this prior interpretation, payments made by an employer under a union leave or "no docking" policy to a union official are payments received as a "bona fide employee" of the employer and, as such, not required to be reported on Form LM–30. We are proposing this change for several reasons. First, the approach taken in the 2007 rule does not comport with what the Department considers to be the best reading of the language of section 202. Second, it creates substantial burden for union officials on matters unlikely to pose conflicts of interest, thus unduly interfering with the internal workings of labor unions and labor-management relations. Third, as a matter of policy, there is no persuasive reason why union officials must report such payments, while employers making such payments are under no similar obligation.

Section 202 applies to "every officer * * * and every employee of a labor organization," requiring as a general rule the reporting of any payments received from a represented employer "except payments and other benefits received as a *bona fide* employee of such employer," emphasis added. An individual's status as an employee is based on the various factors articulated in the common law. *See* Nationwide Mutual Ins. v. Darden, 503 U.S. 318 (1992). "Bona fide" is synonymous with "good faith" or "genuine," *i.e.*, without fraud or deceit.[4] Thus, section 202(a)(1) is most naturally read to except from reporting payments to a current or former employee of the company making the payment unless made under the guise of employment, such as where payment was for a no show job with the company, in an amount that unreasonably exceeds the value or amount of the work performed, or the payment is made on terms inconsistent with the parties' negotiated agreement or the workplace custom and practice. Where a payment made to an individual working on behalf of the union by his current or past employer is sanctioned by a collective bargaining agreement or custom or practice of the workplace, the legitimacy or "bona fides" of the payment is established.

Further, as noted in the 2007 rule, union leave and "no docking" payments were common at the time the LMRDA was enacted. 72 FR at 36126. Yet, the Department is unaware of any concerns about conflicts of interest presented by such payments, unlike other payments such as for no show work, featherbedding, or similar practices, raised in the hearings before the McClellan Committee or in any of the legislative materials relating to the LMRDA. As noted in the 2007 rule, the legislative history does not shed light on whether Congress had a specific intention to require or not the reporting of such payments by union officials. *See* 72 FR at 36126. While, as noted in the 2007 rule, legislative silence is not generally a conclusive guide to interpreting statutory text, it is notable that Congress did not identify union leave or "no docking" payments as requiring disclosure to union members and the public as a matter of course. *See* 72 FR at 36126. Equally significant, such payments were not in any way proscribed by the AFL–CIO codes of ethics that strongly influenced the reporting provisions of the LMRDA. *See* 72 FR at 36112–13. Employers have historically agreed to compensate stewards, safety and health committee representatives and others for such work because they see it as adding value to their organization. A number of States such as Oregon and Washington require the establishment of joint labor-management safety and health committees. *See http://www.cbs.state.or.us/external/osha/pdf/rules/division_1/437-001-0765.pdf; http://www.lni.wa.gov/wisha/rules/corerules/HTML/296-800-130.htm. See also* Emily A. Spieler, Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries, 31 Hous. L. Rev. 119, n. 505, 514, 518, 520 (1994) (identifying States requiring such committees). Having employees serve on employee assistance programs and wellness committees is also seen as a cost effective business decision by many employers. *See* Edward Cohen-Rosenthal and Cynthia E. Burton, Mutual Gains: A Guide to Union-Management Cooperation 80–83 (1993) (Mutual Gains).

Moreover, such payments, where established by a collective bargaining agreement or custom or practice of the workplace, do not present the sort of conflict of interests presented by other payments to union officers and employees. Rather, they serve the mutual goals of employers and unions. They help ensure that individuals with first-hand knowledge of an employer's workplace will be able to take a position with the union, a benefit not only to the union and employer but also the represented employees. Such payments are voluntary; without the assent of both

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well as compensation for work previously performed, such as earned or accrued wages, payments or benefits received under a bona fide health, welfare, pension, vacation, training or other benefit plan, leave for jury duty, and all payments required by law.

Compensation received under a "union-leave," or "no-docking" policy is not received as a bona fide employee of the employer making the payment. Under a union-leave policy, the employer continues the pay and benefits of an individual who works full time for a union. Under a no-docking policy, the employer permits individuals to devote portions of their day or workweek to union business, such as processing grievances, with no loss of pay. Such payments are received as an employee of the union and thus, such payment must be reported by the union officer or employee unless they (1) totaled 250 or fewer hours during the filer's fiscal year and (2) were paid pursuant to a bona fide collective bargaining agreement. If a filer must report payments for union-leave or no-docking arrangements, the filer must enter the actual amount of compensation received for each hour of union work. If union-leave/no-docking payments are received from multiple employers, each such payment is to be considered separately to determine if the 250 hour threshold has been met. For purposes of Form LM–30, stewards receiving union-leave/no-docking payments from an employer or lost time payments from a labor organization are considered employees of the labor organization.

[4] *See Black's Law Dictionary* (8th ed. 2004), which defines the term as: "1. Made in good faith; without fraud or deceit. 2. sincere; genuine"; *The Random House Dictionary of the English Language, Unabridged* (2d ed. 1987), which defines the term as: "1. made, presented, *etc.* in good faith; without deception or fraud. * * * 2. genuine.—syn. 1. honest, sincere, lawful, legal. 2. genuine.—ant. spurious, deceitful, false." *See also Black's* "bona fide operation," defined as "[a] real, ongoing business"; and "bona fides," defined as "1. Good faith. 2. *Roman law.* The standard of conduct expected of a reasonable person, esp. in making contracts ands similar actions; acting without fraudulent intent or malice."

management and labor, the payments cannot be made. They are not kept secret from employees; they must be in writing or reflect the custom and practices in the workplace. Additionally, these payments are usually made under the terms of a collective bargaining agreement and tied to the same rate of pay that the union official would have received under the agreement for time worked at his or her trade. Further, a potential consequence of requiring the reporting of payments received under union leave or "no docking" policies is that union members will be discouraged from running for union office and others from serving as stewards or in other voluntary positions—an unnecessary yet significant increase in burden. As a matter of policy, the Department believes that its historical position to except union leave and "no docking" payments from reporting promotes the purposes of the LMRDA and is consistent with the Congressional plan that the government avoid unnecessary intrusion into internal union affairs. *Cf. Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463, 470–71 (1968).

Finally, the Department proposes to modify the interpretation of "bona fide employee" with respect to its application to union leave and "no docking" payments because it creates a significant inconsistency between the application of reporting exceptions and the reporting burden on union officers and employees compared with the corresponding exceptions and burden on employers through the Form LM–10, which effectuates the reporting requirements under section 203.

Section 203(a)(1) requires the reporting of certain payments, transactions, arrangements, and agreements with officers, agents, shop stewards, other representatives, and employees of labor organizations. This section exempts from employer reporting, "payments of the kind referred to in section 302(c) of the Labor Management Relations Act [LMRA]," which includes any payment of money or other thing of value from an employer to, "any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." LMRA Section 302(c)(1), 29 U.S.C. 186(c)(1).

Courts have held that "no docking" and union leave payments meet the requirements of the section 302(c)(1) exemption.[5] Thus, the Department has historically exempted such payments from Form LM–10 reporting. *See* Exception (c) to Item 8.a. of the Form LM–10 Instructions; LMRDA Interpretative Manual, at sections 253.305, 253.320, 253.321, 253.322, and 253.323. The 2007 rule requires union officials to report union leave and "no docking" payments on the Form LM–30, but employers are not similarly required to report such payments to their employees on a corresponding Form LM–10 report. The Department has reexamined the policy underlying the current requirement and has concluded it is unreasonable to impose these reporting requirements on union officers and employees, while employers, due to a statutory exemption (by reference to LMRA section 302), are not required to report such payments on the Form LM–10.[6]

For the foregoing reasons, the Department proposes to rescind the 2007 requirement to report union leave and "no docking" payments on the Form LM–30 and invites comment on this proposal.

B. Form LM–30 Reporting by Union Stewards

The 2007 rule extended the union officer and employee reporting obligation to union stewards, treating them as employees of the union by virtue of their receipt of "no docking," union leave, or "lost time" payments. The Department now proposes to return to its longstanding position that union stewards are not covered by the Form LM–30 reporting requirements. The Department articulated this position in the Form LM–30 instructions issued in 1963, and this position had remained essentially unchanged for over 40 years. The 1963 regulation, 28 FR 14384 (Dec. 27, 1963), establishing the pre-2007 form and instructions did not anywhere suggest that union stewards were union employees.[7] *See* pre-2007 Form LM–30 Instructions.

In extending the union officer and employee reporting obligation to union stewards in the 2007 rule, the Department determined that a union steward receiving "no docking," union leave or "lost time" payments would be considered to be a labor organization employee within the meaning of the Form LM–30. As stated in the preamble to that rule: "An individual who is paid by an employer to perform union work is an employee of the union if he or she is under the control of the union, while so engaged." 72 FR at 36109. Stewards were deemed to be "labor organization employees" by virtue of their receiving either "lost time payments" from the union or union leave or "no docking" payments from an employer. (*See* the definition of "bona fide employee" and "labor organization employee" in sections D4 and D11, respectively, of the LM–30 instructions, *see* 72 FR at 36178, 36180.)

Generally, a union steward is responsible for informing employees of their rights under the collective bargaining agreement and applicable law, investigating grievances filed by union members, representing union members in presenting those grievances to management, and otherwise enforcing the collective bargaining agreement. *See* generally Herman Erickson, The Steward's Role in the Union 29–54 (1971). Often, these individuals continue to receive pay from their employers while performing these functions for the union, in the form of union leave or "no docking" pay. In other instances, the stewards perform these functions on their own time (*e.g.*, breaks, meal periods, and before or after working hours). As a general rule, stewards continue to perform their regular jobs for an employer while serving in this role. As a need arises, consistent with a collective bargaining agreement or custom and practice, they will temporarily interrupt their work at their trade to help resolve grievances that arise in the workplace. Union members who volunteer on safety committees and the like engage in similar functions, often receiving payments from their employer while

[5] *See Caterpillar* v. *UAW*, 107 F.3d 1052, 1055 (3d Cir. 1997), citing *NLRB* v. *BASF* Wyandotte Corp., 798 F.2d 849, 854–56 (5th Cir. 1986); *BASF Wyandotte Corp.* v. Local 227, 791 F.2d 1046 (2d Cir. 1986); *Herrera* v. *International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), aff'g 858 F.Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers* v. *Bell Atlantic Network Servs., Inc.*, 670 F.Supp. 416, 423–24 (D.D.C. 1987); *Employees' Independent Union* v. *Wyman Gordon Co.*, 314 F.Supp. 458, 461 (N.D. Ill. 1970).

[6] *See* LMRDA Interpretative Manual, at section 241.600. This section states that the reporting exceptions in section 203 do not affect the reporting by union officers and employees in section 202, "*where* the applicable provision of section 202 does not provide a pertinent exception." (Emphasis added.) Section 202, however, contains a pertinent exception: the bona fide employee exception, which, as noted in the text, has historically been interpreted as applying the regular wage exception of LMRA section 302(c) to various subsections of section 202. *See* LMRDA Interpretative Manual, section 248.005.

[7] In the unusual situations where the position of steward is a constitutional office in the union, or an individual, although serving as a steward, is an employee of the union under circumstances distinct from his or her status as steward, or is an employee of the union because the steward position is a paid union position, such individuals, both historically and under the Department's proposal, are subject to the reporting requirements of the Form LM–30.

they are engaged in such duties. These individuals likewise interrupt their usual jobs on an as needed basis to perform tasks that advance the mutual interests of labor and management.

Upon review, the Department believes that the 2007 rulemaking did not satisfactorily address or adequately support the expansion of the Form LM–30 reporting requirements to include stewards. Rather, the rule focused on the "bona fide employee" exception of section 202, which, as mentioned, was revised to require the reporting of "no docking" and union leave payments.[8] (*See* the discussion above concerning this change to the "bona fide employee exception.") The rule also provided, almost in passing, that stewards as well as union officers and employees needed to report such payments. The Department justified this new requirement by stating that the "correct issue" is whether or not the official is a bona fide employee of the payer-employer *during the time for which payment was made*. 72 FR 36124. (Emphasis added). Having so defined the question, the Department answered it in the negative. Thus, the Department reasoned that stewards who received their regular compensation from the employer during time spent on union work did not receive this compensation as a "bona fide employee of the employer," and the compensation was therefore reportable. As stated in the preamble to the 2007 rule: "In general, where a union steward receives union-leave/no-docking payments from an employer or lost time payments from the union, the steward will be regarded as an employee of the labor organization as the individual has received compensation for performances of services for the union." 72 FR 36144.[9]

Upon review, the Department believes that the Form LM–30 reporting requirements should not be expanded to include stewards. The issue as to whether union stewards may be regarded as employees of a labor organization required to file reports under section 202 of the LMRDA, solely on the basis of having received union leave, "no docking," or "lost time" payments, raises legal and practical concerns. An examination of the text of the relevant provisions of Title II of the LMRDA suggests that Congress did not intend that stewards be considered to be union employees. Section 202 of the LMRDA requires reporting from "every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services)." Separately, Congress, in section 203, mandated that employers report certain payments to unions and certain categories of individuals with a relationship to unions. Section 203(a)(1) requires an employer to report direct or indirect payments or loans "to any labor organization or officer, agent, *shop steward*, or other representative of a labor organization, or employee of any labor organization." (Emphasis added). Section 203 thus refers to "officer" and "employee" as well as "agent, shop steward, or other representative of a labor organization." The absence of similar language in section 202 is a strong indication of Congressional intent to exclude agents, stewards, and similar representatives from the prescribed reporting requirements. Additional support for this position can be gleaned from the LMRDA's legislative history. An early version of the bill that became the LMRDA, H.R. 4473, included a section 208, "Individual Reports of Officers, Agents, Shop Stewards, and Representatives of a Labor Organization." 1 Leg. History 166, 227–30. As evidenced by the title of that section, the bill would have imposed a plain reporting requirement on union officers, employees, *and* stewards and representatives. However, the final language of section 202 includes only union officers and employees.

The foregoing demonstrates the reasonableness of the Department's view that Congress made deliberate decisions as to when it would and would not include shop stewards within a regulated class. Congress, revealingly, did not include the term "stewards" in describing the regulated class established by section 202, despite inserting the term in other LMRDA sections, thus indicating that those members who serve as "shop stewards" are of a different category than "labor organization employees." When Congress wanted financial payments made to stewards to be reported, it knew how to do so. Section 203 requires employers to report payments made to stewards. Had Congress wanted stewards to be covered under section 202, it could have likewise inserted the phrase "shop stewards" in that section.

Additionally, the 2007 rule created uncertainty regarding the reporting obligation of union members, other than stewards, who volunteer to serve on various committees in the workplace, *e.g.*, those who serve on health and safety committees. As discussed above, employers have historically agreed to compensate stewards and union members who work on these committees because they see it as adding value to their company and several States require the establishment of joint labor-management safety and health committees. The Department believes that union members who perform functions similar to those performed by stewards should not be required to file a Form LM–30. As support for this proposition, the Department notes, as discussed above, that section 202, in addition to not including the term "steward," does not reference "representative" of a union.

Imposing obligations on union stewards and other volunteers may also intrude in internal union affairs. Union stewards and other representatives perform valuable tasks and extending onerous reporting requirements to them would "chill" future offers to serve. Imposing reporting burdens on such individuals clearly will temper the willingness of individuals to volunteer

[8] Definition 11 of the 2007 Form LM–30 instructions reads:

Labor organization employee means any individual (other than an individual performing exclusively custodial or clerical services) employed by a labor organization within the meaning of any law of the United States relating to the employment of employees.

Note: An individual who is paid by the employer to perform union work, either under a "union-leave" or "no-docking" policy, is an employee of the union for reporting purposes if the individual performs services for, and under the control of, the union.

For purposes of Form LM–30, stewards receiving union-leave/no-docking payments from an employer or lost time payments from a labor organization are considered employees of the labor organization.

72 FR at 36180.

[9] The estimates in the 2007 rule do not appear to reflect fully the burden imposed on stewards by its new reporting requirements. *See* 72 FR at 36155. The baseline burden estimates were derived from the number of LM–30 forms that had been filed by union officials, a number that necessarily failed to account for stewards because they had never been required to file such reports. In the final rule, the Department added to the baseline by estimating the number of stewards and others receiving "no docking" and union leave payments based on a 1980 study of collective bargaining agreements. *Id.* Because the study was limited to provisions in selected collective bargaining agreements, it contained no estimate of the number of stewards who received union leave or "no docking" payments by virtue of custom or practice in their workplace. Moreover, although only a few unions attempted to quantify the number of stewards in their comments on the 2005 NPRM, the number is obviously greater than the total number of filers (6,916; union officers, stewards, and non-steward union employees) estimated by the Department in the 2007 rule. *See* 72 FR at 36153. Although the Department attempted to take into account that some stewards would be filing reports, it is unclear from the burden analysis how it derived this estimate. It appears that the Department assumed, without so stating, that most stewards would not have to report "no docking" or union leave payments because of the 250-hour threshold and further assumed, even though it is not apparent from the rule, that this would exempt stewards that did not meet the threshold from having to report other interests or payments covered by section 202. *See* 72 FR at 36154–55.

to serve in such positions—a loss to the union, the employer, and these individuals' fellow employees. Discouraging union representatives from taking time during the workday to attend to such matters can only have a deleterious effect on the labor relations system's capacity to resolve disputes at the workplace fairly and expeditiously. This could impede labor-management relations in the workplace as members are deterred from volunteering to serve in such important roles.

The practical problems faced by stewards and other representatives in maintaining records necessary to meet the reporting burden placed on them were not fully considered in the 2007 rule. Unless the employer has a payroll reporting system that allows the union stewards to clock in and out every time they have to perform union work, the stewards would have to keep their own records. A member's work on behalf of the union is not always performed during a series of discrete intervals where it is easy to determine when union work begins and ends. Sometimes, such representatives will briefly engage in union work when a co-worker comes and speaks to the on-duty steward. Sometimes the conversation occurs when the representative is on the way to the break room or at lunch. Sometimes union work occurs during a work-related conversation with a supervisor or manager and a grievance question comes up. Thus, the amount of time required to perform steward and similar functions may vary significantly from day-to-day and week-to-week and is therefore not easy to predict. For example, in the building and construction trades, with its very mobile workforce and short-term employment on construction projects, stewards will change from job to job, not just from week to week.

For the foregoing reasons, the Department proposes to rescind the definition of "labor organization employee" in the 2007 Form LM–30 and to insert the following language in the revised Form LM–30 Instructions in Section II, Who Must File:

> For purposes of the Form LM–30, an individual who serves the union exclusively as a union steward or as a similar union representative, such as a member of a safety committee or a bargaining committee, is not considered to be an employee of the union.

The Department seeks comment on the definition of "labor organization employee," and the addition of the above language in Section II of the revised Form LM–30 Instructions, including its treatment of shop stewards and others in similar positions voluntarily serving on behalf of the union.

C. Reporting of Loans Under Sections 202(a)(3) and (4)

The Department proposes to amend the Form LM–30 to exempt from reporting under sections 202(a)(3) and (4) of the LMRDA marketplace transactions with bona fide credit institutions, including loans, interest, dividends, and payments and credit extended through credit card transactions, provided that they are arms length transactions in accordance with usual business practice. In so doing, the Department establishes the balance between privacy and disclosure intended under the LMRDA—to disclose only an official's actual or potential conflicts of interests, while keeping private his or her bona fide investments "because they are not matters of public concern." Senate Report, at 15, reprinted in 1 Leg. History, at 411.

The Act requires union officers and employees to disclose "any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which [they] directly or indirectly derived from, any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees the official's labor organization represents or is actively seeking to represent" (section 202(a)(3)) and "a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with such labor organization" (section 202(a)(4)).

The 2007 rule established the general requirement that union officials report the details of any loan received from any employer, business, or trust with which the official's union had dealings or any employer whose employees are represented by the official's union (or whose employees the union actively seeks to represent). 72 FR at 36133–38.

Under the proposal, union officials as a general rule will not be required to report loans or other marketplace transactions with bona fide credit institutions, such as interest, dividends, and payments and credit extended through credit card transactions, provided that they are arms length transactions in accordance with usual business practice. The 2007 rule engendered strong protests from union officials, and some segments of the financial services industry, as intrusive and complicated. Shortly after the rule was published, the Department had to issue guidance, identifying several kinds of payments from credit institutions that did not need to be reported, such as savings and checking accounts, and certificates of deposit, but also explaining that credit card arrangements would not have to be reported by union officials.[10]

Upon review of this issue, the Department notes that the 2007 rule reflected a basic policy choice that the disclosure of information, even where the risks of a conflict of interest were not apparent, was a paramount interest that generally outweighed the privacy interests of union officials and the reporting burden on union officials. In making this choice, the Department, as evidenced by its treatment of loans, may not have given sufficient weight to Congress's concern that the LMRDA should not unnecessarily regulate unions and their officials. The Department now believes that the better policy is to require the reporting of loans from a credit institution, as a general rule, only where the loan is on other than market terms. Loans made on market terms are of little or no interest to union members, yet they disclose to members and the general public matters about which union officials, no less than other individuals, have a legitimate expectation of privacy.

Furthermore, by establishing a routine business transaction exemption to loan reporting under sections 202(a)(3) and (a)(4), the Department would prevent the submission of superfluous reports that would overwhelm the public with unnecessary information, thus inhibiting the discovery of true conflict of interest payments. At the same time, the Department would prevent unnecessary burdens on union officers and employees and avoid interference with the privacy of such officials.

[10] The Department issued a series of Form LM–30 FAQs pertaining to the 2007 form, of which FAQs 70–73 deal with issues surrounding payments from credit institutions. In particular, FAQ 70 stated, in part, that union officials do not need to report "credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to the official's status in the labor organization." FAQs 71 and 72 outlined the obligations of union officials regarding home loans, which clarified that such loans must be reported if received from a trust in which the official's union is interested, a business that deals with the official's union or a trust in which the union has an interest, or a business, a substantial part of which deals with an employer the official's union represents or is actively seeking to represent. Finally, FAQ 73 affirmed that the de minimis exemption applies to transactions, interests, and dividends from a financial institution, even if it had dealings with the official's union.

Without such exception, a union official would have to report each mortgage or other bank loan received from any credit institution that deals with his union, section 3(l) trust, or, in substantial part, with his or her represented employer. In the Department's view, the burden would outweigh the value of the additional information disclosed. The Department concurs with its reasoning in the 2007 rule to except from reporting under section 202(a)(6) loans, interest, and dividends earned during the regular course of business with a bona fide credit institution, because of the burden associated with reporting what "are among the most common financial transactions undertaken by individuals." 72 FR 36118. The Department believes that this reasoning applies as well to bona fide loans received from a credit institution covered under sections 202(a)(3) and (4).

As such, the Department proposes the following exemption for income and other benefits of monetary value received from a business and otherwise reportable by the union official on Part B of the proposed LM–30:

Bona fide loans. Do not report bona fide loans, including mortgages, received from national or State banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions, if the loans are based upon the credit institution's own criteria and made on terms unrelated to the official's status in the labor organization. Additionally, do not report other marketplace transactions with such bona fide credit institutions, such as credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to the official's status in the labor organization.

This exemption is limited to bona fide loans from legitimate financial institutions. The Department does not propose to alter other longstanding interpretations of section 202 that require union officers and employees to report other payments from vendors, service providers, financial institutions, and other businesses, that deal in substantial part with the represented employer or in any part with either the official's union *or* any trust in which the official's union is interested.

The Department does not believe arms length loan transactions with a bona fide credit institution (other than where its employees are represented by an official's union or whose employees the union actively seeks to represent) present an actual or potential conflict of interest with the official's duties to his or her labor organization, because these loans, particularly mortgage loans, are usual transactions. The monetary value of bona fide loans obtained at market rates from credit institutions does not create the conflict of interest that arises with respect to other kinds of income from or interest in a business that deals with a represented employer, union, or section 3(l) trust. In contrast, a non-bona fide loan, gift, or other benefit derived from a transaction other than at arms length provides the union official with a net monetary gain, and consequently a potential desire to deal with a business in some way contrary to the interests of the union.[11]

Therefore, for the foregoing reasons, the Department proposes an administrative exemption under section 202(a)(3) and (4) for reporting bona fide loans made on market terms.

D. Scope of Reporting Requirements Under Section 202(a)(6)

Sections 202(a)(1)–(5) of the LMRDA establish conflict of interest reporting requirements concerning payments received by union officers and employees from two sets of entities: (1) Employers that a union represents or is actively seeking to represent; and (2) businesses, such as vendors and service providers, that buy or sell to the represented and potentially represented employers, the union official's union, or trusts in which the official's union is interested. In each case, the reporting obligation is triggered by the particular relationship that exists between an official's union and the entity from which the official holds an interest in or receives a payment.

By contrast, section 202(a)(6) does not specify any relationship between an entity and an official's union, nor does it enunciate when payments must be reported. Rather, it more broadly requires union officials to report any payment of money or other thing of value from "any employer or any person who acts as a labor relations consultant to an employer" (except payments of the kinds referred to in section 302(c) of the LMRA).

In addressing the scope of reporting required under section 202(a)(6) of the LMRDA, the Department, in its 2007 rule, attempted to clarify that section 202(a)(6) covers payments not captured in section 202(a)(1)–(5) that otherwise would create or pose a potential conflict between the financial interests of the union official and the interests of his or her union. 72 FR at 36128–29. As cited in the 2007 rule, the Department has long accepted this position, as LMRDA Interpretative Manual section 248.005 states, in part: "[Section] 202(a)(6) is designed for those situations which pose conflict of interest problems which are not covered in the previous five sections of 202." 72 FR at 36129. Further, the 2007 rule made clear that section 202(a)(6) is not restricted to matters that directly involve labor-management activities, but can be read to encompass any employer who makes a payment that could present a financial conflict of interest for the union official. *Id.*

The Department retains the view that section 202(a)(6) was intended to be a "catch-all" provision, requiring reporting under circumstances that were not set forth in the first five provision of section 202(a). Although it would be impractical to delineate all possible circumstances that would trigger a reporting obligation under section 202(a)(6), the Department proposes a return to the guiding principles of the LMRDA Interpretative Manual. Only payments that present a conflict of interest or the reasonable potential for a conflict of interest should be reported. Those that do not present an actual or potential conflict of interest should not be reported. *See* LMRDA Interpretative Manual section 248.005.

In applying this principle, the Department proposes to retain, in Part C of the proposed form, the requirement to report five types of payments outlined in the 2007 rule, regardless of the relationship the employer has with the filer's union. These payments to a union official (or the official's spouse or minor child) from any employer or labor relations consultant to an employer, are for the following purposes: (1) Not to organize employees; (2) to influence employees in any way with respect to their rights to organize; (3) to take any action with respect to the status of employees or others as members of a labor organization; (4) to take any action with respect to bargaining or dealing with employer whose employees the filer's organization represents or whose employees the union is actively seeking to represent; and (5) to influence the

[11] The proposed modification does not relax the obligation to report on loans or other financial transactions (including credit card arrangements and interest bearing accounts) where a union official receives terms more favorable than the market allows, or payments on the loan are extended or forgiven because of preferential treatment as a union official.

However, loans received from employers or businesses that are not financial institutions will have to be reported as will any loans on other than market terms from employers or businesses that have a relationship with the official's union, and, pursuant to section 202(a)(1) and (a)(2), any loans from an employer represented by the official's union (or whose employees it actively seeks to represent).

outcome of an internal union election. 72 FR at 36128, 36173. These payments create an actual or potential conflict between the filer's financial interests and his or her duties to the labor organization.

The Department also proposes to retain the general requirement that officials report payments from employers and labor relations consultants, from whom a payment would create an actual or potential conflict between the filer's personal financial interests and the interests of the filer's labor organization (or duties to the labor organization). The instructions for the proposed Form LM–30 list examples of such actual or potential conflicts of interest; however, the list should not be considered exhaustive. The examples include, as did the 2007 rule, payments from business competitors to the employer whose employees the union official's union represents or whose employees the union is actively seeking to represent, although, as explained below, a qualification has been added to this example to ensure that only actual or potential conflict of interest payments are reported; and payments from an employer that is a not-for-profit organization that receives or is actively and directly soliciting (other than by mass mail, telephone bank, or mass media) money, donations, or contributions, from the official's labor organization.

As discussed below, the Department proposes to narrow the scope of reporting required under section 202(a)(6) with respect to (1) payments from business competitors to the employer whose employees the union official's union represents or whose employees the union actively seeks to represent; (2) payments received from trusts; and (3) payments from unions.

1. Obligation To Report Payments From Business Competitors to the Employer Whose Employees the Union Official's Union Represents or Whose Employees the Union Is Actively Seeking To Represent

The 2007 rule requires a union official to report payments from an employer or a labor relations consultant to an employer that "is in competition with an employer whose employees your labor organization represents or is actively seeking to represent." 72 FR at 36173. On review, the Department proposes to modify this requirement to avoid undue burden on union officials by requiring reporting only of actual or potential conflict of interest payments.

Under the 2007 rule, all union officers and employees were required to report all payments from all competitors to the represented employer. To do so, they are required to undertake research in order to discover whether they, their spouses, or their minor children, hold any interests in or received any payments from competitors to their union's represented employers. Union officials must track each gift, loan, or payment received. Union officials with a side business, such as catering, IT services, printing, or landscaping, would have to review each business receipt. They would then have to review the source of each gift, loan or payment, and determine which of these individuals or entities constitute "competitors" to the employer of the union members. Then they would have to perform the same analysis for their spouses and minor children. Only then could they make the determination of whether a report was owed.

In contrast, the reporting requirement in the proposed rule focuses on payments that represent an actual or potential conflict of interest. Such payments would include those from an employer in competition with an employer whose employee's the official's labor organization represents or is actively seeking to represent if the official is involved with the organizing, collective bargaining, or contract administration or is actively engaged in the organizing activities related to a particular represented employer or possesses significant authority or influence over such activities. The proposed instructions state:

> Complete Part C if you, your spouse, or your minor child received, directly or indirectly, any payment of money or other thing of value (including reimbursed expenses) from any employer (other than a Represented Employer under Part A or Business covered under Part B above) from whom a payment would create an actual or potential conflict between your financial interests and the interest of your labor organization or your duties to your labor organization. Such employers include, but are not limited to, an employer in competition with an employer whose employees your labor organization represents or whose employees your union is actively seeking to represent, if you are involved with the organizing, collective bargaining, or contract administration activities or possess significant authority or influence over such activities. You are deemed to have such authority and influence if you possess authority by virtue of your position, even if you did not become involved in these activities.

Examples may help illustrate the difference between the existing Form LM–30 and the narrower reporting requirement proposed here. An individual employed part-time by a union to handle computer problems works full time for a technology company that is a competitor to a company whose employees are represented by the union. Under the 2007 rule, the individual would have to file a Form LM–30 to report the payments he receives from his full-time job. Under the proposed rule, he would not have to report these payments. In a contrasting example, an individual employed by a union as an organizer also works part-time for a technology company that is a competitor to a company whose employees the union is actively attempting to organize. Under the proposed rule and the 2007 rule, the individual would have to file a Form LM–30 to report payments he receives from the technology company.

Restricting this reporting requirement to those officials involved with organizing, collective bargaining, or contract administration activities related to a particular represented employer or who possesses significant authority or influence over such activities, will relieve unnecessary burden on filers and ensure that Form LM–30 reports contain useful information for the employees of the represented employer, the employees of the competitor, and the public. Individuals elected to a union's governing body and employees of a union, such as a director of organizing, who possess such authority by virtue of their positions, would be required to report interests held in and payments received from competitors with a represented employer.

2. Obligation To Report Payments Received From Trusts

The Department believes that the Department's historical position that union officials were not required to file reports from "an employer that is a trust in which your labor organization is interested as defined in section 3(l) of the LMRDA" reflects a better policy choice than the position taken in the 2007 rule to require such reporting. *See* Form LM–30 Instructions, p. 5. Such a trust is defined as a "trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries." *See* Form LM–30 Instructions, p. 13.

In the preamble to the 2007 rule, the Department explained its view that loans and other payments from a section 3(l) trust to a union official pose a conflict of interest between the official's personal financial interests and his or her duty to the union. The Department took the position that the interests of the trust and the union are not always congruent. 72 FR at 36136. It stated that the money that "a participating union pays into a trust" is money that otherwise "would be maintained in the union's own account." *Id.* The union's own money would be reported on its Form LM–2 annual financial disclosure report. "[W]ithout requiring a union official to report payments he or she receives from a trust, an official would be able to circumvent and evade the disclosure that would have occurred if the funds had remained in the union's coffer." *Id.* In other words, trust money was deemed to be union money. After further consideration of this issue, the Department believes that the position taken in the 2007 rule was not well founded.

Prior to the 2007 rule, payments from trusts to union officers and employees were not reportable by union officials. The Department's longstanding view is reflected in an opinion, which is dated December 20, 1967 and signed by the head of OLMS's predecessor agency, Frank M. Kleiler, and the Department's Solicitor, Charles Donahue. Indeed, for 40 years, this was written policy. The opinion letter responds to an inquiry from several union officials concerning whether reporting is required of union officers who receive payments from the union and from employer-established pension and welfare plans. The letter concluded that no report was required because none of the trusts were businesses or employers and because the information sought was obtainable under a statute that predated ERISA. Kleiler-Donahue Ltr., p. 2. The letter also determined that trusts were not businesses, because they were not engaged in commercial activities. *Id.*, p. 3. The letter also concluded that there was no conflict of interest between the union officer's loyalty to the union and his service to the trust. *Id.*, p. 4. In addition, the letter considered whether trust funds constituted employers under the LMRDA. The letter stated: "Even assuming that such trust funds may be recognized as 'employers' for some purposes, we must reject the notion that Congress intended to treat such employers as employers under" the LMRDA's union officer and employee reporting provisions. *Id.* As there stated:

> Congress was concerned with arrangements with the primary employer, that is, the one whose employees the union represents or seeks to represent, which might impair the union officer's loyalty as a representative of that organization [vis-à-vis] the employer. Even assuming that a trust fund could successfully be characterized as a primary employer, which we doubt, we fail to perceive the existence of a conflict where a union official received payments from a trust fund for which he also works, even if this arrangement is approved by employer representatives on the trust. The employer representatives are acting in their role as trustees and thus no conflict of interest situation with which Congress was concerned arises.

Id., p. 4–5. The opinion letter noted that even under the provision of the LMRDA that requires reporting from employers other than the "primary employer," the absence of a conflict of interest indicates that the payments are not reportable. The letter noted that "most, if not all" of these payments would be exempted as ordinary compensation, and would not be reportable under the LMRDA, anyway. *Id.* Finally, the letter noted that the transactions involved were already required to be reported under a statute predating ERISA. *Id.*, p. 5. The Kleiler-Donahue opinion letter was simply noted without any substantive discussion in the 2007 rulemaking. 72 FR at 36154.

The Department has now reconsidered its basis for the policy shift. Upon review of the policy enunciated in the Kleiler-Donahue letter, the Department is convinced of its significance and its persuasive value. As the letter notes, payments from trusts to union officers and employees—wages to employees or reimbursed expenses—are payments reported elsewhere and, more importantly, pose "no conflict with which Congress was concerned." Kleiler-Donahue Ltr., p. 5.

On these foregoing bases, the Department proposes to return to the 40-year understanding of the Form LM–30, and exempt from reporting payments from trusts to union officers and employees.

3. Obligation To Report Payments From Unions

The Department has reconsidered the general requirement in the 2007 rule that union officials report must payments received from a labor union. The Department's position was based on the conclusion that payments from a labor union (to the extent it has any employees and thus is an employer) should not be treated differently from payments from any other employer in situations that arguably pose the possibility of a conflict of interest. 72 FR at 36140–41. The Department believes that its proposed approach better takes into account the LMRDA's distinctions between labor organizations and employers. For this reason, the Department proposes to modify this reporting requirement.

The 2007 rule requires union officials to report payments where the employer is a labor union that:

a. Has employees the official's union represents or is actively seeking to represent;

b. Has employees in the same occupation as those represented by the official's union;

c. Claims jurisdiction over work that is also claimed by the official's union;

d. Is a party to or will be affected by any proceeding in which the official has voting authority or other ability to influence the outcome of the proceeding; or

e. Has made a payment to the official for the purpose of influencing the outcome of an internal union election.

Item A.5 on Schedule 3 of the 2007 Form, 72 FR at 36163. The Department proposes to remove this provision. However, this proposal will not affect a staff union official's obligation to report payments he or she receives from a union-employer whose employees the official's union represents. Any such payments would be reportable under Part A of the proposed form and previously had been reportable under Part A of the pre-2007 form as payments from an employer whose employees the official's labor organization represents (or actively seeks to represent). There is no need to require their reporting under section 202(a)(6). Compare 29 U.S.C. 432(a)(1), (a)(2), and (a)(5) to 29 U.S.C. 432(a)(6). This "staff union" scenario represents an obvious archetypal conflict of interest: a non-wage payment from an employer to a union officer. In this instance, the labor union is acting in the capacity of an employer in a labor-management situation and making a payment that poses an obvious conflict. However, the Department believes that Congress simply did not intend labor unions, apart from this instance, to be treated as employers for purposes of Form LM–30 reporting.

As the statutory analysis, below, explains, Title II of the LMRDA provides a reticulated reporting regime, setting forth distinct but interrelated reporting requirements. Section 201 contains reporting rules for labor organizations, section 202 requires reports from union officers and employees, and section 203 requires reports from employers and labor consultants. Under section 201, the assets, liabilities, receipts and disbursement of labor unions are reported on the Department's Form LM–2, Form LM–3, and Form LM–4. These forms require all covered labor organizations to account for disbursements, including those to officers and employees of other unions. Depending on the dollar amount, some of the payments may be individually itemized on the Form LM–2, and some may be aggregated with other information. But, in either case, they are incorporated in the Form LM–2. Pursuant to section 201(c), moreover, labor organization members can view the union's underlying records to learn the exact amount and recipient of each disbursement. Consequently, additional reporting on Form LM–30 would be inconsistent with the statutory scheme, unduly burdensome, and unnecessarily duplicative of other reporting requirement.

Moreover, the Department, in reconsidering this question, has concluded that a preferred reading of the LMRDA would not consider labor unions or trusts as employers, as each of these entities is treated separately under the Act. In drafting the LMRDA reporting and disclosure requirements, Congress mandated separate requirements for the discrete statutory actors: "labor organizations," "labor organization officers" and "labor organization employees," "employers," "labor relations consultants," and "trusts in which a labor organization is interested." (While there are no reporting requirements for section 3(l) trusts, section 208 authorizes the Secretary to establish such requirements for labor organizations concerning such entities.) Further, the statute separately defined five of these six terms. *See* sections 3(e), 3(i), 3(l), 3(m), and 3(n) of the LMRDA. The 2007 rule, in contrast, characterized "labor organizations" as employers, pursuant to section 202(a)(6).

Section 201 requires "labor organizations" to disclose, among other financial transactions and information, disbursements to many individuals and entities, including employers, businesses, their own officers and employees and, potentially, those of other labor organizations. Section 203 requires "employers" to file certain reports. As applied to section 202, "labor organization" officers and employees must report payments from "employers" and "businesses" that have certain relationships to the official's "labor organization." The statute thus sets out employers and labor organizations as distinct and separate entities. There is nothing in the statute that indicates that Congress intended that the category of employers also would include labor organizations, or that Congress meant for officers and employees to report transactions with labor organizations. It seems apparent that, if Congress had intended that transactions with labor organizations be included in reporting under section 202, it would have explicitly included labor organizations in that section.[12]

Additionally, the Department believes that this reading of the statute better implements the labor union and labor-management reporting requirements of the LMRDA. First, as stated previously, conflict of interest payments from labor organization-employers represented by staff unions are reportable on Form LM–30 pursuant to sections 202(a)(1), (2), and (5). Second, the Form LM–2, LM–3, and LM–4 Labor Organization Annual Disclosure Reports require all covered labor organizations to disclose any disbursement, including those to officers and employees of other unions, pursuant to section 201. Such disbursements include those addressed in provisions 5(b)–(e), quoted above, all of which constitute payments from labor organizations in their capacity as the representative of employees, not as an employer of employees. A member or other viewer of LM reports would naturally look to the labor organization's annual financial disclosure report, and not the Form LM–30 reports, to view disbursements from their labor organization. Further, pursuant to section 201(c), union members can view the underlying records of their union's reports to ascertain further information related to the payments to third party union officials.

E. Scope of Form LM–30 Reporting by National, International, and Intermediate Body Union Officials

The Department proposes to remove the definition of "labor organization" (Part III, D10, of the 2007 instructions), which addresses the reporting obligation of national, international and intermediate body officials under section 202 of the LMRDA. In its place, the Department will rely on the statutory definition of "labor organization" under section 3(i) and (j) of the LMRDA, and proposes the inclusion of the following language to clarify the top-down reporting obligation of national, international, and intermediate body officials:

> When applying the Form LM–30 reporting requirements, a national, international, or intermediate union officer or employee must look at employers and businesses with requisite relationships with lower levels of the official's union (*e.g.*, a local or other subordinate body), as well as the official's own level of the union.

[12] This reasoning is consistent with LMRDA Interpretative Manual section 260.005. This section provides that no report is required for activities performed by an attorney on behalf of a union (distinct from activities performed for an employer), even though the attorney meets the definition of "labor relations consultants" under section 3(m), because the only section of the Act which requires reports from labor relations consultants is section 203(b), which provides for reports from every person who has an agreement with an *employer* for certain purposes.

The Department's proposal will require union employees to report the same interests and payments that union officers are required to report. Further, the Department proposes to restore the obligation that these officers and employees report any interests in or payments received from businesses that deal with employers whose employees are represented by subordinate affiliates of their union (and any employers such affiliates are actively seeking to represent), as well as businesses that deal with the official's union or such subordinate affiliates of their union, including their section 3(l) trusts, and to require that union officials report interest and payments or other financial benefits received by their spouses and minor children from such employers. The 2007 rule removed the obligation to report on these interests and payments.

Section 202 requires union officers and employees to report certain payments and interests from employers and businesses that have specified relationships with the official's labor organization in order to disclose potential conflicts of interest. The Department has long recognized that such potential conflicts could be related to a national or international union official's responsibility to either the immediate union that he or she serves or some other union within the labor organization's hierarchy. For example, in section 241.100 of the LMRDA Interpretative Manual, the Department addressed the reporting standards for international union officers, as follows:

> Section 202(a)(3) of the Act requires reports from "every officer of a labor organization" of income derived from "any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees such labor organization represents or is actively seeking to represent." An international union officer must report his income from such a business even though he is not an officer of the local which represents the employees of the business, and even though his duties as an international officer do not include representation activities.

Recognizing that the pre-2007 Form LM–30 Instructions did not expressly address this type of issue, and seeking to ensure proper disclosure of conflict of interest payments under section 202 of the Act, the 2007 rule defined "labor organization" in a way that reached such payments. 72 FR at 36121–24. This definition of "labor organization" and the related reporting instructions prescribed a "top-down" approach to disclosure, which requires national, international, and intermediate body officers to "look-down" to lower levels of the union hierarchy in determining the full scope of their section 202 reporting responsibilities. The reporting standard is significantly narrower than that set forth in the 2005 NPRM, which had proposed to require officials to also report conflict of interest payments and interests involving any higher-level affiliate of the official's union—a "look-up" approach to complement the "look-down" approach. 70 FR at 51182–83. The 2007 rule also differs from the 2005 proposal in that the rule narrowed the "top-down " reporting obligation to union *officers*, excepting employees from this obligation. 72 FR at 36123–24, emphasis added. Further, under the 2007 rule, the officers of intermediate, national, or international unions are not required to report payments from or interests in businesses that deal with employers represented by, or actively being organized by, any lower level of the officer's labor organization. They also are not required to report payments and other financial benefits received by their spouses or minor children as bona fide employees of a business or employer involved with a lower level of the officer's labor organization.

Upon review, the Department believes that the approach taken in the 2007 Form LM–30 instructions, at Part III, D10, does not achieve the policy choice that best comports with the purposes served by section 202. First, the 2007. rule requires only officers (and not employees) of national, international, and intermediate unions to report payments from and interests in entities that deal with lower levels of the officers' labor organizations. 72 FR at 36123–24. As recognized under the LMRDA statutory scheme, union employees, not solely union officers, can hold positions of considerable authority and influence in all levels of a union hierarchy. Such employees include key administrative personnel such as business agents, heads of departments or major units, attorneys, and organizers who exercise substantial independent authority. *See* section 3(q), 29 U.S.C. 402(q). Moreover, union employees, like union officers, may also have interests in or receive payments from the same entities that pose the same actual or potential conflict with the interests of their union or their duties to their union. For example, an international union organizer may have a business interest in an employer that a subordinate local is trying to organize. Under the 2007 rule, this interest would not be reported. Maintaining the same reporting rules for officers and employees throughout all sections of the Form LM–30 increases the clarity and consistency of the LM–30 reporting requirements.

Secondly, Part III, D10, of the 2007 Form LM–30 instructions exempt the reporting of "payments from or interests in businesses that deal with employers represented by, or actively being organized by, any lower level of the officer's labor organization." 72 FR at 36122. The exception does not adequately consider longstanding policy of the Department, cited above. It also creates the possibility of unreported conflicts of interest. For example, an employee of an international union may have a side business selling information technology services. The business may contract with a grocery market organized by an affiliated local union to maintain the market's payroll system. Under the 2007 rule, the international union employee would not have to report his or her IT business and its relationship with the employer represented by the affiliated local.

Further under the 2007 rule, a national/international or intermediate officer is not required to report payments and other financial benefits received by the spouse or by a minor child as a bona fide employee of a business or employer involved with a lower level of the officer's organization. For example, the Secretary Treasurer of an international union has a spouse that is the head of purchasing for an auto parts manufacturer that deals with an employer of the union members. Under the 2007 rule, the Secretary Treasurer would not have to report the position and income of the spouse. Such payments must be reported under the proposed rule, as they were prior to the 2007 rule.

Additionally, the existing instructions, at Part III, D10, are potentially confusing to Form LM–30 filers because of these inconsistencies with the overall LM–30 reporting scheme. In addition, the Department finds, on review, that the instructions explaining the "top-down" reporting requirements are vague and often difficult to follow. For example, the 2007 LM–30 Instructions list various exceptions noting what is not required to be reported (with respect to top-down reporting), yet fail to clearly delineate what top-down scenarios must be reported. *See* 2007 LM–30 Instructions, D10 at p. 11–12.

For the foregoing reasons, the Department has determined to apply the principles of longstanding policy articulated in section 241.100 of the LMRDA Interpretative Manual to officers and employees of national, international, and intermediate unions. When applying the Form LM–30 reporting requirements, a national, international, or intermediate union officer or employee must look at employers and businesses with requisite relationships with lower levels of the official's union (*e.g.*, a local or other subordinate body), as well as the official's own level of the union.

IV. Proposed Revisions to the Regulations, Form, and Instructions

The Department is proposing changes to the Form LM–30 to simplify its use by filers, chiefly by reducing the length of the form (from nine pages to two pages) and its instructions (from 22 pages to 13 pages) and eliminating or modifying some burdensome and unnecessarily intrusive reporting requirements. The 2007 rule established a lengthy, complicated form and instructions. Although the length of these documents was due, in part, to the inclusion of numerous examples, many of these examples provided little practical assistance to filers and, in their entirety, the examples created a perception among filers that they were required to make extensive and complex legal and accounting determinations. The proposed instructions contain only a few examples. While particular filers may have questions about whether certain matters should be reported, the Department believes that these questions are better addressed through compliance assistance than by imposing a burden on all filers to read about complex issues that concern a very small number of filers. The Department also is proposing to revise the format of the instructions to define key terms as they first appear in the instructions, rather than to collect the definitions in the middle of the instructions, the approach taken in the 2007 rule.

The discussion that follows describes the Department's proposal to revise its regulations implementing section 202(a) of the LMRDA, 29 CFR 404.4, and the Form LM–30 and its accompanying instructions, which are incorporated into the regulations by reference. 29 CFR 404.3.

A. Regulations

Only one proposed change involves the regulatory text. 29 CFR 404.1(f). In section 404.1(f), the Department proposes to remove the definition of "labor organization," which had been added in the 2007 rule to establish the scope of reporting required of higher level union officers. Paragraphs (g) through (j) of section 404.1 also will be re-designated as (f) through (i), respectively. As discussed below, the term "labor organization" is separately defined in the LMRDA, and language regarding the scope of reporting for national, international, and intermediate union officers and employees has been added to the proposed instructions.

B. Proposed Form

In this notice, the Department proposes the implementation of a new Form LM–30, entitled "Labor Organization Officer and Employee Annual Report," which will feature a revised, simplified format. The Department believes its proposed form will better facilitate filers' compliance with LM–30 reporting requirements than earlier forms and increase the form's utility to the public.

With respect to layout, the proposed form more closely resembles the pre-2007 form than the lengthier 2007 form. The proposed form, which is two pages in length, contains four sections: a section that contains basic identifying information on the filer and labor organization, and Parts A through C. Parts A, B, and C are designed to capture reportable transactions with a represented employer, a business that has dealings with the official's union, a trust in which the union has an interest, or has substantial dealings with a represented employer, and other employers or labor relations consultant, respectively. The form has been simplified by removing numerous schedules, checklists, and examples. While the inclusion of this information in the 2007 form was intended to assist filers, it is the Department's present view that these additions made the form more confusing and difficult to complete.

The proposed form does not contain the summary schedule that was on the first page (Item 5) of the 2007 form. The Department doubts the utility of the summary schedule. The Department does not believe that requiring the reporting of "total reported income or other payments" and "total reported assets" is useful information, by itself, and may be misleading. Without knowing the context to the reportable transaction or transactions, a viewer does not have a basis to assess the actual or potential conflict of interest and the impact such a conflict would have on the official's duties to the labor organization. For a filer with multiple payments, a summed total on the front page of the form is misleading, even if the totals are separated by assets and other payments, since a viewer of the form can only judge a conflict of interest by looking at the monetary value of the payment or interest along with its source and other pertinent circumstances. A sum of money or other payment or asset, in of itself, has no meaning, and can lead to confusion for the viewer and reflect unfairly on the filer. Further, presenting a figure for "total reported income or other payments" gives the impression that this total represents income and payments received by the filer, when in fact, this figure might also include items such as interest in personal or real property, insurance, or share holdings.

The proposed form does not contain sections on Employer and Business Relationships (Items 6 and 7, respectively, on the 2007 form). The Department does not believe that this general information adds to the usefulness of the form, because this information is reported on each schedule. A bulleted checklist for the relationships has also been eliminated.

The proposed form's contact information sections in Parts A, B, and C generally collect the same information requested in Schedule 1 of the 2007 form, except that the proposed form will not ask whether the filer, filer's spouse, or minor child had a relationship with the employer, business, or labor relations consultant *at the end of the reporting period,* as this information does not aid the viewer of the form in assessing any conflict of interest for the fiscal year in question. The proposed form also eliminates the requirement that a filer provide the Web site address of the employer, business, or labor relations consultant in which the filer holds an interest or receives a payment. The Department does not believe that the Web site address is necessary, since viewers of the form can independently locate this information.

In place of the separate Additional Information Schedule, which was included in the 2007 form, the proposed instructions simply provide guidance on how to provide additional information. Filers who choose to file a paper copy of the form are instructed to attach a separate letter-size page, with identifying information. Filers who choose to file electronically will be able to add additional information as needed.

A section-by-section discussion of the proposed form follows:

First Section—Basic Identifying Information (Items 1–5)

The first section of the proposed form gathers basic information about the filer and his or her labor organization. Item 1 requests the LM–30 file number, and Item 2 calls for the fiscal year covered in the report. Item 3 provides a box to identify the form as an amended report. Filers must provide their contact information in Item 4, which includes lines for their name and street address (both required), and an e-mail address (optional). In Item 5, they must provide identifying information about their labor organization, indicate whether they are an officer or employee, and note their officer position or job title. If the filer serves as an officer or employee in more than one labor organization, this information is captured on an Item 5 Continuation Page.

Below the first section, the proposed form states, "Complete Part A, B, or C if, during the past fiscal year, you or your spouse or minor child directly or indirectly had a reportable interest in, transaction or arrangement with, or received income, payment, or benefit from the entities described below."

Part A—Represented Employer (Items 6 and 7)

In the proposed form, "Represented Employer" is defined as "an employer whose employees your labor organization represents or whose employees it is actively seeking to represent." If the filer had a reportable interest, transaction, benefit, arrangement, income, or loan from his/her "Represented Employer," he or she must provide in Item 6 the employer's contact information, including the name and telephone number of a contact person. In Item 7a, the filer must provide the nature of the interest, transaction, benefit, arrangement, income, or loan, and in Item 7b, he or she must provide the amount or value. As stated above, the Department has removed the requirement that filers report the Web site address for the employer.

As will be explained in the Proposed Instructions section below, the filer must complete a separate Part A for each "Represented Employer" or transaction reported. A Continuation Button is located below Part A if the filer needs to complete one or more additional Part As.

Part B—Business (Items 8–12)

The proposed form provides that the filer must complete Part B if he or she had a reportable interest in, transaction or arrangement with, or received income, payment, or benefit from "[a] business, such as a vendor or service provider, (1) a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with the business of a Represented Employer described in Part A or (2) any part of which consists of buying from or selling or leasing directly or indirectly to, or otherwise dealing with your labor organization or with a trust in which your labor organization is interested."

If the filer has reportable activity with such a business, he or she must provide in Item 8 the contact information for the business, including the name and telephone number of a contact person. In Item 9, the filer must indicate the entity the business deals with by checking the box for (a) labor organization, (b) trust, or (c) employer. If the filer checks the box for trust or employer, he or she must provide the trust or employer's name and contact information in Item 10. The filer must provide the nature of the dealings in Item 11a, and the value of the dealings in Item 11b. Additionally, the filer must provide in Item 12a the nature of the interest, benefit, arrangement, or income. Item 12b calls for the amount or value of the interest, benefit, arrangement, or income. As stated above, the Department has removed the requirement that filers report the Web site address for the business. As will be explained in the Proposed Instructions section below, the filer must complete a separate Part B for each business or transaction reported. A Continuation Button is located below Part B if the filer needs to complete one or more additional Part Bs.

Part C—Other Employer or Labor Relations Consultant (Items 13 and 14)

The proposed form provides that the filer must complete Part C if he or she had a reportable interest in, transaction or arrangement with, or received income, payment, or benefit from "an employer (other than a Represented Employer or Business covered under Parts A and B above) from whom a payment would create an actual or potential conflict between your personal financial interests and the interests of your labor organization (or your duties to your labor organization); or a labor relations consultant to such an employer or to the Represented Employer listed in Part A."

If the filer has reportable activity with such an employer or labor relations consultant, he or she must provide in Item 13a the contact information for the employer or labor relations consultant. In Item 13b, the filer must indicate whether the entity is an employer or consultant. The filer must provide the nature of the payment in Item 14a, and the amount or value of the payment in Item 14b. As stated above, the Department has removed the requirement that filers report the Web site address for the employer or labor relations consultant.

As will be explained in the Proposed Instructions section below, the filer must complete a separate Part C if reporting more than one employer, labor relations consultant, or transaction. A Continuation Button is located below Part C if the filer needs to complete one or more additional Part Cs.

Signature and Verification (Item 15)

The filer must provide his or her signature; date, and telephone number in Item 15, which is located on the bottom of the first page. As explained in the instructions, filers are instructed to view the OLMS Web site for further information on how to electronically sign and submit the Form LM–30. The signature line on the proposed form is identical to that on the 2007 form, except for the fact that the proposed form assigns the heading "Signature and Verification" to Item 15. The signature line on the 2007 form did not include a heading.

C. Proposed Instructions

1. General

The proposed instructions reflect significant changes in both layout and content from the 2007 form. The content has been changed to reflect the specific changes discussed in the preceding sections of the notice. Other changes have been made to add clarity and eliminate unnecessary repetition. The discussion immediately below highlights significant changes between the proposed and 2007 instructions.

As noted above, the proposed form and instructions reinstate the general "Parts A, B, and C" format featured in the pre-2007 form and instructions instead of the multiple-schedule format introduced in the 2007 form and instructions. The Department believes that the proposed format is clearer and more streamlined and will make the form much easier for filers to understand and complete, without affecting the usefulness of the information disclosed.

The proposed instructions do not include a separate "Definitions" section, which was included in the 2007 instructions. The proposed instructions instead present definitions and clarifications of key terms in the context of the sections in which they appear in the document. When a definition follows a section of the instructions, the term to be defined is italicized. Further, if a defined term is used in multiple places, the later references refer back to the section in which the term is first used and defined. The Department believes that this approach will help filers understand key terms as they read through the instructions, and will eliminate the need for filers to frequently refer to a separate "Definitions" section to determine what must be reported and how it must be reported.

The Department also proposes to remove the examples that are dispersed throughout the 2007 instructions. The numerous examples in the 2007 instructions, many of which involved situations confronted by a very small number of filers, made the form unnecessarily complex and difficult to complete, without meeting the intended goal of providing helpful guidance. Following the publication of a revised Form LM–30, the Department intends to provide compliance assistance support to Form LM–30 filers.

Additionally, the Department proposes to modify the definitions of some key terms that are found in the 2007 Form LM–30 Instructions. First, the Department proposes to remove the definition of "bona fide employee" as used in the 2007 rule and add the bona fide employee exemption found in the instructions for the pre-2007 form. The language to be added reads:

> Payments and benefits received *as a bona fide employee* of the employer for past or present services, including wages, payments or benefits received under a bona fide health, welfare, pension, vacation, training or other benefit plan; and payments for periods in which such employee engaged in activities other than productive work, if the payments for such period of time are: (a) Required by law or a bona-fide collective bargaining agreement, or (b) made pursuant to a custom or practice under such collective bargaining agreement, or (c) made pursuant to a policy, custom or practice which the employer has adopted without regard to any holding by such employee of a position with a labor organization.

Emphasis added. Second, the Department proposes to modify the definition of "labor organization employee." As a result, the Department proposes the following language for insertion into the revised Form LM–30 Instructions in Section II, Who Must File: "For purposes of the Form LM–30, an individual who serves the union exclusively as a union steward or as a similar union representative, such as a member of a safety committee or a bargaining committee, is not considered to be an employee of the union."

Third, the Department proposes to remove the definition of "labor organization" (Part III, D10), which had been added to the 2007 rule in order to describe the reporting obligation of national, international and intermediate body officers under section 202 of the LMRDA. As explained earlier in the notice, the term "labor organization" is separately defined in the LMRDA, and language regarding the scope of reporting for national, international, and intermediate union officers and employees has been added to the proposed instructions. The proposed text removes language that excepted employees of international, national, and intermediate unions from reporting about conflicts of interest involving subordinate affiliates of their union.

The reasons for these changes are discussed in detail in section III, parts A and B, of this notice.

2. Particular Sections and Parts

Section I, Why File: This section presents general information about the reporting requirements of section 202. This information is identical to that presented in the 2007 instructions, except that it has been simplified to refer to the individual completing the form as "you," instead of "filer."

Section II, Who Must File: The 2007 instructions presented a lengthy *Section II, Who Must File and What Must Be Reported* (located on pages 1–9). The proposed instructions have divided this into two separate, concise sections, *Section II, Who Must File* and *Section III, What Must Be Reported.* The Department believes that this change will enable filers to more easily understand this basic information. This section states that "*(a)ny officer or employee of a labor organization* (other than an employee performing clerical or custodial services exclusively), as defined by the LMRDA, must file Form LM–30 if, during the past fiscal year, the officer or employee, or his/her spouse, or minor child, either directly or indirectly, held any legal or equitable interest, received any payments, or engaged in any transactions (including loans) of the types described in these instructions." "Labor organization employee" is defined as "any individual (other than an individual performing exclusively clerical or custodial services) employed by a labor organization within the meaning of any law of the United States relating to the employment of employees." It also provides: "For purposes of the Form LM–30, an individual who serves the union exclusively as a union steward or as a similar union representative, such as a member of a safety committee or bargaining committee, is not considered to be an employee of the union." The term "minor child" is also defined as someone younger than 21 years of age.

The reporting exceptions for insubstantial payments and gifts, including attendance at widely attended gatherings, are unchanged from the 2007 instructions, but their discussion has been moved to *Section X, Completing Form LM–30.*

Section III, What Must Be Reported: This proposed section simply refers filers to Parts A, B, and C of the instructions for information about financial transactions and interests that must be reported.

Section IV, Who Must Sign the Report: This section specifies that the labor organization officer or employee is required to sign the completed Form LM–30.

Section V, When to File: The information in this section is substantively identical to the information in *Section IV, When to File* in the 2007 instructions.

Section VI, How to File: The proposal provides for submission of the For LM–30 in paper format or electronically. Filers will be able to choose between the two options. Proposed Section VI provides information regarding these filing options, including how to obtain the form, and instructions on submitting it, from the OLMS Web site.

The Department plans significant improvements to electronic submission processes that will simplify the electronic signature procedure and eliminate the associated costs to filers. Specifically, the Department will implement a simplified electronic signature that only requires the filer to acquire a Personal Identification Number (PIN) and password, which the Department will provide at no cost to the filer. The Department believes that electronic reporting is, generally, easier for filers, and that it will enable the Department to better incorporate submitted forms into its Electronic Labor Organization Reporting System (e.LORS), ensuring easy access to information for the public.

Section VII, Public Disclosure: With the exception of a slight change in wording, this section is unchanged from the Public Disclosure section in the 2007 instructions.

Section VIII, Officer and Employee Responsibilities and Penalties: With the exception of a slight change in wording in the first sentence (changed "required to file" to "required to sign"), this section of the proposed instructions is identical to the information in the *Section VII, Officer or Employee Responsibilities and Penalties* in the 2007 instructions.

Section IX, Recordkeeping: This section contains information identical to that in the *Recordkeeping* section of the 2007 instructions.

Section X, Completing Form LM–30: This section presents detailed instructions on completing all of the information items in the Form LM–30. The Department believes that the placement of this section on page 3 of the proposed instructions represents a significant improvement over the 2007 instructions, which does not begin to instruct filers on completing the form until page 14.

This section begins with an introduction that includes information on electronic completion of the form. The 2007 instructions did not provide this information. The Department believes that most filers will submit the form electronically, which justifies instructions geared towards this method. Additionally, the Department will provide compliance assistance support for both paper format and electronic filing.

This section provides information on completing Information Items 1 through 5, which gather basic identifying information about the filer and his or her labor organization. With the exception of minor changes in wording, these "basic identifying" information items are the same as in the 2007 instructions.

Next, the proposed instructions feature the heading, "Information Items—Parts A, B, and C." The proposed form features the simpler "Parts A through C" approach, as opposed to the multiple-schedule format introduced in the 2007 form, the proposed instructions differ from the 2007 instructions, especially in format, but also in content.

First, the subsection "General Instructions for Reportable Transactions and Interests" begins with: "You must report only if, during the past fiscal year he/she, or his/her spouse or minor child, *directly or indirectly:* (1) Held an interest; (2) engaged in a transaction; or (3) received income, payment or other economic benefit with monetary value covered by the Act."

Next, the instructions provide information on the scope of filing for national, international, and intermediate union officers and employees, which (as explained above in section III, part E, of this notice) operates to require union employees, to report the same top-down information now required of union officers. This change is discussed in greater detail in section III, part E, of this notice.

The definition of "directly or indirectly" is presented directly below this introductory language. This definition, including its two examples, is unchanged from the 2007 rule.

The proposed subsection, General Exclusions, describes the general reporting exemptions, "insubstantial payments and gifts" and "widely-attended gatherings," both of which are unchanged from the 2007 rule. Next, the definition for "trust in which a labor organization is interested" is provided. This definition is unchanged from the 2007 rule.

Filers are also instructed to complete a separate Part A, B, and/or C if they are reporting more than one entity or transaction. The instructions explain that additional Parts A, B, and C are available by clicking the Continuation Button on the electronic form or attaching a separate Part A, B, or C, if using a paper format.

Part A (Items 6 and 7): Represented Employer

The proposed instructions for Part A present information on how to complete Items 6 and 7, which pertain to the Represented Employer. Specifically, the instructions state: "Complete Part A if you (1) held an interest in, (2) engaged in transactions (including loans) or arrangements with, or (3) derived income or other economic benefit of monetary value from, an employer whose employees your labor organization represents or is actively seeking to represent." The instructions state that payments received as "director's fees" must be reported. This requirement was contained in the 2007 instructions.

Next, the definition for "actively seeking to represent" is provided. This definition is unchanged from the 2007 rule.

The subsection Part A Exclusions lists items that do not need to be reported in Part A. The first three exclusions—(i), (ii), and (iii)—are substantively unchanged from the 2007 instructions These relate, respectively, to de minimis payments or other financial benefits; holdings, transactions and income from bona fide investments in securities traded on a national securities exchange and other designated securities; and holdings—of $1,000 or less—or income of $1,000 or less—from bona fide investments in other securities. The fourth exclusion, "Payments and benefits received as a *bona fide employee*," emphasis added, has been modified to incorporate the historical interpretation given payments received by union officials under union leave and "no docking" policies established by collective bargaining agreements or workplace custom or practice.

Since the first Part A Exclusion refers to "bona fide investments," this term is defined in this section. The definition for "bona fide investment" is unchanged from the 2007 rule.

The instructions here advise that filers should not report on the form bank account numbers, policy numbers, social security numbers, or similar information.

In the proposed instructions, the following definitions are presented in connection with Information Item 7: "arrangement," "benefit with monetary value," "income," and "legal or equitable interest." All of these definitions are unchanged from the 2007 rule. The note to item 7 has been revised to eliminate an example which does not appear helpful. Additionally, specific instructions are provided on how to complete Items 6 and 7, which are described in the above subsection, Proposed Form.

Part B (Items 8–12): Business

In the proposed instructions, the filer is instructed:

> Complete Part B if you held an interest in or derived income or other benefit with monetary value, including reimbursed expenses, from a business (1) a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with the business of an employer whose employees your labor organization represents or is actively seeking to represent, or (2) any part of which consists of buying from or selling or leasing directly or indirectly to, or otherwise dealing with your labor organization or with a trust in which your labor organization is interested. Report payments received as director's fees, including reimbursed expenses. Complete a separate Part B for each such business and for each such interest or item of income connected with that business.

Definitions for "substantial part" and "dealing" are provided. These definitions are unchanged from the 2007 rule.

The subsection Part B Exclusions lists items that do not need to be reported in Part B. Two of the Part B exclusions are retained from the 2007 rule (relating to holdings, transactions and income from bona fide investments in securities traded on a national securities exchange and other designated securities; and holdings—of $1,000 or less—or income of $1,000 or less—from bona fide investments in other securities). These two Part B exclusions are the same as the exclusions set forth in (i) and (ii) in Part A. However, the proposed rule proposes to provide an exception regarding market place transactions from bona fide credit institutions, as explained in greater detail in section III, part C, of this notice.

The Department also proposes to exempt union officials from reporting certain interests in or payments received from businesses, "a substantial part of which * * * deals with the business of an employer whose employees the labor organization represents or is actively seeking to represent," section 202(a)(3), or "from a business * * * dealing with [the official's] labor organization," section 202(a)(4). Specifically, the proposed instructions read:

> *Bona fide loans.* Do not report bona fide loans, including mortgages, received from national or State banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions, if the loans are based upon the credit institution's own criteria and made on terms unrelated to the official's status in the labor organization. Additionally, do not report other marketplace transactions with such bona fide credit institutions, such as credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to the official's status in the labor organization.

Additionally, specific instructions are provided on how to complete Items 8 through 12, which are described in the above subsection, Proposed Form.

Part C (Items 13 and 14): Other Employer or Labor Relations Consultant

In the proposed instructions, the filer is instructed:

> Complete Part C if you, your spouse, or your minor child received, directly or indirectly, any payment of money or other thing of value (including reimbursed expenses), from any employer (other than a Represented Employer under Part A or Business covered under Part B above), from whom a payment would create an actual or potential conflict between your financial interests and the interest of your labor organization or your duties to your labor organization. Such employers include, but are not limited to, an employer in competition with an employer whose employee's your labor organization represents or whose employees your union is actively seeking to represent, if you are involved with the organizing, collective bargaining, or contract administration or is actively engaged in the organizing activities related to a particular represented employer or possesses significant authority or influence over such activities. You are deemed to have such authority and influence if you possess authority by virtue of your position, even if you did not become involved in these activities. Additionally, complete Part C if you received a payment of money or other thing of value from a labor relations consultant to a Represented Employer or Part C employer.

The italicized portion represents a change from the 2007 instructions, as explained in section III, part D, of this notice. The Department removed "labor organizations" and "trusts in which your labor organization is interested" from the scope of section 202(a)(6) and Part C, as explained in section III, part D, of this notice.

The subsection Part C Exclusions lists items that do not need to be reported in Part C. The first administrative exemption in Part C—relating to payments of the kind referred to in section 302(c) of the Labor Management Relations Act, 1947, as Amended (LMRA)—remains substantially the same as that in the 2007 instructions; the only change is that LMRA section 302(c) is not quoted in the instructions (instead, the reader is directed to a later part of the instructions where this section is set forth in full).

The second administrative exemption in Part C—relating to bona fide loans interests or dividends from a bona fide credit institution—is modified slightly from the 2007 rule; specifically, the following sentence, present in the 2007 instructions, is not included in the proposed instructions: "This exception does not apply to national or State banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions that constitute a 'trust in which your labor organization is interested.'" Accordingly, the proposed rule excepts from reporting under Part C:

(ii) Bona fide loans (including mortgages), interest or dividends from national or State banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions, if such loans, interest or dividends are based upon the credit institution's own criteria and made on terms unrelated to your status in a labor organization. Additionally, do not report other marketplace transactions with such bona fide credit institutions, such as credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to your status in the labor organization.

The third administrative exemption in Part C returns to the Department's historical interpretation, exempting:

(iii) Interest on bonds or dividends on stock, provided such interest or dividends are received, and such bonds or stock have been acquired, under circumstances and terms unrelated to your status in a labor organization and the issuer of such securities is not an enterprise in competition with the employer whose employees your labor organization represents or actively seeks to represent.

The Department believes that the 2007 rule did not adequately justify the removal of this exemption. Further, interest on bonds or dividends on stock are routine business transactions, which do not ordinarily raise conflict of interest questions. Their inclusion would increase the burden on union officials, without any apparent benefit to the public. Indeed, the reporting of non-conflict of interest payments could hide from scrutiny those payments that are in need of transparency. Finally, in order to ensure that actual or potential conflict of interest payments are reported, the Department has provided two qualifications on this exemption: the payments must be received under circumstances and terms unrelated to the recipient's status in a labor organization and the issuer of such securities is not an enterprise in competition with the represented employer.

Additionally, specific instructions are provided on how to complete Items 13 and 14, which are described in the above subsection, Proposed Form.

The Department has also retained the section 202(a)(6) requirements that an official report:

- Any payment of money or other thing of value from a labor relations consultant to a Part C employer;
- Payments from an employer that is a not-for-profit organization that receives or is actively and directly soliciting (other than by mass mail, telephone bank, or mass media) money, donations, or contributions, from the official's union; and
- Any payments from an employer (not covered by Parts A or B), or from any labor relations consultant to an employer, for the following purposes:

(1) Not to organize employees;

(2) To influence employees in any way with respect to their rights to organize;

(3) To take any action with respect to the status of employees or others as members of a labor organization;

(4) To take any action with respect to bargaining or dealing with employers whose employees your organization represents or seeks to represent; and

(5) To influence the outcome of an internal union election.

See 72 FR at 36128, 36130, 36173.

Remainder of Instructions

The instruction for Item 15, Signature and Verification, states that the completed Form LM–30 must be signed by the officer or employee and that forms submitted electronically must use digital signatures. The instructions indicate that the filer must enter the telephone number used by the filer to conduct official business, and note that the filer does not need to report a private, unlisted telephone number.

The proposed instructions then feature: "Selected Definitions from the Labor-Management Reporting and Disclosure Act of 1959, as Amended (LMRDA)" [LMRDA section 3]; "Related Provisions of the Labor-Management Reporting and Disclosure Act of 1959, as Amended (LMRDA)—Report of Officers and Employees of Labor Organizations" [LMRDA section 202]; Section 302(c) of the Labor Management Relations Act, 1947, as Amended [Sec. 8(c) of the National Labor Relations Act, as Amended]; and an "If You Need Assistance" section, which includes a list of OLMS field offices and explains the information available on the OLMS Web site. This information is only slightly changed from the 2007 instructions.

V. Regulatory Procedures

Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. This rule is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. It is not "economically significant" as defined in section 3(f)(1) of Executive Order 12866. Specifically, in the Paperwork Reduction Act (PRA) analysis below, the Department estimates that the proposed rule will result in a total burden on labor union officers and employees of $138,621, which is significantly less than the $100,000,000 threshold that triggers an economic analysis.

Unfunded Mandates Reform

This proposed rule will not include any Federal mandate that may result in increased expenditures by State, local, and Tribal governments, in the aggregate, of $100 million or more, or in increased expenditures by the private sector of $100 million or more.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132 (Federalism)

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that the proposed rule does not have federalism implications. Because the economic effects under the rule will not be substantial for the reasons noted above and because the rule has no direct effect on States or their relationship to the Federal government, the rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, requires agencies to prepare regulatory flexibility analyses, and to develop alternatives wherever possible, in drafting regulations that will have a significant impact on a substantial number of small entities, including "small businesses," "small organizations," and "small governmental jurisdictions." Today's proposed rule revises the reporting obligations of union officers and employees, who, as individuals, do not constitute small business entities. Accordingly, the final rule will not have a significant economic impact on a substantial number of small business entities. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This statement is prepared in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501. As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed, continuing, and revised collections of information in accordance with the Paperwork PRA (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

A. Summary of the Proposed Rule: Need and Economic Impact

The following is a summary of the need for and objectives of the proposed rule. A more complete discussion of various aspects of the proposal is found in the notice.

The Labor-Management Reporting and Disclosure Act (LMRDA or Act) was enacted to protect the rights and interests of employees, labor organizations and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and labor organization officers, employees, and representatives. Provisions of the LMRDA include financial reporting and disclosure requirements for labor organizations and others as set forth in Title II of the Act. *See* 29 U.S.C. 431–36, 441. The Department has developed several forms to implement the union annual reporting requirements of the LMRDA. Under section 202 of the Act, 29 U.S.C. 432, union officers and employees are required to file reports if they, or their spouses or minor children, engage in certain transactions or have financial holdings that may constitute a conflict of interest. The Department has developed the Form LM–30, Labor Organization Officer and Employee Report, to implement section 202.

This proposed rule modifies the financial disclosure report that section 202 requires to be filed by labor organization officers and employees. The revised paperwork requirements are necessary, because the proposed rule reduces the burden associated with completing the form. As discussed above, the form, as proposed, has been simplified and will no longer have to be filed by certain individuals, notably stewards, and certain interests and transactions, including most bona fide loans, will not have to be reported. The proposed rule also signals the Department's efforts to achieve the goals of greater transparency and disclosure, while mitigating burden on labor organization officers and employees by eliminating reporting on matters without demonstrated utility.

The proposed Form LM–30 will provide transparency of the financial practices of union officers and employees, which the Act requires to be public information. These reports will allow union members to view the information needed by them to monitor their union's affairs and to make informed choices about the leadership of their union and its direction. Accurate disclosure and increased transparency promote the unions' own interests as democratic institutions and the interests of the public and the government. Financial disclosure deters fraud and self-dealing, and facilitates the discovery of such misconduct when it does occur.

The proposed financial disclosure form will promote increased compliance with the statute by clarifying the form and instructions, organizing the information in a more useful format, and modifying it to better meet the requirements of the LMRDA and the Department's policy judgments consistent with its discretion under the Act.

Published at the end of this notice are the proposed Form LM–30 and instructions. Electronic versions of the pre-2007 and 2007 Form LM–30s and instructions are available for download from the Department's Web site at *http://www.olms.dol.gov.* The proposed Form LM–30 and instructions also will be made available via the Internet. The information collection requirements contained in this Notice of Proposed Rulemaking have been submitted to OMB for approval.

B. Overview of the Proposed Form LM–30 and Its Instructions

The proposed Form LM–30 largely returns to the format of the pre-2007 Form, which has two pages and four parts: (1) An introductory section (Items 1–5); (2) Part A; (3) Part B; and (4) Part C. The layout of the forms (pre-2007 and proposed) are largely identical, with several minor changes, the most important of which are highlighted below. One modification relates to the introductory section (Items 1–5) and the descriptions of Part A, B, and C, which were made more user-friendly by the use of descriptions that paraphrase the statutory language rather than repeating it verbatim. (All of the changes described below are addressed in greater detail in previous sections in this notice.)

Items 1–5 require reporting of basic information, including the filer's LM number and fiscal year, an indication of whether or not the form is amended, as well as contact information for the filer and union, the latter of which will have a continuation page for a filer with an affiliation with more than one union.

Part A (Items 6, 7a, and 7b) requires reporting of the interest, income, benefit, transaction or arrangement from an employer whose employees the filer's labor organization represents or is actively seeking to represent. Item 6 requires reporting of the contact information for such an employer.

Part B comprises Items 8, 9, 10, 11a, 11b, 12a, and 12b, which requires reporting of income and other benefits derived from a business that deals in substantial part with an employer described in Part B, the filer's union, or a trust in which the filer's union is interested. Item 8 requires reporting of the contact information for such business, and Items 9–11 require the filer to identify the entity with which such business deals, and the nature and value of the dealings. In Item 12, the filer is to report the nature and value of the income or other benefit derived from such business.

Part C comprises Items 13a, 13b, 14a, and 14b, and requires reporting of payments from an employer (other than one required to be included in the Part A or B report) from whom a payment would constitute a conflict between the filer's financial interest and the interests of his or her labor organization or duties to such organization. It also requires reporting of payments from a labor relations consultant to a represented employer or a Part C employer. Item 13 requires reporting of the contact information for such employer or labor relations consultant, and in Item 14 the filer is to detail the nature and amount or value of the payment(s) from the employer or labor relations consultant.

Item 15 captures the signature and verification information for the form. The filer must sign the form, include date and telephone number, and verify its authenticity.

The instructions to the proposed Form LM–30 are a hybrid between the pre-2007 and 2007 versions. Several changes are proposed to make them more user-friendly. Like the pre-2007 form, the instructions consist of ten sections, with the first nine consisting of: Section I, Why File; Section II, Who Must File; Section III, What Must be Reported; Section IV, Who Must Sign the Report; Section V, When to File; Section VI, How to File; Section VII, Public Disclosure; Section VIII, Officer and Employee Responsibilities; and Section IX, Recordkeeping. Section X, Completing Form LM–30, provides most of the information assisting filers on how to complete each item in the form, and what data must be included in each part.

As a general matter, the definitions in the 2007 instructions were largely retained, although they were distributed to the appropriate section of the proposed instructions. The definition of "labor organization employee" has been retained; however, the addition of a note exempts from the reporting requirements those individuals who serve as stewards or as representatives of the union in similar positions. Additionally, the Department proposes to remove the regulatory definition of "labor organization" as confusing and unnecessary in light of other changes and proposes the inclusion of language to clarify the top-down reporting obligation of national, intermediate, and intermediate body officials. The examples from the 2007 version were not retained, as the Department believes they added unnecessary length and complexity to the form without providing practical assistance to most filers.

The instructions also include an excerpt of statutory sections, including section 3 of the LMRDA, which includes definitions of the key terms used in the Act, section 202 of the LMRDA, and section 302 of the Labor Management Relations Act.

Further description of the proposed Form LM–30 and instructions can be found in section IV (Proposed Revisions to the Regulations, Form, and Instructions) of this notice.

C. Methodology for the Burden Estimates

The Department first estimated the number of Form LM–30 filers that will submit the revised form. Then, it proposed the estimated number of minutes that each filer will need to meet the reporting and recordkeeping burden imposed by the proposed form, as well as the total burden hours. The Department then estimated the cost to each filer for meeting those burden hours, as well as the total cost to filers. The Department has also estimated the Federal costs associated with the proposed rule. Please note that some of the burden numbers included in this PRA analysis will not add perfectly due to rounding.

1. Number of Proposed Form LM–30 Filers

The Department estimates that 1,932 union officers and employees will submit the proposed Form LM–30. This figure represents the total pre-2007 and 2007 Form LM–30 reports submitted during Fiscal Year (FY) 2009. (In FY 2009 the Department established an enforcement policy that enabled union officers and employees to use either the pre-2007 form or the more complex 2007 version in satisfying their reporting obligation under section 202 of the LMRDA.)

2. Hours To Complete and File Proposed Form LM–30: Reporting and Recordkeeping

The Department has estimated the number of minutes that each Form LM–30 filer will need for completing and filing the proposed form (reporting burden), as well as the minutes needed to track and maintain records necessary to complete the form (recordkeeping burden). The estimates are included in Table 1, which describes the information sought by the proposed form and instructions, where on each form the particular information is to be reported, if applicable, and the amount of time estimated for completion of each item of information. The proposed reporting regime more closely resembles the pre-2007 Form LM–30, in both form and content, than the 2007 form.

In proposing these estimates, the Department is aware that not all union officers and employees will be required to file the Form LM–30, as well as the fact that not all of those who file will need to complete each Part of the form. However, for purposes of assessing an average burden per filer, the Department assumes that the average filer serves as an officer or employee for one labor organization, and that the filer receives reportable payments or interests for a single entity on Parts A, B, and C, respectively.

Additionally, the below estimates are for all filers, including first-time filers and subsequent filers. While the Department considered separately estimating burdens for first-time and subsequent filers, the nature of Form LM–30 reporting militates against such a decision. Union officers may serve for relatively short periods of time and reportable transactions may not go on into subsequent years for a variety of reasons. Where the Department has reduced burden estimates for subsequent year filings, it generally did so with regard to annual reports, specifically labor organization annual reports, Forms LM–2, LM–3, and LM–4. In contrast, the Form LM–30 is only required for union officers and employees in years that they engage in reportable transactions. Further, these officials do not have the same benefit of the "institutional memory," particularly those officials only recently elected or hired. *See* 72 FR at 36157, n. 4. As such, the burden estimates assume that the union officer or employee has never before filed a Form LM–30.

Recordkeeping Burden. The recordkeeping estimate of 15 minutes per filer represents a 5-minute change from the 20-minute estimate for the 2007 Form LM–30. 72 FR at 36157. This estimate reflects new exemptions to reporting of union leave and "no docking" payments, and mortgages and other loans, as well as the decision to eliminate reporting from trusts and unions under section 202(a)(6), which reduces the complexity of the recordkeeping requirements. Additionally, most of the financial books and records needed to complete the form are maintained in the filer's normal course of business, both union and personal. Finally, the 15 minutes accounts for the 5-year retention period required by statute. *See* section 206, 29 U.S.C. 436.

Reporting Burden. The reporting burden of 75 minutes addressed in Table 1 reflects the time required to read the Form LM–30 instructions to discover whether or not a report is owed and determine the correct manner to report the necessary information. The Department estimates that the average filer will need 30 minutes to read the instructions, which is substantially less than the 55 minutes estimated in the 2007 Form LM–30. 72 FR at 36157.[13] This reduction is due in part to the reduced scope of required reporting. In particular, the Department proposes to eliminate the requirement to report union leave and "no docking" payments, bona fide loans, and payments from trusts and unions pursuant to section 202(a)(6). Further, the creation of a more concise and consolidated form and instructions, with definitions and other explanations placed in a more readily accessible format, will enable filers to more quickly ascertain the necessary reporting requirements.

The Department believes that the simple data entry required by Items 1–3 will only require 30 seconds each. The Department believes that a filer will be able to enter his or her own contact information in only two minutes, in Item 4. Generally, filers will only need three minutes to enter contact information, such as for their labor organization in Item 5, as well as the contact information for the trust or employer with which the business deals, in Item 10. The Department believes, however, that filers will need five minutes, respectively, to enter the contact information for the represented employer in Item 6, the business that deals with a labor organization, trust, or employer in Item 8, and the "other employer" or labor relations consultant in Item 13. The Department believes that filers will need one minute to complete Item 9, which asks filers to indicate whether the business identified deals with a labor organization, trust, or employer.

Additionally, the Department estimates that filers will need 3 minutes to enter the financial data required in Items 7, 12, and 14, and 3.5 minutes to report the nature and value of the dealings in Item 11. Finally, the Department estimates that a filer will utilize five minutes to check responses and review the completed report, and will require two minutes to sign and verify the report in Item 15. The Department will introduce in calendar year 2010 a cost-free and simple electronic filing and signing protocol. For this reason, the burden estimate remains constant whether the form is electronically signed, or signed by hand.

As a result, the Department estimates that a filer of the proposed revised Form LM–30 will incur 90 minutes in reporting and recordkeeping burden to file a complete form. This compares with the 2007 estimate of 120 minutes per filer.

TABLE 1—REPORTING AND RECORDKEEPING BURDEN (IN MINUTES)

Burden description	Section of proposed form	Recurring burden hours
Maintaining and gathering records	Recordkeeping Burden	15 minutes.
Reading of the instructions to determine applicability of the form and how to complete it	Reporting Burden	30 minutes.
Reporting LM–30 file number	Item 1	30 seconds.
Reporting covered fiscal year	Item 2	30 seconds.
Identifying if report is amended	Item 3	30 seconds.
Reporting filer's contact information	Item 4	2 minutes.
Reporting labor organization contact information	Item 5	3 minutes.
Part A: Reporting name and contact information for employer in Part A of form	Item 6	5 minutes.
Part A: Reporting the nature of the interest, transaction, arrangement, benefit, or income, as well as the amount, received from the employer identified in Part A.	Items 7a and 7b	3 minutes.
Part B: Reporting contact information for business	Item 8	5 minutes.
Part B: Identifying if the business deals with a labor organization, trust, or employer	Item 9	1 minute.
Part B: Reporting the contact information for the trust or employer with which the business deals.	Item 10	3 minutes.
Part B: Reporting the nature and value of the dealings between the business and employer, union, or trust.	Items 11a and 11b	3½ minutes.
Part B: Reporting the nature and amount of interest held or income received from the business.	Items 12a and 12b	3 minutes.
Part C: Reporting the contact information for the employer or labor relations consultant, and identifying the entity as an employer or labor relations consultant.	Items 13a and 13b	5 minutes.
Part C: Reporting the nature and amount of payment from the employer or labor relations consultant.	Items 14a and 14b	3 minutes.
Checking responses	N/A	5 minutes.
Signature and verification	Item 15	2 minutes.
Total Recordkeeping Burden Hour Estimate per File		15 minutes.
Total Reporting Burden Hour Estimate per File		75 minutes.
Total Burden Hour Estimate per Filer		*90 minutes.*

Total Reporting and Recordkeeping Burden. As stated, the Department estimates that there are 1,932 union officers and employees that will be annually filing the Form LM–30. Thus, the estimated recordkeeping burden for all filers is 28,980 minutes (15 × 1,932 = 28,980 minutes) or 483 hours (28,980/60 = 483). The total estimated reporting burden for all filers is 144,900 minutes (75 × 1,932 = 144,900 minutes) or approximately 2,415 hours (144,900/60 = 2,415 hours). The total estimated burden for all filers is, therefore, 173,880 minutes or approximately 2,898 hours. *See* Table 2 below.

TABLE 2—TOTAL REPORTING AND RECORDKEEPING BURDEN FOR ALL 1,932 ESTIMATED FILERS

	Hours
Total Recordkeeping Burden	483
Total Reporting Burden	2,415
Total Burden	2,898

[13] Additionally, the Department estimates that those union officers and employees who are not required to file will spend ten minutes reading the instructions. This burden is not included in the total reporting burden, since these officials do not file and are thus not respondents.

3. Calculation of Total Costs for Labor Organization Officers and Employees to Complete the Proposed Form LM–30

The Department estimates the dollar cost to filers to complete the Form LM–30 by using fiscal year (FY) 2009 data derived from Form LM–2, Labor Organization Annual Reports, filed with the Department pursuant to section 201 of the LMRDA. The Form LM–2 is the annual financial disclosure report filed by the largest labor organizations, those with $250,000 or more in total annual receipts. The Department notes that many Form LM–30 reports are filed by lower level labor organization officers and employees, whose labor organizations file the less detailed Form LM–3 and Form LM–4 Labor Organization Annual Reports, and who are often part-time officials earning lower salaries than parent body labor organizations that file the more comprehensive Form LM–2. However, because only part-time annual salaries are reported by part-time officers on the Form LM–3 (and individual salaries are not reported on the LM–4), but not the hours upon which those part-time annual salaries are based, it is impractical to calculate an average hourly wage for union officers from the Form LM–3, whereas we can assume that the annual salaries for officers of larger locals are primarily for full-time employees, which makes it possible to determine average hourly wages. Therefore, the Form LM–2 provides the Department with more comprehensive data by which to ascertain a reasonable estimate of union officer and employee salaries.

The Department also assumes, as it did for burden estimates under the pre-2007 Form LM–30, that one-third of the forms will be filed by union presidents, secretary-treasurers, and international representatives (the last designation as a proxy for union employees), respectively. The Department derived the average hourly wage for each of these categories by utilizing data from FY 2009 Form LM–2 reports.

With respect to the international representatives analysis, the salary data derived from the Department's Electronic Labor Organization Reporting System (e.LORS) included only international or national unions and only those employee titles and gross salary data from Form LM–2, Schedule 12 of those international/national unions that included words like "national" or "international" and "representative. The next step was to eliminate blank salary entries (either nothing was listed in the Form LM–2 or a zero was listed). The inclusion of blank entries in the calculation of the average would impact the average calculation, and there are a variety of reasons why the salary can be blank or zero. Finally, the Department calculated the average hourly wage by dividing the average annual salary by 2080 hours (40 hours per week times 52 weeks per year). Next, the Department increased these figures by 43.0% to account for total compensation.[14]

The methodology and assumptions are somewhat similar for the president and secretary-treasurers averages. Here, the Department had data from FY 2009 for all Form LM–2 filers with $800,000 or more in annual receipts. The $800,000 figure was selected because it represents roughly the average of all Form LM–2 filers, and we hypothesized that larger than average Form LM–2 filers are more likely to have presidents and secretary-treasurers who file Form LM–30.

As a result, the Department estimates that union presidents earn an average hourly wage of $34.65 ($49.55 after adjusting by 43.00% for total compensation); union secretary-treasurers, $31.87 ($45.57 after adjusting by 43.00% for total compensation); and international representatives, $33.83 ($48.38 after adjusting by 43.00% for total compensation). The Department also estimated that each of these categories of union officials accounted for one-third of the Form LM–30 reports submitted and thus one-third of the total burden hours (2,898 hours divided by three equals 966). Therefore, the total cost was $138,621 (966 × $49.55 = $47,865.30; 966 × $45.57 = $44,020.62; and 966 × $48.38 = $46,735.08). The estimated cost per filer is approximately $71.75 ($47,865.30 + $44,020.62 + $46,735.08 = $13,621; $13,621/1932 = $71.75).

Finally, in its recent submission for revision of OMB #1215–0188, which contains all LMRDA forms (except the pre-2007 Form LM–30, which was approved under OMB #1215–0205), the Department estimates that its costs associated with the LMRDA forms are $2,710,726 for the OLMS national office and $3,779,778 for the OLMS field offices, for a total Federal cost of $6,490,504. Federal estimated costs include costs for contractors and operational expenses such as equipment, overhead, and printing as well as salaries and benefits for the OLMS staff in the National Office and field offices who are involved with reporting and disclosure activities. These estimates include time devoted to: (a) Receipt and processing of reports; (b) disclosing reports to the public; (c) obtaining delinquent reports; (d) reviewing reports, (e) obtaining amended reports if reports are determined to be deficient; and (f) providing compliance assistance training on recordkeeping and reporting requirements.

Request for Public Comment

Currently, the Department is soliciting comments concerning the information collection request ("ICR") for the information collection requirements included in this proposed regulation at section 403.2, Annual financial report, of title 29, Code of Federal Regulations, which, when implemented will revise the existing OMB control number 1245–0002 (formerly, OMB Control Number 1215–0205). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting Linda Watts-Thomas at (202) 693–4223 (this is not a toll-free number)/e-mail: *DOL_PRA_PUBLIC@dol.gov*. Please note that comments submitted in response to this notice will be made a matter of public record.

The Department hereby announces that it has submitted a copy of the proposed regulation to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the 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

[14] *See* Employer Costs for Employee Compensation Summary, from the Bureau of Labor Statistics (BLS), at *http://www.bls.gov/news.release/ecec.nr0.htm*. The Department increased the average hourly wage rate for employees ($20.49 in 2008) by the percentage total of the average hourly compensation figure ($8.90 in 2008) over the average hourly wage.

other forms of information technology, *e.g.*, by permitting electronic submission of responses.

Comments on the ICR should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; *Attention:* Desk Officer for the Office of Labor Management Standards. Comments on the ICR may be submitted by using the Federal Rulemaking Portal at *http://www.regulations.gov*, or by e-mail to *OIRA_submission@omb.eop.gov*, or by fax to (202) 395–5806. Comments may also be submitted by mail. To ensure proper consideration, OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking and that the OMB Control Number is referenced (*see* below). Please note that comments submitted to OMB are a matter of public record.

Type of Review: Request for new information collection.

Agency: Office of Labor-Management Standards.

Title: Labor Organization Officer and Employee Report.

OMB Control Number: 1245–0New.

Affected Public: Private Sector: labor organization officers and employees.

Estimated Number of Respondents: 1,932.

Estimated Number of Annual Responses: 1,932.

Frequency of Response: Annual.

Estimated Total Annual Burden Hours: 2,898 hours.

Estimated Total Annual Burden Cost: $138,621.

Potential respondents are hereby duly notified that, notwithstanding any other provision of law, individuals are not required to respond to a collection of information or revision thereof unless approved by OMB under the PRA and it displays a currently valid OMB control number. 35 U.S.C. 3506(c)(1)(B)(iii)(V). In accordance with 5 CFR 1320.11(k), the Department will publish a notice in the **Federal Register** informing the public of OMB's decision with respect to the ICR submitted thereto under the PRA.

List of Subjects in 29 CFR Part 404

Labor union officers and employees; Reporting and recordkeeping requirements.

Text of Proposed Rule

Accordingly, the Department proposes to amend part 404 of 29 CFR Chapter IV as set forth below:

PART 404—LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORTS

1. The authority citation for part 404 is revised to read as follows:

Authority: Labor-Management Reporting and Disclosure Act Secs. 202, 207, 208, 73 Stat. 525, 529 (29 U.S.C. 432, 437, 438); Secretary's Order No. 08–2009, Nov. 6, 2009, 74 FR 58835 (Nov. 13, 2009).

2. In § 404.1, paragraph (f) is removed and paragraphs (g) through (j) are redesignated as (f) through (i), respectively.

Signed in Washington, DC this 29th day of July, 2010.

John Lund,

Director, Office of Labor-Management Standards.

Note: The following appendix will not appear in the Code of Federal Regulations.

VI. Appendix: Proposed Form and Instructions

BILLING CODE 4510–CP–P

U.S. Department of Labor
Office of Labor-Management Standards
Washington, DC 20210

FORM LM-30
LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORT

Form Approved
Office of Management and Budget
No. XXXX-XXXX
Expires XX-XX-XXXX

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

For Official Use Only
E

PLEASE READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT.

1. LM-30 File Number: **U-** ______________

2. Fiscal Year Covered: from ______________ (mm/dd/yyyy) through ______________ (mm/dd/yyyy)

3. Amended Report – If this is an amended report, check here: ☐

4. Your Contact Information

Name (first, middle, last)		
Street address		
City	State	ZIP
E-mail address (optional)		

5. Labor Organization Identifying Information

Name		
Street address		
City	State	ZIP
File number		
Officer ☐	Employee ☐	
Your officer position or job title		

[Continuation button]

▶ Complete **PART A, B, or C** if, during the past fiscal year, you or your spouse or minor child directly or indirectly had a reportable interest in, transaction or arrangement with, or received income, payment, or benefit from the entities described below.

PART A – REPRESENTED EMPLOYER. An employer whose employees your labor organization represents or is actively seeking to represent.

6. Name of represented employer ______________________________

Contact name ______________________ Telephone ______________

Street address ______________________________

City ______________ State ________ ZIP ______________

7.a. Nature of interest, transaction, benefit, arrangement, income, or loan

7.b. Amount or value of interest, transaction, benefit, arrangement, income, or loan

[Continuation button]

15. Signature and Verification

The undersigned declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct and complete.

Signed ______________________ On ______________ Date (mm/dd/yyyy) Telephone Number ______________

File Number **U** - ________________

PART B – BUSINESS. A business, such as a vendor or service provider, (1) a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with the business of a Represented Employer described In Part A or (2) any part of which consists of buying from or selling or leasing directly or indirectly to, or otherwise dealing with your labor organization or with a trust in which your labor organization is interested.

8. Name of business ______ Contact name ______ Telephone ______ Street address ______ City ______ State ______ ZIP ______	11.a. Nature of dealings
9. Business deals with ☐ a. Labor Organization ☐ b. Trust ☐ c. Employer	11.b. Value of dealings
10. If 9.b. or 9.c. is checked give trust or employer's name ______ Contact name ______ Telephone ______ Street address ______ City ______ State ______ ZIP ______	12.a. Nature of interest, benefit, arrangement, or income 12.b. Amount or value of interest, benefit, arrangement, or income

[Continuation button]

PART C – OTHER EMPLOYER OR LABOR RELATIONS CONSULTANT. An employer (other than a Represented Employer or Business covered under Parts A and B above) from whom a payment would create an actual or potential conflict between your personal financial interests and the interests of your labor organization (or your duties to your labor organization); or a labor relations consultant to such an employer or to the Represented Employer listed in Part A.

13.a. Contact information for employer or labor relations consultant Name of employer or labor relations consultant ______ Contact name ______ Telephone ______ Mailing address ______ City ______ State ______ ZIP ______	14.a. Nature of payment
13.b. Type of entity: Is the entity an ☐ employer or ☐ consultant?	14.b. Amount or value of payment

[Continuation button]

Paperwork Reduction Act Statement. Public reporting burden for this collection of information is estimated to average 90 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number (1245-0002, with an expiration date of 2-28-2013). Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

Revised XX-XX-XXXX

DO NOT SEND YOUR COMPLETED FORM LM-30 TO THE ABOVE ADDRESS.

Instructions for Form LM-30
Labor Organization Officer and Employee Report

General Instructions

I. Why File

The Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA or Act), requires public disclosure of certain financial transactions and financial interests of labor organization officers and employees and their spouses and minor children. *See* 29 C.F.R. 404.1-404.9 (reports by officers and employees of labor organizations). The purpose of disclosure, among other things, is to publicly identify an actual or potential conflict between the personal financial interests of a union officer or employee and his or her obligations to the union and its members.

The LMRDA establishes basic rights of union members, including equal voting rights, freedom of speech and assembly, and other essential safeguards for union democracy, among other protections; establishes financial reporting and disclosure requirements for unions, union officers and employees, employers, and labor relations consultants; regulates union trusteeships; details procedural requirements for the conduct of union officer elections; and establishes a fiduciary duty on union officers, employees, and other representatives.

Pursuant to Section 202 of the LMRDA, and subject to certain exceptions, if you are a labor organization officer or employee (other than an employee performing exclusively clerical or custodial services), who has, directly or indirectly, held any legal or equitable interest in, received any payments from, or engaged in any transactions or arrangements (including loans) with certain employers or businesses or labor relations consultants during your fiscal year, you must file a detailed report with the Secretary of Labor (Secretary). *See* Part X of these instructions for a detailed discussion of the types of financial matters that must be reported. You are not required to file a report unless you or your spouse or minor child held a reportable interest, received a reportable payment, or engaged in a reportable transaction or arrangement during the reporting period. As discussed in Part X, you are not required to report insubstantial payments or gifts, as there defined.

The Department's Office of Labor-Management Standards (OLMS) has developed guidance to assist with LMRDA compliance. Guidance to assist with completion of the Form LM-30 is available on the OLMS website: **www.olms.dol.gov**. For additional OLMS contact information, see the final page of these instructions.

The reporting requirements of the LMRDA and of the regulations and forms issued under the Act relate only to the public disclosure of specified transactions and interests. The reporting requirements do not address whether such transactions and interests are lawful or unlawful. The fact that a particular transaction or interest is or is not required to be reported is not indicative of whether it is or is not subject to any legal restriction; this must be determined by provisions of law other than those prescribing the reports. Failure to file a required report may subject an individual to civil or criminal penalties, or both. *See* Part VIII of these instructions.

II. Who Must File

Any *officer* or *employee* of *a labor organization* (other than an employee performing clerical or custodial services exclusively), as defined by the LMRDA, must file Form LM-30 ***if***, during the past fiscal year, the officer or employee, spouse, or minor child, either directly or indirectly, held any legal or equitable interest, received any payments, or engaged in transactions or arrangements (including loans) of the types described in these instructions.

LABOR ORGANIZATION EMPLOYEE – means any individual (other than an individual performing exclusively clerical or custodial services) employed by a labor organization within the meaning of any law of the United States relating to the employment of employees.

For purposes of the Form LM-30, an individual who serves the union exclusively as a union steward or as a similar union representative, such as a member of a safety committee or a bargaining committee, is not considered to be an employee of the union

LABOR ORGANIZATION OFFICER – means (1) a person identified as an officer by the constitution and bylaws of the labor organization; (2) any person authorized to perform the functions of president, vice president, secretary, or treasurer; (3) any person who in fact has executive or policy-making authority or responsibility; and (4) a member of a group identified as an executive board or a body which is vested with functions normally performed by an executive board.

NOTE: Under this definition, an officer includes a trustee appointed by the national or international union to administer a local union in trusteeship. If you are a trustee elected or appointed by the local union to audit and/or hold the assets of the union, you may or may not be a union officer, depending on your union's constitution and these four factors.

MINOR CHILD – means a son, daughter, stepson, or stepdaughter less than 21 years of age.

NOTE: Selected definitions from the LMRDA follow these instructions.

III. What Must Be Reported

The types of financial transactions and interests which must be reported are set forth in Form LM-30 and in Part A, Part B, and Part C of these instructions.

IV. Who Must Sign the Report

You (the labor organization officer or employee) must sign the completed Form LM-30.

V. When to File

A Form LM-30 report must be filed *within 90 days* after the end of your fiscal year. Fiscal year usually means the calendar year, but if you serve as an officer or employee for only a portion of the fiscal year, you may limit this report to that portion of the fiscal year. For more clarification, see instructions for Item 2 (Fiscal Year Covered).

VI. How to File

Form LM-30 is available on the OLMS website at **www.olms.dol.gov**. You can complete and submit the form electronically or print a copy and complete it manually. If you do not have access to the Internet, you can obtain a blank form from the nearest OLMS field office listed at the end of these instructions, from the OLMS National Office at 202-693-0124, or by calling the DOL toll-free help desk at 866-487-2365.

If the Form LM-30 report is prepared in paper format, the completed Form LM-30 and any additional pages must be mailed to the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210-0001

NOTE: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

VII. Public Disclosure

The LMRDA requires that the Department make Form LM-30 and other reports required by the LMRDA available for inspection by the public. Reports may be viewed and downloaded from the OLMS website at **www.unionreports.gov**. Copies of reports and union constitutions and bylaws can also be ordered on the same website. Reports may also be examined and copies may be purchased at the OLMS Public Disclosure Room at the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210-0001

VIII. Officer and Employee Responsibilities and Penalties

The labor organization officer or employee required to sign the Form LM-30 is personally responsible for its filing and accuracy. Under the LMRDA, this individual is subject to criminal penalties for willful failure to file a required report and/or for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or for knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting labor organization officer or employee required to sign Form LM-30 is also subject to civil prosecution for violations of filing requirements. Section 210 of the LMRDA provides that "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

The officers and employees responsible for filing Form LM-30 are also subject to criminal penalties for false reporting and perjury under Sections 1001 of Title 18, 1746 of Title 28, and 1621 of Title 18 of the United States Code.

You, your spouse, and minor child and any individuals or entities associated with the reportable interests and transactions may be required to provide additional information to the Department concerning reported or reportable interests.

IX. Recordkeeping

The labor organization officer or employee required to file Form LM-30 is responsible for maintaining records on the matters required to be reported that will provide in sufficient detail the necessary basic information and data from which the Form LM-30 may be verified, explained or clarified, and checked for accuracy and completeness. These records shall include vouchers, worksheets, receipts, financial and investment statements, contracts, correspondence, and applicable resolutions, in their original electronic and paper formats, and any electronic programs by which they are maintained. Records must be kept available for examination for a period of not less than five years after the filing of the Form LM-30.

X. Completing Form LM-30

While OLMS encourages you to complete Form LM-30 electronically, the Form LM-30 is available for use in both paper and electronic formats. If you are using the electronic Form LM-30, you may click on the "Validate Form" button at any time to check for errors. This action will generate an "Errors Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

If filing in paper format, submit entries that are typed or clearly printed in black ink. Do not use a pencil or any other color ink.

How to Provide Additional Information. If you are filing in electronic format, the form will permit you to add additional space to each entry.

If you are filing in paper format and need additional space to complete an item, or to attach an additional item, include the additional information on a separate letter-size (8.5 x 11) page, indicating the number of the item to which the information applies. Print clearly at the top of each page the following information: (1) your full name, (2) your 5-digit file number as reported in Item 1, if available; and (3) the ending date of the reporting period as reported in Item 2. All attachments must be labeled sequentially 1 of __, 2 of __, etc.

Information Items 1–5

Select the appropriate box for those questions requiring a "Yes" or "No" answer; do not leave both boxes blank. Enter a single "0" in the boxes for items requiring a number or dollar amount if there is nothing to report.

1. LM-30 FILE NUMBER — Enter the five-digit file number (U-XXXXX) assigned to you by OLMS as a reporting officer or employee. If you have never previously filed the Form LM-30, leave Item 1 blank. OLMS will notify you of your assigned file number, which should be used on all future reports.

2. FISCAL YEAR COVERED — Enter the beginning and ending dates of the fiscal year covered in this report. Your fiscal year will normally be identical to the calendar year. Note that your fiscal year may differ from the fiscal year utilized by your union for filing its annual financial report, Form LM-2, LM-3, or LM-4. This Form LM-30 report must not cover more than a 12-month period. For example, if your 12-month fiscal year begins on January 1 and ends on December 31, do not enter a date beyond the 12-month period, such as January 1 to January 1; this is an invalid date entry. Note that if you served as a union officer or employee for only part of the fiscal year, you may consider that portion of the year as the entire fiscal year for the purposes of completing this report.

3. AMENDED REPORT — Check the box if you are filing an amended report.

4. YOUR CONTACT INFORMATION —Enter your full name and the complete address where mail should be sent and received, including any building and room number. Enter your e-mail address in the space provided. If you do not have an e-mail address or choose not to provide it, leave this space blank.

5. LABOR ORGANIZATION IDENTIFYING INFORMATION – Enter the name of the labor organization (including the local number, if any) of which you are an officer or employee. Enter the complete business address of the labor organization where mail should be sent, including any building and room number. Enter the labor organization's OLMS file number. If you cannot obtain the file number of the labor organization, go to www.unionreports.gov or contact the nearest OLMS field office listed at the end of these instructions. Specify your status in the labor organization by checking the appropriate box indicating whether you are an officer or an employee. List your official position or title with the labor organization. If you serve as an officer or employee to multiple labor organizations, click on the Continuation Button to attach an additional Item 5 (if you are filing in electronic format). If you are filing in paper format, see the "How to Provide Additional Information" section on page 3.

Officer titles include, but are not limited to, president, vice president, secretary, treasurer. Job titles include, but are not limited to, business agent, organizer, attorney.

Information Items Parts A, B, and C

GENERAL INSTRUCTIONS FOR REPORTABLE TRANSACTIONS AND INTERESTS — You must report ***if***, during the past fiscal year, you or your spouse or minor child, *directly or indirectly*: (1) held an interest; (2) engaged in a transaction or arrangements (including loans); or (3) received income, payment or other benefit with monetary value covered by the Act.

When applying the Form LM-30 reporting requirements, if you are a national, international, or intermediate union officer or employee, you must look at employers and businesses with requisite relationships with lower levels of your union (e.g., a local or other subordinate body), as well as your own level of the union.

DIRECTLY OR INDIRECTLY – means by any course, avenue, or method. *Directly* encompasses holdings and transactions in which you, your spouse, or minor child receives a payment or other benefit without the intervention or involvement of another party. *Indirectly* includes any payment or benefit which is intended for you, your spouse, or minor child or on whose behalf a transaction or arrangement is undertaken, even though the interest is held by a third party, or was received through a third party.

NOTE: You must disclose any benefits that you have received (or your spouse or minor child has received) from a third party where the third party is acting on behalf, or at the behest, of an employer or business that would have to report the benefit if they provided it directly to you (or your spouse or minor child).

The following are examples of reporting direct and indirect payments or benefits:

- You are employed by XYZ Widgets and also serve as the president of the local union representing XYZ Widgets employees. In a recent conversation with the XYZ Widgets human resources manager, you mention that you are placing your 15 year-old daughter in a private school. XYZ Widgets sends you a check for $1,000 with a note saying "Good luck with the new school!" You have received a *direct benefit*.
- You are employed by XYZ Widgets and also serve as the president of the local union representing XYZ Widgets employees. In a recent conversation with the XYZ Widgets human resources manager, you mention that you are placing your 15 year-old daughter in a private school. You receive a letter from your daughter's new school stating that she has received a $1,000 scholarship through a donation from XYZ Widgets. You have received an *indirect benefit*.

General Exclusions

Insubstantial payments and gifts. You do not have to report any payments or gifts totaling $250 or less from any one source, and payments or gifts valued at $20 or less do not need to be included in determining whether the $250 threshold has been met. For example, if you receive from an employer two gifts worth $20 each and two restaurant meals worth $150 each, you need only keep records of the restaurant meals, and report your receipt of this $300 value. However, you may not use the exception to hide the receipt of a series of payments or gifts purposely set at $20 or less to avoid reaching the $250 reporting threshold. For example, you would have to report your receipt of individual tickets worth $20 or less to all of a professional baseball team's home games even if they are provided before each game rather than given as a complete package at the start of the season.

Widely-attended gatherings. You also do not have to report the benefits, such as food and entertainment, that you received while in attendance at one or two widely-attended receptions, meetings or gatherings in a single fiscal year for which an employer or business has spent $125 or less per attendee per gathering. You do not have to include the value of those gatherings in determining whether the $250 threshold has been met for the employer or business providing the meeting or gathering. However, if you attend three or more such widely-attended gatherings provided by an employer or business, you must count the value of all such events.

A gathering is widely attended if a large number of persons are in attendance and the attendees include union officers and employees and a substantial number of individuals with no relationship to a union or a *trust in which a labor organization is interested*. For a gathering to qualify as widely attended, those individuals with a relationship to a union must be treated the same as others when the employer or business advertises or distributes invitations for the event and must be treated alike at the event.

TRUST IN WHICH A LABOR ORGANIZATION IS INTERESTED – means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

Report payments received as director's fees, including reimbursed expenses.

Complete a separate Part A, B, and/or C if reporting more than one entity or transaction. For example, if you (or your spouse or minor child) held stock in three (3) businesses that have lease agreements with your labor organization, then you must complete and submit a separate Part B for each business.

Additionally, if, for example, you received both income and a loan from a business that has a lease agreement with your labor organization, then you must submit a separate Part B for each transaction with this report.

Do not submit more than one Form LM-30 report for the same fiscal year. If filing in electronic format, click on the Continuation Button to generate the needed separate Parts A, B, or C. If filing in paper format, attach a separate Part A, B, or C.

PART A (ITEMS 6 and 7) – REPRESENTED EMPLOYER

Complete Part A if you (1) held an interest in, (2) engaged in transactions or arrangements (including loans) with, or (3) derived income or other benefit of monetary value from, an *employer whose employees your labor organization represents or is actively seeking to represent*. Report payments received as director's fees, including reimbursed expenses.

ACTIVELY SEEKING TO REPRESENT – means that a labor organization has taken steps during your fiscal year to become the bargaining representative of the employees of an employer, including but not limited to:

- Sending organizers to an employer's facility;
- Placing an individual in a position as an employee of an employer that is the subject of an organizing drive and paying that individual subsidies to assist in the union's organizing activities;
- Circulating a petition for representation among employees;
- Soliciting employees to sign membership cards;
- Handing out leaflets;
- Picketing; or
- Demanding recognition or bargaining rights or obtaining or requesting an employer to enter into a neutrality agreement (whereby the employer agrees not to take a position for or against union representation of its employees), or otherwise committing labor or financial resources to seek representation of employees working for the employer.

Where your union has taken any of the foregoing steps, you are required to report a payment or interest received, or transaction conducted, during that reporting period.

NOTE: Leafleting or picketing, such as purely "informational" or "area standards" picketing, that is wholly without the object of organizing the employees of a targeted employer will not alone trigger a reporting obligation. For example, if a union pickets a sporting goods retailer solely for the purpose of alerting the public that the retailer is selling goods that are made by children working in oppressive conditions in violation of accepted international standards, the picketing would not meet the "actively seeking to represent" standard.

Part A Exclusions

Part A excludes reporting with respect to the following:

(i) **Holdings of, transactions in, or income from**, *bona fide investments* in (1) securities traded on a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934 (including the American Stock Exchange, Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, International Securities Exchange, NASDAQ, National Stock Exchange ,New York Stock Exchange, Pacific Exchange, and Philadelphia Stock Exchange); (2) shares in an investment company registered under the Investment Company Act of 1940, or (3) securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935.

BONA FIDE INVESTMENT – means personal assets of an individual held to generate profit that were not acquired by improper means or as a gift from any of the following: (1) an employer, (2) a business that deals with your union or a trust in which your union is interested, (3) a business a substantial part of which consists of dealing with an employer whose employees your union represents or is actively seeking to represent, or (4) a labor relations consultant to an employer.

(ii) **Holding of, transactions in, or income from**, securities not listed or registered as described in (i) above, provided any such holding, or transaction, or receipt of income is of insubstantial value or amount and occurs under terms unrelated to your status in a labor organization. For purposes of this exclusion, holdings or transactions involving $1,000 or less and receipt of income of $100 or less in any one security shall be considered insubstantial.

(iii) **Transactions** involving purchases and sales of goods and services in the regular course of business at prices generally available to any employee of the employer. This does not apply to loans or to transactions involving interests in the employer.

(iv) **Payments and benefits** received as a *bona fide employee* of the employer for past or present services, including wages, payments or benefits received under a bona fide health, welfare, pension, vacation, training or other benefit plan; and payments for periods in which such employee engaged in activities other than productive work, if the payments for such period of time are: (a) required by law or a bona fide collective bargaining agreement, or (b) made pursuant to a custom or practice under such a collective bargaining agreement, or (c) made pursuant to a policy, custom, or practice with respect to employment in the establishment which the employer has adopted without regard to any holding by such employee of a position with a labor organization.

6. CONTACT INFORMATION FOR REPRESENTED EMPLOYER — Enter the name (including trade or commercial name, if applicable, such as a d/b/a or "doing business as" name) and address of the employer whose employees your labor organization represents or is actively seeking to represent, including any building and room number. Also enter the name and telephone number of a contact person at the employer.

7. NATURE AND AMOUNT OF INTEREST, TRANSACTION, BENEFIT, ARRANGEMENT, INCOME, OR LOAN — Provide full information as to the nature and amount of each interest, transaction, arrangement, item of income, benefit, or loan. However, do not include account or social security numbers. Your report will be deficient if you provide unclear or nonspecific descriptions. If you need additional space, see the "How to Provide Additional Information" section on page 3. If an interest in real property is reported, identify the location of the property.

ARRANGEMENT – means any agreement or understanding, tacit or express, or any plan or undertaking, commercial or personal, by which you, your spouse, or minor child will obtain a benefit, directly or indirectly, with an actual or potential monetary value.

NOTE: The term "arrangement" is very broad and covers both personal and business transactions, including an unwritten understanding. For example, if during the reporting period an employer's representative offered you a job with the employer, you must report the offer unless you rejected it. A standing job offer must be reported, because it carries the potential of monetary value.

BENEFIT WITH MONETARY VALUE – means anything of value, tangible or intangible. It includes any interest in personal or real property, gift, insurance, retirement, pension, license, copyright, forbearance, bequest or other form of inheritance, office, options, agreement for employment or property, or property of any kind. You do not need to report pension, health, or other benefit payments from a trust to you, your spouse, or minor child that are provided pursuant to a written specific agreement covering such payments.

INCOME – means all income from whatever source derived, including, but not limited to, compensation for services, fees, commissions, wages, salaries, interest, rents, royalties, copyrights, licenses, dividends, annuities, honoraria, income and interest from insurance and endowment contracts, capital gains, discharge or indebtedness, share of partnership income, bequests or other forms of inheritance, and gifts, prizes or awards.

Enter in Item **7.a.** the nature of the interest, transaction, benefit, arrangement, income, or loan, such as the continuing use of an automobile for personal purposes, gift of a computer, payments for services) in the detail set forth below.

Enter in Item **7.b.** the amount or value of each *legal or equitable interest*, transaction, benefit, arrangement, or item of income, or loan, in the detail set forth below, and the date(s) any income or other benefit was received. Report amounts in dollars only; do not enter cents. Round cents to the nearest dollar. Enter a single "0" in the space for reporting dollars if you have nothing to report. Enter the exact value if known or easily obtainable; otherwise, enter a good faith estimate of the fair market value and explain the basis for the estimate (for information on where to provide this explanation, see the "How to Provide Additional Information" section on page 3). The fair market value may be determined by:

- The purchase price
- Recent appraisal
- Assessed value for tax purposes, adjusted to reflect market value if the assessed value is computed at less than 100% of the market value
- The year-end book value of stock that is not publicly traded, the year-end exchange rate of corporate stock, or the face value of corporate bonds or comparable securities
- The net worth of a business partnership or business venture
- The equity value of an individually-owned business or any other recognized indication of value (such as the sale price on the stock exchange at the time of the report or, for transactions, the sale price on the stock exchange at the time of the sale).

If the exact value is not known and cannot be estimated, enter "N/A" and explain the situation. (See the "How to Provide Additional Information" section on page 3.).

For each such interest and transaction, identify the nature of the interest held (for example, common stock, preferred stock, bonds, options, etc.) and give the total number of shares or other units held during the fiscal year. If the interest was acquired during the fiscal year or if this is your first report of the interest, give an approximate date or dates of acquisition, total cost to you, and manner of acquisition (for example, employee stock purchase plan, purchase on market, gift, etc.). If the interest was disposed of during the fiscal year, give an approximate date, total amount received by you and the manner of disposition (for example, sale on market, gift, exchange, etc.). In each case, identify the other party or parties to the transaction.

LEGAL OR EQUITABLE INTEREST – means any property or benefit, tangible or intangible, which has an actual or potential monetary value for you, your spouse, or minor child without regard to whether the you, you spouse, or minor child holds possession or title to the interest. (See the definitions of *income* and *benefit with monetary value* above in Item 7.)

For example:

- You are an officer of a union. You and your spouse jointly own an accounting business that provides tax services to a number of clients, including your union. You hold a legal interest in the company providing services to your union.

- You are an officer of a union. You form a tax preparation business with two partners and put your share of the business in your wife's name. The business prepares tax returns and LM reports for your union. You hold an equitable interest in a business that deals with your union.

Other transactions or arrangements involving (1) any loan to or from the employer; (2) any business transaction or arrangement (for example, purchases and sales of goods and services not excluded under Part A Exclusion (iii) above; rentals, credit arrangements, franchises, or contracts, etc.):

For each transaction, identify the nature of the transaction and the property involved (for example, loan of money from employer, rental of loft building, located at X street, Y City, Z State, etc.) and state:

1) the total dollar amount you paid or received during the fiscal year (for example, amount of a loan, rent, sale, etc.);
2) the dollar value of existing obligation, if any, by the end of the fiscal year (for example, unpaid balance of a loan, rentals due pursuant to a lease, amount due under a contract, etc.);
3) the date transaction was entered into and the date it was terminated, if any;
4) the terms and conditions of the transaction (for example, unsecured loan under employer loan plan payable over one year, discount purchases of goods, sale and lease back one year, etc.);
5) names and addresses of intermediate parties involved in any indirect transactions (for example, loans made to you in the name of another, etc.).

For each arrangement, identify its nature and provide sufficient detail to identify the date, persons involved, and information as to conditions, if any, of the arrangement and the anticipated date on which the benefit will be obtained.

PART B (Items 8 - 12) – BUSINESS

(a) Complete Part B if you held an interest in or derived income or other benefit with monetary value, including reimbursed expenses, from a business (1) a *substantial part* of which consists of buying from, selling or leasing to, or otherwise *dealing* with the business of an employer whose employees your labor organization represents or is actively seeking to represent, or (2) any part of which consists of buying from or selling or leasing directly or indirectly to, or otherwise dealing with your labor organization or with a trust in which your labor organization is interested. Report payments received as director's fees, including reimbursed expenses.

SUBSTANTIAL PART – means 10% or more. Where a business's receipts from an employer(s) whose employees your labor organization represents or is actively seeking to represent constitute 10% or more of its annual receipts, a substantial part of the business consists of dealing with this employer(s).

DEALING – means to engage in a transaction (bargain, sell, purchase, agree, contract) or to in any way traffic or trade, including solicitation for business. The term "traffic or trade" includes not only financial transactions that have occurred but also the act of soliciting such business. Thus, for example, potential vendors or service providers attempting to win business with a union will be considered to be "dealing" with the union to the same extent as vendors who are already doing business with the union.

Potential vendors must engage in the active and direct solicitation of business (other than by mass mail, telephone bank, or mass media). A business that passively advertises its services generally and would provide services consumed by, for example, a union would not meet this test. The potential vendor must be actively seeking the commercial relationship. Under certain circumstances, the payment itself will be evidence of the solicitation of business, such as a potential vendor who treats a union official to a golf outing and dinner to discuss the vendor's products.

PART B EXCLUSIONS

You do NOT need to report in Part B the items identified in the Part A exclusions set forth in (i) and (ii). (See the "Part A Exclusions" section in the instructions for Part A above.)

Bona Fide loans, Do not report bona fide loans, including mortgages, received from national or state banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions, if the loans are based upon the credit institution's own criteria and made on terms unrelated to your status in the labor organization. Additionally, do not report other marketplace transactions with such bona fide credit institutions, such as credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to your status in the labor organization.

8. CONTACT INFORMATION FOR BUSINESS — Enter the name (including trade or commercial name, if any, such as "d/b/a" or "doing business as" name) and address of the business to which the interest, transaction, or benefit was connected. Also enter the name and telephone number of a contact person at the business.

9. and 10. BUSINESS DEALS WITH —Select the appropriate box describing the type of organization with which the business (referred to in Item 8) dealt. If you select 9.b. (trust) or 9.c. (employer), enter the name and address of each trust or employer in Item 10. Include the name and telephone number of a contact person.

11.a. NATURE OF DEALINGS — Describe in detail the nature of the purchases, sales, leases, or other dealings between the business and the organization specified in Items 9 and 10. For example, if the business and Union A arranged a payroll service in the amount of $45,000 for union members, the dealing could be described as follows: "One payment for payroll services for Union A members." Do not include account or social security numbers. Your report will be deficient if you provide unclear or nonspecific descriptions. If an interest in real property is reported, identify the location of the property.

11.b. VALUE OF DEALINGS — Enter the value of the purchases, sales, leases, or other dealings between the business and the organization specified in Items 9 and 10.

12.a. NATURE OF INTEREST, BENEFIT, ARRANGEMENT, OR INCOME — Enter the nature of each interest, benefit, arrangement, or income covered by Part B, including the applicable information set forth in the instructions to Item 7.

12.b. AMOUNT OR VALUE OF INTEREST, BENEFIT, ARRANGEMENT, OR INCOME — Enter the approximate dollar amount or value of interest, benefit, arrangement, or income covered by Part B, including the applicable information set forth in the instructions to Item 7.

PART C (Items 13 and 14) – OTHER EMPLOYER OR LABOR RELATIONS CONSULTANT

Complete Part C if you, your spouse, or your minor child received, directly or indirectly, any payment of money or other thing of value (including reimbursed expenses) from any employer (other than a Represented Employer under Part A or Business covered under Part B above) from whom a payment would create an actual or potential conflict between your financial interests and the interest of your labor organization or your duties to your labor organization. Such employers include, but are not limited to, an employer in competition with an employer whose employees your labor organization represents or whose employees your union is actively seeking to represent, if you are involved with the organizing, collective bargaining, or contract administration activities or possess significant authority or influence over such activities. You are deemed to have such authority and influence if you possess authority by virtue of your position, even if you did not become involved in these activities. Additionally, complete Part C if you received a payment of money or other thing of value from a labor relations consultant to a Represented Employer or Part C employer.

Employers under Part C also include, but are not limited to, an employer that is a not-for-profit organization that receives or is actively and directly soliciting (other than by mass mail, telephone bank, or mass media) money, donations, or contributions, from your labor organization. Report payments received as director's fees, including reimbursed expenses.

Information that must also be reported under Part C includes any payments from an employer (not covered by Parts A or B), or from any labor relations consultant to an employer, for the following purposes:

(1) not to organize employees;

(2) to influence employees in any way with respect to their rights to organize;

(3) to take any action with respect to the status of employees or others as members of a labor organization;

(4) to take any action with respect to bargaining or dealing with employers whose employees your organization represents or seeks to represent; and

(5) to influence the outcome of an internal union election.

PART C EXCLUSIONS

The items listed below do *not* need to be reported in Part C. Please note that these exceptions do *not* apply to the five types of payments enumerated above.

i. Payments of the kinds referred to in Section 302(c) of the Labor Management Relations (LMRA), as set forth on page 12 below, and payments your spouse or minor children receive as compensation for, or by reason of, their service to their employer.

ii. Bona fide loans (including mortgages), interest or dividends from national or state banks, credit unions, savings or loan associations, insurance companies, or other bona fide credit institutions, if such loans, interest or dividends are based upon the credit institution's own criteria and made on terms unrelated to your status in a labor organization. Additionally, do not report other marketplace transactions with such bona fide credit institutions, such as credit card transactions (including unpaid balances) and interest and dividends paid on savings accounts, checking accounts or certificates of deposit if the payments and transactions are based upon the credit institution's own criteria and are made on terms unrelated to your status in the labor organization.

iii. Interest on bonds or dividends on stock, provided such interest or dividends are received, and such bonds or stock have been acquired, under circumstances and terms unrelated to your status in a labor organization and the issuer of such securities is not an enterprise in competition with the employer whose employees your labor organization represents or actively seeks to represent.

13.a. CONTACT INFORMATION FOR EMPLOYER OR LABOR RELATIONS CONSULTANT — Enter the name, and address of the employer or labor relations consultant (including trade or commercial name, if any, such as d/b/a or "doing business as" name) from whom the payment in Part C was received. Also enter the name and telephone number of a contact person.

13.b. TYPE OF ENTITY — Select the appropriate box to indicate whether the entity that made the payment is an employer or labor relations consultant.

14.a. NATURE OF PAYMENT — For each payment or benefit reportable under Part C, identify the nature of the payment or benefit (for example, continuing use of automobile for personal purposes, gift of refrigerator, gift of a computer, payment for services not excluded above). List the date you received the payment or benefit. For each payment or benefit reported, provide a detailed description of the relationship between the employer or labor relations consultant and your labor organization. For example, if the payment was received from an employer in competition with a represented employer, indicate the name of the employer whose employees your union represents or whose employees it is actively seeking to represent and the industry or activities in which they compete. Do not include account or social security numbers. If an interest in real property is reported, identify the location of the property. Your report will be deficient if you provide unclear or nonspecific descriptions.

14.b. AMOUNT OR VALUE OF PAYMENT — Enter the amount or value of each payment, including the applicable information set forth in the instructions to Item 7.

15. SIGNATURE (Bottom of Page 1) — The completed Form LM-30, which is filed with OLMS, must be signed by you (officer or employee of the labor organization). Enter the telephone number you use to conduct official business. You do not have to report a private unlisted telephone number.

Electronically submitted forms must be signed using digital signatures. The date of signature will automatically be entered. Information about the digital signature process can be obtained on the OLMS website at **www.olms.dol.gov**.

SELECTED DEFINITIONS FROM THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED (LMRDA)

SEC. 3. For the purposes of titles I, II, III, IV, V (except section 505), and VI of this Act

(a) "Commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(b) "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(c) "Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

(d) "Persons" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, or receivers.

(e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce

(1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or

(2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

(g) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(h) Not applicable.

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees or an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2) ; or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(k) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

(l) "Trust in which a labor organization is interested" means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

(n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

(o) Not applicable.

(p) Not applicable.

(q) "Officer, agent, shop steward, or other representative," when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel.

NATIONAL LABOR RELATIONS ACT, AS AMENDED

Section 8. "(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

RELATED PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED (LMRDA)

Report of Officers and Employees of Labor Organizations

Sec. 202. (a) Every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services) shall file with the Secretary a signed report listing and describing for his preceding fiscal year-

(1) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child derived directly or indirectly from, an employer whose employees such labor organization represents or is actively seeking to represent, except payments and other benefits received as a bona fide employee of such employer;

(2) any transaction in which he or his spouse or minor child engaged, directly or indirectly, involving any stock, bond, security, or loan to or from, or other legal or equitable interest in the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(3) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(4) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with such labor organization;

(5) any direct or indirect business transaction or arrangement between him or his spouse or minor child and any employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer and except purchases and sales of goods or services in the regular course of business at prices generally available to any employee of such employer; and

(6) any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or indirectly from any employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended.

(b) The provisions of paragraphs (1), (2), (3), (4), and (5) of subsection (a) shall not be construed to require any such officer or employee to report his bona fide investments in securities traded on a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934, in shares in an investment company registered under the Investment Company Act or in securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, or to report any income derived therefrom.

(c) Nothing contained in this section shall be construed to require any officer or employee of a labor organization to file a report under subsection (a) unless he or his spouse or minor child holds or has held an interest, has received income or any other benefit with monetary value or a loan, or has engaged in a transaction described therein.

SECTION 302(c) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

"(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, which-ever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event of the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such dead-lock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of pro-viding pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such a representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978."

If You Need Assistance

The Office of Labor-Management Standards has field offices in the following cities to assist you if you have any questions concerning LMRDA and CSRA reporting requirements.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Grand Rapids, MI
Guaynabo, PR
Honolulu, HI
Houston, TX
Kansas City, MO
Los Angeles, CA
Miami, FL
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Haven, CT
New Orleans, LA
New York, NY
Newark, NJ
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and phone number of your nearest field office.

Information about OLMS, including key personnel and telephone numbers, compliance assistance materials, the text of the LMRDA, and related Federal Register and Code of Federal Regulations (CFR) documents, is available on the OLMS website at **www.olms.dol.gov**.

Copies of labor organization annual financial reports, employer reports, labor relations consultant reports, and union officer and employee reports filed for the year 2000 and after can be viewed and printed at **www.unionreports.gov**. Copies of reports for the year 1999 and earlier can be ordered through the website.

For questions on Form LM-30 and/or the instructions, call the Department of Labor's toll-free number at: 866-4-USA-DOL (866-487-2365) or email **olms-public@dol.gov**.

If you would like to receive via email periodic updates from the Office of Labor-Management Standards, including information about the LM forms, enforcement results, and compliance assistance programs, you may subscribe to the OLMS Mailing List from the OLMS website: **www.olms.dol.gov.**

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Part III

Federal Trade Commission

16 CFR Part 310
Telemarketing Sales Rule; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 310

Telemarketing Sales Rule

AGENCY: Federal Trade Commission ("Commission" or "FTC").

ACTION: Final rule amendments.

SUMMARY: In this document, the Commission adopts amendments to the Telemarketing Sales Rule ("TSR" or "Rule") that address the telemarketing of debt relief services. These amendments define debt relief services, prohibit debt relief providers from collecting fees until after services have been provided, require specific disclosures of material information about offered debt relief services, prohibit specific misrepresentations about material aspects of debt relief services, and extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements. The amendments are necessary to protect consumers from deceptive or abusive practices in the telemarketing of debt relief services.

DATES: These final amendments are effective on September 27, 2010, except for § 310.4(a)(5), which is effective on October 27, 2010.

ADDRESSES: Requests for copies of these amendments to the TSR and this Statement of Basis and Purpose ("SBP") should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room 130, Washington, D.C. 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the final amendments to the TSR and SBP, are available at (*http://www.ftc.gov*).

FOR FURTHER INFORMATION CONTACT: Alice Hrdy, Allison Brown, Evan Zullow, or Stephanie Rosenthal, Attorneys, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Room NJ-3158, Washington, D.C. 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION:

I. Overview and Background

A. Overview

This document states the basis and purpose for the Commission's decision to adopt amendments to the TSR that were proposed and published for public comment on August 19, 2009.[1] After careful review and consideration of the entire record on the issues presented in this rulemaking proceeding, including public comments submitted by 321 interested parties,[2] the Commission has decided to adopt, with several modifications, the proposed amendments to the TSR intended to curb deceptive and abusive practices in the telemarketing of debt relief services. The Rule provisions will: (1) prohibit debt relief service providers[3] from collecting a fee for services until a debt has been settled, altered, or reduced; (2) require certain disclosures in calls marketing debt relief services; (3) prohibit specific misrepresentations about material aspects of the services; and (4) extend the TSR's coverage to include inbound calls made to debt relief companies in response to general media advertisements.

Beginning on September 27, 2010, sellers and telemarketers of debt relief services will be required to comply with the amended TSR requirements, except for § 310.4(a)(5), the advance fee ban provision, which will be effective on October 27, 2010.

B. The Commission's Authority Under the TSR

Enacted in 1994, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act" or "Act") targets deceptive and abusive telemarketing practices, and directed the Commission to adopt a rule with anti-fraud and privacy protections for consumers receiving telephone solicitations to purchase goods or services.[4] Specifically, the Act directed the Commission to issue a rule defining and prohibiting deceptive and abusive telemarketing acts or practices.[5] In addition, the Act mandated that the FTC promulgate regulations addressing some specific practices, which the Act designated as "abusive."[6] The Act also authorized state attorneys general or other appropriate state officials, as well as private persons who meet stringent jurisdictional requirements, to bring civil actions in federal district court.[7]

Pursuant to the Act's directive, the Commission promulgated the original TSR in 1995 and subsequently amended it in 2003 and again in 2008 to add, among other things, provisions establishing the National Do Not Call Registry and addressing the use of pre-recorded messages.[8] The TSR applies to virtually all "telemarketing," defined to mean "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call."[9] The Telemarketing Act, however, explicitly states that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the Federal Trade Commission Act ("FTC Act").[10] As a result, some entities and products fall outside the scope of the TSR.[11]

In addition, the Rule wholly or partially exempts several types of calls from its coverage. For example, the Rule generally exempts inbound calls placed by consumers in response to direct mail or general media advertising.[12]

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[1] *TSR Proposed Rule*, 74 FR 41988 (Aug. 19, 2009). The TSR is set forth at 16 CFR 310.

[2] The comments and other material placed on the rulemaking record are available at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*). In addition, a list of commenters cited in this SBP, along with their short citation names or acronyms used throughout the SBP, follows Section V of this SBP. When a commenter submitted more than one comment, the comment is also identified by date.

[3] Throughout the SBP, the Commission uses the term "providers" to refer to "sellers and telemarketers" as defined in the TSR. "Seller" is defined as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 CFR 310.2(aa). "Telemarketer" is defined as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." 16 CFR 310.2(cc).

[4] 15 U.S.C. 6101-6108. Subsequently, the USA PATRIOT Act, Pub. L. No. 107–56, 115 Stat. 272 (Oct. 26, 2001), expanded the Telemarketing Act's definition of "telemarketing" to encompass calls soliciting charitable contributions, donations, or gifts of money or any other thing of value.

[5] 15 U.S.C. 6102(a).

[6] 15 U.S.C. 6102(a)(3).

[7] 15 U.S.C. 6103, 6104.

[8] *TSR and Statement of Basis and Purpose and Final Rule ("TSR Final Rule")*, 60 FR 43842 (Aug. 23, 1995); *Amended TSR and Statement of Basis and Purpose ("TSR Amended Rule")*, 68 FR 4580 (Jan. 29, 2003); *Amended TSR and Statement of Basis and Purpose ("TSR Amended Rule 2008")*, 73 FR 51164 (Aug. 29, 2008).

[9] 16 CFR 310.2(cc) (using the same definition as the Telemarketing Act, 15 U.S.C. 6106(4)). The TSR excludes from the definition of telemarketing:

> the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

Id.

[10] 15 U.S.C. 6105(b).

[11] *See* 15 U.S.C. 44, 45(a)(2), which exclude or limit from the Commission's jurisdiction several types of entities, including bona fide nonprofits, bank entities (including, among others, banks, thrifts, and federally chartered credit unions), and common carriers, as well as the business of insurance.

[12] 16 CFR 310.6(b)(5)-(6). Moreover, the Rule exempts from the National Do Not Call Registry provisions calls placed by for-profit telemarketers to solicit charitable contributions; such calls are not exempt, however, from the "entity-specific" do not

However, there are certain "carve-outs" from some of the TSR's exemptions that limit their reach, such as the carve-out for calls initiated by a customer in response to a general advertisement relating to investment opportunities.[13]

The TSR is designed to protect consumers in a number of different ways. First, the Rule includes provisions governing communications between telemarketers and consumers, requiring certain disclosures and prohibiting material misrepresentations.[14] Second, the TSR requires telemarketers to obtain consumers' "express informed consent" to be charged on a particular account before billing or collecting payment and, through a specified process, to obtain consumers' "express verifiable authorization" to be billed through any payment system other than a credit or debit card.[15] Third, the Rule prohibits as an abusive practice requesting or receiving any fee or consideration in advance of obtaining any credit repair services;[16] recovery services;[17] or offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success.[18] Fourth, the Rule prohibits credit card laundering[19] and other forms of assisting and facilitating sellers or telemarketers engaged in violations of the TSR.[20] Fifth, the TSR, with narrow exceptions, prohibits telemarketers from calling consumers whose numbers are on the National Do Not Call Registry or who have specifically requested not to receive calls from a particular entity.[21] Finally, the TSR requires that telemarketers transmit to consumers' telephones accurate Caller ID information[22] and places restrictions on calls made by predictive dialers[23] and those delivering pre-recorded messages.[24]

C. Overview of Debt Relief Services

Debt relief services have proliferated in recent years as the economy has declined and greater numbers of consumers hold debts they cannot pay.[25] A range of nonprofit and for-profit entities – including credit counselors, debt settlement companies, and debt negotiation companies – offer debt relief services, frequently through telemarketing. Thus, consumers with debt problems have several options for which they may qualify. Those who have sufficient assets and income to repay their full debts over time, if their creditors make certain concessions (*e.g.*, a reduction in interest rate), can enroll in a debt management plan with a credit counseling agency. On the other end of the spectrum, for consumers who are so far in debt that they can never catch up, declaring Chapter 13 or Chapter 7 bankruptcy might be the most appropriate course. Debt settlement is ostensibly designed for consumers who fall between these two options, *i.e.*, consumers who cannot repay their full debt amount, but could pay some percentage of it.[26]

Over the last several years, the Commission has addressed consumer protection concerns about debt relief services through law enforcement actions,[27] consumer education,[28] and outreach to industry and other relevant parties.[29] The brief description of the debt relief services industry in the next section is based upon information in the record, the enforcement activities of the FTC and the states, and independent research by Commission staff.[30]

1. Credit Counseling Agencies

Credit counseling agencies ("CCAs") historically were nonprofit organizations that worked as liaisons between consumers and creditors to negotiate "debt management plans" ("DMPs"). DMPs are monthly payment plans for the repayment of credit card and other unsecured debt, enabling consumers to repay the full amount owed to their creditors under renegotiated terms that make repayment less onerous.[31] To be eligible for a DMP,

call provisions or the TSR's other requirements. 16 CFR 310.6(a).

[13] *See, e.g.*, 16 CFR 310.6(b)(5)-(6) (provisions related to general advertisements and direct mail solicitations).

[14] The TSR requires that telemarketers soliciting sales of goods or services promptly disclose several key pieces of information in an outbound telephone call or an internal or external upsell: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment is necessary to win. 16 CFR 310.4(d); *see also* 16 CFR 310.2(ee) (defining "upselling"). Telemarketers also must disclose in any telephone sales call the cost of the goods or services and certain other material information. 16 CFR 310.3(a)(1).

In addition, the TSR prohibits misrepresentations about, among other things, the cost and quantity of the offered goods or services. 16 CFR 310.3(a)(2). It also prohibits making false or misleading statements to induce any person to pay for goods or services or to induce charitable contributions. 16 CFR 310.3(a)(4).

[15] 16 CFR 310.4(a)(7); 16 CFR 310.3(a)(3).

[16] 16 CFR 310.4(a)(2).

[17] 16 CFR 310.4(a)(3). As the Commission has previously explained, [in] recovery room scams . . . a deceptive telemarketer calls a consumer who has lost money, or who has failed to win a promised prize, in a previous scam. The recovery room telemarketer falsely promises to recover the lost money, or obtain the promised prize, in exchange for a fee paid in advance. After the fee is paid, the promised services are never provided. In fact, the consumer may never hear from the telemarketer again.

TSR Final Rule, 60 FR at 43854.

[18] 16 CFR 310.4(a)(4); *see TSR Amended Rule*, 68 FR at 4614 (finding that these three services were "fundamentally bogus").

[19] 16 CFR 310.3(c).

[20] 16 CFR 310.3(b).

[21] 16 CFR 310.4(b)(iii).

[22] 16 CFR 310.4(a)(7).

[23] 16 CFR 310.4(b)(1)(iv) (a call abandonment safe harbor is found at 16 CFR 310.4(h)(4)).

[24] 16 CFR 310.4(b)(1)(v).

[25] *See, e.g.*, TASC (Oct. 26, 2009) at 7; NFCC at 2; Federal Reserve Board, *Charge-off and Delinquency Rates* (May 24, 2010), *available at* (*http://www.federalreserve.gov/releases/chargeoff/delallsa.htm*) (charting recent increase in credit card delinquency rate); *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the S. Comm. on Commerce, Science, & Transportation*, 111th Cong. at 1 (2010) (statement of Philip A. Lehman, Assistant Attorney General, North Carolina Department of Justice) ("NC AG Testimony").

[26] *See* Weinstein (Oct. 26, 2009) at 8 (*see* attached Bernard L. Weinstein & Terry L. Clower, *Debt Settlement: Fulfilling the Need for An Economic Middle Ground* at 7 (Sept. 2009) ("Weinstein paper")). It is not clear, however, how wide a "slice" of the debt-impaired population is suitable for debt settlement programs. *See* Summary of Communications (June 16, 2010) at 1 (according to industry groups, consumers who can afford to pay 1.5-2% of their debt amount each month should enter debt settlement). Moreover, even for those consumers for whom debt settlement might be appropriate, the practice of charging large advance fees makes it much less likely that those consumers can succeed in such a program. CFA at 9; CareOne at 4; *see* SBLS at 2-3.

[27] *See* List of FTC Law Enforcement Actions Against Debt Relief Companies, following Section V of the SBP, for a list of cases that the FTC has prosecuted since 2003 ("FTC Case List"). In addition, as detailed in the subsequent List of State Law Enforcement Actions Against Debt Relief Companies ("State Case List"), state law enforcement agencies have brought at least 236 enforcement actions against debt relief companies in the last decade.

[28] *See, e.g.*, FTC, *Settling Your Credit Card Debts* (2010); FTC, *Fiscal Fitness: Choosing a Credit Counselor* (2005); FTC, *For People on Debt Management Plans: A Must-Do List* (2005); FTC, *Knee Deep in Debt* (2005).

[29] In September 2008, the Commission held a public workshop entitled "Consumer Protection and the Debt Settlement Industry" ("Workshop"), which brought together stakeholders to discuss consumer protection concerns associated with debt settlement services, one facet of the debt relief services industry. Workshop participants also debated the merits of possible solutions to those concerns, including the various remedies that were subsequently included in the proposed rule. An agenda and transcript of the Workshop are available at (*http://www.ftc.gov/bcp/workshops/debtsettlement/index.shtm*). Public comments associated with the Workshop are available at (*http://www.ftc.gov/os/comments/debtsettlementworkshop/index.shtm*). As discussed below, in November 2009, the Commission held a public forum on issues specific to the rulemaking proceeding.

[30] A more detailed description of the history and evolution of these different forms of debt relief can be found in Section II of the Notice of Proposed Rulemaking in this proceeding.

[31] GP (Oct. 22, 2009) at 2; Cambridge (Oct. 26, 2009) at 1. Each creditor determines what, if any, repayment options to offer the consumer based on

Continued

a consumer generally must have sufficient income to repay the full amount of the debts, provided that the terms are adjusted to make such repayment possible. Credit counselors typically also provide educational counseling to assist consumers in developing manageable budgets and avoiding debt problems in the future.[32]

Nonprofit CCAs generally receive funding from two sources. First, consumers typically pay for their services: usually $25 to $45 to enroll in a DMP, followed by a monthly charge of roughly $25.[33] The second source of funding is creditors themselves. After a consumer enrolls in a DMP, the consumer's creditors often pay the CCA a percentage of the monthly payments the CCA receives. In the past, this funding mechanism, known as a "fair share" contribution, has provided the bulk of a nonprofit CCA's operating revenue, but these agencies now typically receive less than 10% of their revenue from such contributions.[34]

Over the past decade, a number of larger CCAs entered the market. Many of these CCAs obtained nonprofit status from the Internal Revenue Service. Other CCAs openly operated as for-profit companies. In response to illegal practices by some of these new entrants, the FTC and state attorneys general brought a number of enforcement actions challenging these practices.[35] Specifically, since 2003, the Commission has brought six cases against credit counseling entities for deceptive and abusive practices. In one of these cases, the FTC sued AmeriDebt, Inc., at the time one of the largest CCAs in the United States.[36] The defendants in these cases allegedly engaged in several common patterns of deceptive conduct in violation of Section 5 of the FTC Act.[37] First, most made allegedly deceptive statements regarding their nonprofit nature.[38] Second, they allegedly made frequent misrepresentations about the benefits and likelihood of success consumers could expect from their services. These included false promises to provide counseling and educational services[39] and overstatements of the amount or percentage of interest charges a consumer might save.[40] Third, the Commission alleged that these entities misrepresented material information regarding their fees, including making false claims that they did not charge upfront fees[41] or that fees were tax deductible.[42] In addition to allegedly violating the FTC Act, some of these entities were engaging in outbound telemarketing and allegedly violating the TSR, particularly the Rule's disclosure requirements and prohibitions of misrepresentations, as well as its provisions on certain abusive practices, including violations of the National Do Not Call Registry provision.[43]

Over the last several years, in response to abuses such as these, the

the consumer's income and total debt load. Repayment options, known as "concessions," include reduced interest rates, elimination of late or over limit fees, and extensions of the term for repayment.

[32] GP (Oct. 22, 2009) at 2; Davis at 2; CCCS NY at 2; FECA (Oct. 26, 2009) at 2-3; DebtHelper at 1; Cambridge (Oct. 26, 2009) at 1 ("Roughly 85% of the individuals who contact Cambridge [a credit counseling agency] simply have questions about a particular aspect of their finances or wouldn't qualify for creditor concessions due to too much or too little income. Nevertheless, they receive the same financial analysis and Action Plan offered to Cambridge's DMP clients, and are also offered ongoing counseling, educational guides and web resources, free of charge."). In fact, Section 501(c)(3) of the Internal Revenue Code ("IRC"), 26 U.S.C. 501(c)(3), dictates that nonprofits must provide a substantial amount of free education and counseling to the public and prohibits them from refusing credit counseling services to a consumer if the consumer cannot pay. FECA (Oct. 26, 2009) at 4.

[33] Cambridge (Oct. 26, 2009) at 1; NWS (Oct. 22, 2009) at 6 (*see* attached Hasnain Walji, *Delivering Value to Consumers in a Debt Settlement Program* at 6 (Oct. 16, 2009) ("Walji paper")) (the average account set up fee is $25 and monthly maintenance fee is $15); *see also* Cards & Payments, Vol. 22, Issue 2, *Credit Concessions: Assistance for Borrowers on the Brink* (Feb. 1, 2009) (nonprofit agencies' counseling fees average about $25 per month); Miami Herald, *Credit Counselors See Foreclosures on the Rise*, July 13, 2008, (CCAs charge an initial fee of $25 and a $25 monthly fee).

These fees are often limited by state law. *See*, e.g., Me. Rev. Stat. Ann. Tit. 17, § 701, et seq., tit. 32 § 6171, et seq. (limiting fees to $75 for set-up and $40 monthly charge); Md. Code Ann. § 12-901 et seq. (limiting fees to $50 consultation fee and the lesser of $40 per month or $8 per creditor per month); Ill. Com. Stat. Ann., § 205 ILCS 665/1 et seq. (limiting fees to an initial counseling fee of $50, provided the average initial counseling fee does not exceed $30 per debtor for all debtors counseled, and $50 per month for each debtor, provided the average monthly fee does not exceed $30 per debtor for all debtors counseled); N.C. Gen. Stat. § 14-423 et seq. (limiting fees to $40 for set-up and 10% of the monthly payment disbursed under the DMP, not to exceed $40 per month).

[34] GP (McNamara), Transcript of Public Forum on Debt Relief Amendments to the TSR ("Tr."), at 77-78; RDRI at 2 (creditor fair share has fallen to 4% to 5% of consumer debt amounts and in some cases has been eliminated); NWS (Oct. 22, 2009) at 5 (*see* attached Walji paper at 5) (fair share is 4% to 10%); *see also* National Consumer Law Center, Inc. & Consumer Federation of America, *Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants* at 10-12 (April 2003); NFCC (Binzel), Transcript of "Consumer Protection and the Debt Settlement Industry" Workshop, September 2008 ("Workshop Tr.") at 37; *but see* JH (Oct. 24, 2009) at 8 (without citation, the commenter states that CCAs receive 22.5% of the total amount collected from each consumer).

[35] *See* FTC and State Case Lists, *supra* note 27.

[36] *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md., final order May 17, 2006). On the eve of trial, the FTC obtained a $35 million settlement and thus far has distributed $12.7 million in redress to 287,000 consumers. *See* Press Release, FTC, *FTC's AmeriDebt Lawsuit Resolved: Almost $13 Million Returned to 287,000 Consumers Harmed by Debt Management Scam* (Sept. 10, 2008), (*http://www.ftc.gov/opo/2008/09/ameridebt.shtm*).

[37] *See, e.g., FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003).

[38] *See U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003). Although the defendants in these cases had obtained IRS designation as nonprofits under IRC § 501(c)(3), they allegedly funneled revenues out of the CCAs and into the hands of affiliated for-profit companies and/or the principals of the operation. Thus, the FTC alleged defendants were "operating for their own profit or that of their members" and fell outside the nonprofit exemption in the FTC Act. *See* 15 U.S.C. 44, 45(a)(2).

As the Commission has stated in testimony before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, significant harm to consumers may accrue from misrepresentations regarding an entity's nonprofit status. *See Consumer Protection Issues in the Credit Counseling Industry: Hearing Before the Permanent Subcomm. on Investigations, S. Comm. on Governmental Affairs*, 108th Cong. 2d Sess. (2004) (testimony of the FTC) ("[S]ome CCAs appear to use their 501(c)(3) status to convince consumers to enroll in their DMPs and pay fees or make donations. These CCAs may, for example, claim that consumers' 'donations' will be used simply to defray the CCA's expenses. Instead, the bulk of the money may be passed through to individuals or for-profit entities with which the CCAs are closely affiliated. Tax-exempt status also may tend to give these fraudulent CCAs a veneer of respectability by implying that the CCA is serving a charitable or public purpose. Finally, some consumers may believe that a 'non-profit' CCA will charge lower fees than a similar for-profit."), *available at* (*http://www.ftc.gov/os/2004/03/040324testimony.shtm*).

[39] *See, e.g., FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. filed Apr. 23, 2004).

[40] *See U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004).

[41] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003).

[42] *See FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006). Other defendants allegedly claimed to have "special relationships" with the consumers' creditors. *See FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006).

[43] *See FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006).

IRS has challenged the tax-exempt status of a number of purportedly nonprofit CCAs – both through enforcement of existing statutes and new tax code provisions.[44] To enhance the IRS's ability to oversee CCAs, in 2006 Congress amended the IRC, adding § 501(q) to provide specific eligibility criteria for CCAs seeking tax-exempt status as well as criteria for retaining that status.[45] Among other things, § 501(q) of the Code prohibits tax-exempt CCAs from refusing to provide credit counseling services due to a consumer's inability to pay or a consumer's ineligibility or unwillingness to enroll in a DMP; charging more than "reasonable fees" for services; or, unless allowed by state law, basing fees on a percentage of a client's debt, DMP payments, or savings from enrolling in a DMP.[46] In addition to receiving regulatory scrutiny from the IRS, as a result of changes in the federal bankruptcy code, 158 nonprofit CCAs, including the largest such entities, have been subjected to rigorous screening by the Department of Justice's Executive Office of the U.S. Trustee ("EOUST").[47] Finally, nonprofits must comply with state laws in 49 states, most of which set fee limits.[48]

2. For-Profit Debt Settlement Services

Debt settlement companies purport to offer consumers the opportunity to obtain lump sum settlements with their creditors for significantly less than the full outstanding balance of their unsecured debts. Unlike a traditional DMP, the goal of a debt settlement plan is for the consumer to repay only a portion of the total owed.

The Promotion of Debt Settlement Services

Debt settlement companies typically advertise through the Internet, television, radio, or direct mail.[49] The advertisements generally follow the "problem-solution" approach – consumers who are over their heads in debt can be helped by enrolling in the advertiser's program. Many advertisements make specific claims that appeal to the target consumers – for example, claims that consumers will save 40 to 50 cents on each dollar of their credit card debts[50] or will become debt-free.[51] The advertisements typically then urge consumers to call a toll-free number for more information.[52]

Consumers who call the specified phone number reach a telemarketer working for or on behalf of the debt settlement provider. The telemarketer obtains information about the consumer's debts and financial condition and makes the sales pitch, often repeating the claims made in the advertisements as well as making additional ones. If the consumer agrees to enroll in the program, the provider mails a contract for signature. Providers sometimes pressure consumers to return payment authorization forms and signed contracts as quickly as possible following the call.[53]

The Debt Settlement Program

In the typical scenario, consumers enroll one or more of their unsecured debts into the program and begin making payments into a dedicated bank account established by the provider.[54] These payments are apportioned in some fashion between the provider's fees and money set aside for settlements of the debts. According to industry representatives, debt settlement providers assess each consumer's financial condition and, based on that individualized assessment and the provider's historical experience, calculate a single monthly payment that

[44] In 2006, the IRS examined all tax-exempt CCAs, resulting in revocation or proposed revocation of the existing tax-exempt status of 41 of them, as well as increased scrutiny of new applications for tax-exempt status. *TSR Proposed Rule*, 74 FR at 41992; Hunter at 1; AICCCA at 5; FECA (Oct. 26, 2009) at 4; CareOne at 4; Eileen Ambrose, *Credit firms' status revoked; IRS says 41 debt counselors will lose tax-exempt standing*, Baltimore Sun, May 16, 2006.

[45] Pension Protection Act of 2006, Pub. L. No. 109-280, Section 1220 (Aug. 2006) (codified as 26 U.S.C. 501(q)).

[46] *See* 26 U.S.C. 501(q). Section 501(q) also limits the total revenues that a tax-exempt CCA may receive from creditors for DMPs and prohibits tax-exempt CCAs from making or receiving referral fees and from soliciting voluntary contributions from a client. 26 U.S.C. 501(q)(1)-(2); *see also* FECA (Oct. 26, 2009) at 4-5.

[47] Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, consumers must obtain credit counseling before filing for bankruptcy and must take a financial literacy class before obtaining a discharge from bankruptcy. *See* Pub L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. 101 et seq.). CCAs seeking certification as approved providers of the required credit counseling must submit to an in-depth initial examination and to subsequent re-examination by the EOUST. *See Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies by United States Trustees; Notice of Proposed Rulemaking*, 73 FR 6062 (Feb. 1, 2008) (seeking comment on proposed rule setting forth additional procedures and criteria for approval of entities seeking to become, or remain, approved nonprofit budget and credit counseling agencies). A list of EOUST-approved credit counselors is available to consumers at (*http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm*).

[48] *Supra* note 33; *see also* CareOne at 4. Some of the state laws apply to for-profit credit counseling companies as well; others do not.

[49] Able (Oct. 21, 2009) at 17; CFA at 2-3; Weinstein (Oct. 26, 2009) at 7 (*see* attached Weinstein paper at 6); *see also* USOBA Workshop Comment at 9.

[50] In April 2010, FTC staff conducted a surf of debt settlement websites, based on a sample of the websites that a consumer searching for debt settlement services on a major search engine would encounter. In conducting the surf, staff searched on Google for the term "debt settlement services," obtaining more than 24,000 results. To best duplicate what a typical consumer searching for these services would find, staff narrowed the results to the websites that appeared on the first six pages of the search results and eliminated duplicates. The staff found that 86% of the 100 debt settlement websites reviewed represented that the provider could achieve a specific level of reduction in the amount of debt owed.

See also, e.g., FTC v. Better Budget Fin. Servs., Inc., No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (Complaint, ¶ 12) (defendants' websites represented that they could "reduce the amount of the consumer's debt by as much as 50% - 70%."); *infra* note 566; *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the Sen. Comm. On Commerce, Science, & Transportation*, 111th Cong. (2010) (testimony of the U.S. Government Accountability Office) ("GAO Testimony") at 13.

[51] Of the 100 websites FTC staff reviewed, *see supra* note 50, 57% represented that they could settle or reduce *all* unsecured debts (websites made claims such as "Become Debt Free," "Debt free in as little as 24-48 months," and "Achieve $0.00 Debt In 12-60 Months."); *see also, e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007) (Complaint, ¶ 16) (defendants' websites represented that "we can reduce your unsecured debt by up to 60% and sometimes more and have you debt free in 18 to 30 months."); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (Complaint, ¶ 26) (the company's website "represent[ed] that, by using DRS's debt negotiation services, consumers can pay off their credit card debt for fifty percent or less of the amount currently owed and be debt free within three to 36 months."); GAO Testimony, *supra* note 50, at 18.

[52] In its review of debt settlement websites, *see supra* note 50, FTC staff found that 91% of websites reviewed directed the consumer to call a telephone number to learn more about the service. The Commission also has observed this practice in its law enforcement experience. *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-CV-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Edge Solutions, Inc.*, No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002).

[53] *See, e.g.*, *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (Complaint ¶ 20) (alleging "[c]onsumers who agree to enroll . . . are sent an initial set of enrollment documents from Debt Set Colorado. During their telephone pitches, the defendants' telemarketers also exhort consumers to fill out the enrollment documents and return the papers as quickly as possible . . . . Included in these documents are forms for the consumer to authorize direct withdrawals from the consumer's checking account, to identify the amounts owed to various creditors, and a Client Agreement.").

[54] *See* SBLS at 1; USDR (Oct. 20, 2009) at 14; Orion (Jan. 12, 2009) at 5; NWS (Oct. 29, 2009) at 10 (*see* attached Walji paper at 10). In fact, most state debt management laws, including the Uniform Debt-Management Services Act ("UDMSA"), require providers to keep client funds in separate, dedicated bank accounts. ULC at 2; CareOne at 6.

the consumer must make to both save for settlements and pay the provider's fee.[55] The providers typically tell consumers that the monthly payments – often in the hundreds of dollars – will accumulate until there are sufficient funds to make the creditor or debt collector an offer equivalent to an appreciable percentage of the amount originally owed to the creditor. The provider generally will not begin negotiations with creditors until the consumer has saved money sufficient to fund a possible settlement of the debt.[56] The provider pursues settlements on an individual, debt-by-debt basis as the consumer accumulates sufficient funds for each debt. According to industry representatives, the process of settling all of a consumer's debts can take three years or more to complete.[57]

While the consumer is accumulating funds, the debt settlement provider often advises the consumer not to talk to the associated creditors or debt collectors.[58] In addition, some providers instruct the consumer to assign them power of attorney[59] and to send creditors a letter, directly or through the provider, instructing the creditor to cease communication with the consumer.[60] In some cases, providers have even executed a change of address form substituting their address for the consumer's, thereby redirecting billing statements and collection notices so that the consumer does not receive them.[61] Some providers represent that they maintain direct contact with the consumer's creditors or debt collectors and that collection calls and lawsuits will cease upon the consumer's enrollment in the debt settlement program.[62]

Debt Settlement Fee Models

Many debt settlement providers charge significant advance fees. Some require consumers to pay 40% or more of the total fee within the first three or four months of enrollment and the remainder over the ensuing 12 months or fewer.[63] These fees must be paid whether or not the provider has attempted or achieved any settlements. An increasing number of providers utilize a so-called "pay as you go" model, spreading the fees over the first fifteen months or more of the program, yet still requiring consumers to pay hundreds of dollars in fees before they receive a single settlement.[64] Even when providers spread the fee over the anticipated duration of the program (usually three years), consumers typically are required to pay a substantial percentage of the fee before any portion of their funds is paid to creditors.[65]

Many debt settlement companies break their fee into separate components, such as an initial fee, monthly fees, and/or contingency fees based on the amount of savings the company obtains for the consumer.[66] While fee models vary greatly, they generally require a substantial portion of the fee in advance of any settlements.[67] As described more fully below, the large initial commitment required of consumers has contributed to the high

[55] *See, e.g.*, FDR (Jan. 14, 2010) at 2; TASC (Oct. 26, 2009) at 7.

[56] USOBA (Oct. 26, 2009) at 32. A trade association reported that creditors may not consider settlements until an account is at least 60 days delinquent. USOBA (Oct. 26, 2009) at 32. If consumers are current on their debts, debt settlement providers sometimes advise them to stop making payments to their creditors so that they can achieve the duration of delinquency necessary for the provider to initiate negotiations. *Infra* note 73.

[57] DSA/ADE at 8; *see also* CO AG at 5 (based on data submitted by industry members, the average program length was 32.3 months).

[58] *See* CFA at 9; SOLS at 2; AFSA at 2; JH (Oct. 24, 2009) at 14; NC AG Testimony, *supra* note 25, at 3-4 ("The whole premise of debt settlement is based on consumers not paying their debts and not communicating with creditors."); *see also, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002).

[59] AFSA at 5 ("Debt settlement providers frequently use such means to block communication between the creditor and the consumer. This prevents the creditor from being able to put together a workout plan that would be free for the consumer."). However, ACA International ("ACA"), a trade organization representing third-party debt collectors, stated that the power of attorney documents prepared by debt settlement providers frequently are legally deficient under state law. *See* ACA Workshop Comment (Dec. 1, 2008) at 5-8. Further, unless presented by an attorney, a power of attorney may permit, but does not require, a creditor to contact the debt settlement provider. Accordingly, it appears that this strategy often does not stop collection calls, lawsuits, or garnishment proceedings, but instead may actually escalate the collection process. *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007)(alleging defendants sent power of attorney documents to consumers); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (alleging that consumers were instructed to sign power of attorney forms); *FTC v. Nat'l Credit Council*, Case No. SACV04-0474 CJC (JWJx) (C.D. Cal. 2004) (alleging that defendants used power of attorney documents).

[60] AFSA at 6; RDRI at 5 ("The issuance of 'cease and desist' letters from debt settlement companies to creditors provides a false sense of security to consumers that their accounts are being successfully negotiated and that there is not any threat of impending legal action."); *see also* ACA Workshop Comment (Dec. 1, 2008) at 4-7; Consumer Bankers Association Workshop Comment (Dec. 1, 2008) at 2-3. Creditors have expressed displeasure, however, that once debt settlement providers intercede on behalf of consumers, the providers are not responsive to creditor contacts. *See, e.g.*, AFSA at 2. One workshop panelist representing the American Bankers Association ("ABA") noted that, even when successful, attempts to inhibit direct communication with consumers prevent creditors from informing consumers about available options for dealing with the debt and the ramifications of the failure to make payments. *See* ABA (O'Neill), Workshop Tr. at 96.

[61] *See, e.g., FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (alleging defendants instructed consumers, among other things, to submit change of address information to creditors so that mail would go directly to defendants); *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM. Exs. Supp. Mot. T.R.O., at Exh. 7 (D. Colo. Mar. 20, 2007) (same).

[62] NACCA at 5; AFSA at 8; *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans* (Mar. 2, 2009) , *available at* (*http://www.bbb.org/us/article/bbb-on-differences-between-debt-consolidation-debt-negotiation-debt-elimination-plans-9350*).

[63] USDR (Oct. 20, 2009) at 2; NAAG (Oct. 23, 2009) at 3; CFA at 4, 8-10; SBLS at 4; QLS at 2; SOLS at 2; *see also, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006) (alleging that defendants required consumers to make a "down payment" of 30% to 40% of the total fee in the first two or three months with the remainder paid over the following six to 12 months). A debt settlement trade association (USOBA) obtained information about providers' fee structures from 58 providers and reported that six of the 58 primarily use this "front end fee model." USOBA (Jan. 29, 2010) at 3 (providing no information as to whether the 58 respondents are representative of the trade association or the industry as a whole).

[64] DRS (Jan. 12, 2010) at 1 (fee of 15% of enrolled debt balance is collected over 15 months); FDR (Oct. 26, 2009) at 14 (fees are collected over the first 18 months or longer of the program); JH (Jan. 12, 2010) at 4 (The first payment goes toward fees; the remainder of the fee is collected in installments over one-half of the program. The company's total fee is 15% of enrolled debt, plus a $49 per month maintenance fee. Formerly, the company collected the 15% fee over the first 12 months.); Hunter at 3 ("[I]t is becoming more common for companies to charge a one-time, flat enrollment fee and prorate the remaining percentage of the fee over at least half the life of the program."); NC AG Testimony, *supra* note 25, at 4 ("a significant portion of the consumer's initial payments is diverted to the settlement company's fees.").

[65] *See* USOBA (Jan. 29, 2010) at 3; CSA (Witte), Tr. at 64 (company collects its entire fee monthly, in even amounts, throughout the program); USDR (Johnson), Tr. at 187 (same); SDS (Jan. 22, 2010) at 1-2 (no fee is taken from the first payment; the fee is then taken in equal amounts from the next 20 payments for 36-month programs).

[66] CRN (Jan. 21, 2010) at 4; FCS (Oct. 27, 2009) at 2; ACCORD (Oct. 9, 2009) at 2-3; SBLS at 4 (Financial Consulting Services, National Asset Services, and American Debt Arbitration, three different companies that share identical websites, have charged a "set-up fee" of $399, an "enrollment fee" equal to half of each of the first six monthly payments, a $49 monthly maintenance fee, a $7.20 monthly bank fee, and a settlement fee of 29% of the savings on each settlement. Two other providers, Debt Choice and the Palmer Firm, have charged an 8% set-up fee, a $65 monthly fee, and a 33% settlement fee on realized savings at the time of settlement. A debt settlement company called Allegro Law has charged a 16% fee collected over 18 months and a $59.99 monthly fee; the 16% fee is due immediately if the customer drops out of the program within the first 18 months. Morgan Drexen and the Eric A. Rosen law firm have charged a set-up fee of 5%, monthly fees of $48, and a 25% settlement fee based on realized savings at time of settlement).

[67] GAO Testimony, *supra* note 50, at 9. The wide variety of fee models makes it difficult for consumers to shop for the lowest cost service. *See* Loeb (Mallow), Tr. at 206.

rate at which consumers drop out of these programs before their debts are settled.

Consumer Protection Concerns

Debt settlement plans, as they are often marketed and implemented, raise several consumer protection concerns. First, many providers' advertisements and ensuing telemarketing pitches include false, misleading, or unsubstantiated representations, including claims that

- the provider will or is highly likely to obtain large debt reductions for enrollees, *e.g.*, a 50% reduction of what the consumer owes;[68]
- the provider will or is highly likely to eliminate the consumer's debt entirely in a specific time frame, *e.g.*, 12 to 36 months;[69]
- harassing calls from debt collectors and collection lawsuits will cease;[70]
- the provider has special relationships with creditors and expert knowledge about available techniques to induce settlement;[71] and
- the provider's service is part of a government program, through the use of such terms as "credit relief act," "government bailout," or "stimulus money."[72]

Many providers also tell consumers that they can, and should, stop paying their creditors, while not disclosing that failing to make payments to creditors may actually increase the amounts consumers owe (because of accumulating fees and interest) and will adversely affect their creditworthiness.[73] The rulemaking record, discussed in detail below, establishes that a large proportion of consumers who enter a debt settlement plan do not attain results close to those commonly represented.

In the context of the widespread deception in this industry, the advance fee model used by many debt settlement providers causes substantial consumer injury. Consumers often are not aware that their initial payments are taken by the provider as its fees and are not saved for settlement of their debt; in many instances, providers deceptively underestimate the time necessary to complete the program.[74] As a result, many consumers fall further behind on their debts, incur additional charges, harm their creditworthiness, including credit scores, and, in some cases, suffer legal action against them to collect the debt.[75] Moreover, in a large percentage of cases, consumers are unable to continue making payments while their debts remain undiminished and drop out of the program, usually forfeiting all the payments they made towards the provider's fees.[76]

Both the Commission and state enforcers have brought numerous law enforcement actions targeting deceptive and unfair practices in the debt settlement industry.[77] Since 2001, the Commission has brought nine actions against debt settlement entities under the FTC Act for many of the abuses detailed above.[78] As in the FTC's actions against deceptive credit counselors, these suits commonly alleged that the provider misrepresented, or failed to disclose adequately, the amount and/or timing of its substantial advance fees.[79] Additionally, the Commission alleged that the defendants in these cases falsely promised high success rates and results that were, in fact, unattainable;[80] misrepresented their refund policies;[81] and failed to disclose the accumulation of creditor late fees and other negative consequences of their programs.[82]

The states also have been active in attacking abuses in this industry. State regulators and attorneys general have filed numerous law enforcement actions against debt settlement providers[83] under their state unfair and deceptive acts and practices statutes[84] or other state laws or regulations.[85] In addition, many states have enacted statutes specifically designed to combat deceptive debt settlement practices;[86] in

[68] *Supra* note 50; *infra* note 566.

[69] *Supra* note 51.

[70] *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002); GAO Testimony, *supra* note 50, at 13; *see also, e.g., In re Positive Return, Inc.* (Cal. Dep't of Corps., desist and refrain order May 28, 2004).

[71] *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004); Press Release, Florida Attorney General, *Two Duval County Debt Negotiation Companies Sued for Alleged Deceptions* (Mar. 5, 2008), *available at (myfloridalegal.com/__852562220065EE67.nsf/0/1E9B7637235FE16C85257403005C595F?Open&Highlight=0,ryan,boyd)*; *In re Am. Debt Arb.*, No. 06CS01309 (Cal. Dep't of Corps., desist and refrain order June 30, 2008).

[72] *See, e.g.*, NAAG (July 6, 2010) at 2; *FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997 (D.D.C. filed June 15, 2010); GAO Testimony, *supra* note 50, at 13-14; Steve Bucci, Bankrate.com, *Settle Credit Card Debt For Pennies?* (Feb. 2, 2010), *available at (http://www.bankrate.com/finance/credit-cards/settle-credit-card-debt-for-pennies-1.aspx)*.

[73] *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002); *see also* Texas Attorney General, Press Release, *Attorney General Abbott Pursues Restitution for Texans from "Debt Settlement Company" in Bankruptcy Court* (Aug. 20, 2009), *available at (http://www.oag.state.tx.us/oagNews/release.php?id=3088)*; *Florida v. Hacker* (Fl. Cir. Ct. - 4th filed Feb 21, 2008); GAO Testimony, *supra* note 50, at 9; NC AG Testimony, *supra* note 25, at 4 ("The theory is that the older and more delinquent the debt, the easier it will be to negotiate."); *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the Sen. Comm. On Commerce, Science, & Transportation*, 111th Cong. (2010) (Statement of Holly Haas) ("Haas Testimony"), at 2 ("We were instructed by [the debt settlement company] not to pay our credit card bills because the credit card companies would not negotiate settlements with current accounts."); RDRI at 5.

[74] *See, e.g.*, Debt Settlement USA, *Growth of the Debt Settlement Industry*,at 10 (Oct. 17, 2008) ("Fraudulent firms also regularly fail to provide the services promised to consumers by claiming that they can help them become debt free in an unrealistically short amount of time and/or promise too low of a settlement."); *see also, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007).

[75] One of the Commission's enforcement actions, *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006), is particularly illustrative of the risk of litigation. In that case, between 2004 and 2005, nearly a third of defendants' 18,116 customers were sued by creditors or debt collectors. *See id.*,Trial Exs. 382, 561, 562, 623 & Schumann Test., Day 4, Vol. III, 37:21 - 40:12; 34:17 - 37:4.

[76] NC AG Testimony, *supra* note 25, at 4 ("If the consumer drops out before the settlement process is concluded, as is usually the case, he or she will lose the fee payments, while facing increased debt account balances."); *see infra* Section III.C.2.a.(1); FTC Case List, *supra* note 27.

[77] *See* FTC and State Case Lists, *supra* note 27.

[78] *See* FTC Case List, *supra* note 27.

[79] *See, e.g., FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging that defendants misrepresented that they would not charge consumers any upfront fees before obtaining the promised debt relief, but in fact required a substantial upfront fee).

[80] *See, e.g., id; FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006).

[81] *See, e.g., FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (defendants misrepresented that they would refund consumers' money if unsuccessful).

[82] *See, e.g., id.; FTC v. Connelly*,No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007).

[83] *See* State Case List, *supra* note 27.

[84] *See, e.g. State of Illinois v. Clear Your Debt, LLC*, No. 2010-CH-00167 (Cir. Ct. 7th Judicial Cir. filed Feb. 10, 2010); *State of Texas v. CSA-Credit Solutions of Am., Inc.*, No. 09-000417 (Dist. Travis Cty. filed Mar. 26, 2009); *State of Florida v. Boyd*, No. 2008-CA-002909 (Cir. Ct. 4th Cir. Duval Cty filed Mar. 5, 2008).

[85] *See, e.g.*, Press Release, Colorado Attorney General, *Eleven Companies Settle With The State Under New Debt-Management And Credit Counseling Regulations* (Mar. 12, 2009), *available at (http://www.ago.state.co.us/press_detail.cfmpressID=957.html)*.

[86] Some states restrict the amount and timing of fees, including initial fees and subsequent monthly charges. In 2005, the Uniform Law Commission ("ULC") drafted the UDMSA in an attempt to foster consistent regulation of both for-profit and nonprofit debt relief services across the United States. ULC at 2. Among the key consumer protection provisions in the UDMSA are: a fee cap, mandatory education requirements, a requirement

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fact, six states have banned for-profit debt settlement services entirely.[87] Most state laws, however, allow these services but impose certain requirements or restrictions, for example, banning advance fees,[88] requiring that providers be licensed in the state,[89] providing consumers with certain key disclosures (*e.g.*, a schedule of payments and fees),[90] and granting consumers some right to cancel their enrollment.[91]

3. Debt Negotiation

In addition to credit counseling and debt settlement, there is a third category of debt relief services, often referred to as "debt negotiation." Debt negotiation companies offer to obtain interest rate reductions or other concessions to lower the amount of consumers' monthly payment owed to creditors.[92] Unlike DMPs or debt settlement, debt negotiation does not purport to implement a full balance payment plan or obtain lump sum settlements for less than the full balance the consumer owes.

Debt negotiation providers often market to consumers through so-called "robocalls."[93] Like debt settlement companies, some debt negotiation providers charge significant advance fees.[94] Additionally, like some debt settlement companies, debt negotiators may promise specific results, such as a particular interest rate reduction or amount of savings that will be realized.[95] In some cases, the telemarketers of debt negotiation services refer to themselves as "card services" or a "customer service department" during telephone calls with consumers in order to mislead them into believing that the telemarketers are associated with consumers' credit card companies.[96] In other cases, debt negotiators represent that they can secure savings for consumers, but the sole service provided is creation of an accelerated payment schedule that recommends increased monthly payments.[97] Although increased monthly payments would result in interest savings, consumers seeking these services usually cannot afford the recommended payments.

The FTC has brought nine actions against defendants alleging deceptive and abusive debt negotiation practices.[98] In each case, the defendants used telemarketing to deliver representations that they could reduce consumers' interest payments by specific percentages or minimum amounts. In many of these cases, the Commission also alleged that the defendants falsely purported to be affiliated, or have close relationships, with consumers' creditors.[99] Finally, in each case, the Commission charged defendants with violations of the TSR.

II. Overview of the Proposed Rule and Comments Received

On August 19, 2009, the Commission published its Notice of Proposed Rulemaking ("NPRM") proposing revisions to the TSR ("proposed rule") to cover debt relief services. The Commission proposed amendments to:

- Define the term "debt relief service" to cover any service to renegotiate, settle, or in any way alter the terms of a debt between a consumer and any unsecured creditor or debt collector, including a reduction in the balance, interest rate, or fees owed;
- Prohibit providers from charging fees until they have provided the debt relief services;
- Require providers to make six specific disclosures about the debt relief services being offered;
- Prohibit misrepresentations about material aspects of debt relief services, including success rates and whether a provider is a nonprofit entity; and
- Extend the TSR to cover calls consumers make to debt relief service

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that the provider employ certified counselors, and accreditation requirements for sellers of debt management services. *Id.* To date, six states have adopted the UDMSA with some modifications; additional state legislatures currently are considering doing so. *Id.*

[87] *See, e.g.*, La. Rev. Stat. § 14:331, et seq.; N.D. Cen. Code § 13-06-02; Wyo. Stat. Ann. § 33-14-101, et seq.; Haw. Rev. Stat. Ann. § 446-2; Mass. Gen. Laws Ann. Ch. 180 § 4A; N.J. Stat. Ann. § 17:16G-2.

[88] N.C. Gen. Stat. § 14-423 et seq.

[89] *See, e.g.*, Kan. Stat. Ann. § 50-1116, et seq.; Me. Rev. Stat. Ann. Tit. 17 § 701, et seq. & tit. 32 § 6171, et seq., 1101-03; N.H. Rev. Stat. Ann. § 339-D:1, et seq.; Va. Code Ann. § 6.1-363.2, et seq.

[90] *See, e.g.*, Kan. Stat. Ann. § 50-1116, et seq.; N.H. Rev. Stat. Ann. § 339-D:1, et seq.; S.C. Code Ann. § 37-7-101, et seq.; Wash. Rev. Code § 18.28.010, et seq.

[91] *See, e.g.*, S.C. Code Ann. § 37-7-101, et seq.; Va. Code Ann. § 6.1-363.2, et seq.; Wash. Rev. Code § 18.28.010, et seq.

[92] NAAG (Oct. 23, 2009) at 3-4; MN AG at 2 ("Minnesotans are being deluged with phone calls and advertising campaigns promising to lower credit card interest rates, reduce bills, or repair damaged credit"); *see, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009); *FTC v. Select Pers. Mgmt.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *see also, e.g.*, Press Release, West Virginia Attorney General, *Attorney General McGraw Announces WV Refunds of $214,000 in Debt Relief Companies Settlement* (Jan. 13, 2010), *available at* (*http://www.wvago.gov/press.cfm?ID=500&fx=more*); Press Release, Minnesota Attorney General, *Attorney General Swanson Files Three Lawsuits Against companies Claiming to Help Consumers Lower Their Credit Card Interest Rates* (Sept. 22, 2009), *available at* (*http://www.ag.state.mn.us/consumer/pressrelease/090922ccinterestrates.asp*).

[93] *See, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009).

[94] NAAG (Oct. 23, 2009) at 3-4; *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (alleging defendants charged an upfront fee of $499 to $1,590); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (alleging defendants charged an upfront fee of $990 to $1,495); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging defendants charged an upfront fee of $495 to $1,995); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (alleging defendants charged an upfront fee of $495 to $995); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants charged an upfront fee of $595 to $895); *FTC v. Select Pers. Mgmt.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants charged an upfront fee of $695); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging defendants charged an upfront fee of $399 to $629).

[95] *See, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (alleging defendants represented that if the consumer did not save the promised amount of $2,500 or more in a short time, the consumer would receive a full refund); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (alleging defendants represented that if consumers did not save a "guaranteed" amount – typically $4,000 or more – they could get a full refund of the upfront fee); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging defendants claimed that their interest rate reduction services would provide substantial savings to consumers, typically $2,500 or more in a short time); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (same); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants represented they would provide consumers with savings of $1,500 to $20,000 in interest); *FTC v. Select Pers. Mgmt.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants represented consumers would save a minimum of $2,500 in interest); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging defendants promised to save consumers $2,500).

[96] MN AG at 2; *see also, e.g.*, *FTC v. JPM Accelerated Servs., Inc.*, No. 09-cv-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010).

[97] NAAG (Oct. 23, 2009) at 3-4; *see also, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010).

[98] *See* FTC Case List, *supra* note 27.

[99] *See, e.g.*, *FTC v. Econ. Relief Techs., LLC*, No. 09-cv-3347 (N.D. Ga. filed Nov. 30, 2009); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26- MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009) (alleging defendants claimed to have "close working relationships with over 50,000" creditors); *FTC v. Select Pers. Mgmt.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007) (alleging defendants claimed to be affiliated with consumers' credit card companies); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging that defendants claimed to have "special relationships" with creditors); *see also* MN AG at 2.

providers in response to general media advertising.

During the course of this rulemaking, the Commission received comments from 321 stakeholders, including representatives of the debt relief industry, creditors, law enforcement, consumer groups, and individual consumers.[100] Most industry commenters supported parts of the proposal but opposed the advance fee ban.[101] One industry member opposed virtually the entire proposal,[102] while a few supported the proposal as a whole.[103] In contrast, state attorneys general and regulators, consumer advocates, legal aid attorneys, and creditors generally supported the proposed amendments, including the advance fee ban.[104] The comments and the basis for the Commission's adoption or rejection of the commenters' suggested modifications to the proposed rule are analyzed in detail in Section III below.

On November 4, 2009, the Commission held a public forum to discuss the issues raised by the commenters in this proceeding. Many of those who had filed comments on the proposed rule participated as panelists at the forum, and members of the public had the opportunity to make statements on the record. A transcript of the proceeding was placed on the public record.[105] After the forum, Commission staff sent letters to trade associations and individual debt relief providers that had submitted public comments, soliciting additional information in connection with certain issues that arose at the public forum.[106] Sixteen organizations responded and provided data. Finally, Commission staff met with industry and consumer representatives to discuss the issues under consideration in the rulemaking proceeding.

III. Summary of the Final Amended Rule and Comments Received

The Commission has carefully reviewed and analyzed the entire record developed in this proceeding. The record, as well as the Commission's own law enforcement experience and that of its state counterparts, shows that amendments to the TSR are warranted and appropriate.[107] As discussed in detail in this SBP, the Final Rule addresses deceptive and abusive practices of debt relief service providers and includes the following elements:

- Defines the term "debt relief service" as proposed in the NPRM;
- Prohibits providers from charging or collecting fees until they have provided the debt relief services, but (1) permits such fees as individual debts are resolved on a proportional basis, or if the fee is a percentage of savings,[108] and (2) allows providers to require customers to place funds in a dedicated bank account that meets certain criteria;
- Requires four disclosures in promoting debt relief services, in addition to the existing disclosures required by the TSR: (1) the amount of time it will take to obtain the promised debt relief; (2) with respect to debt settlement services, the amount of money or percentage of each outstanding debt that the customer must accumulate before the provider will make a bona fide settlement offer; (3) if the debt relief program entails not making timely payments to creditors, a warning of the specific consequences thereof; and (4) if the debt relief provider requests or requires the customer to place funds in a dedicated bank account, that the customer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty, and receive all funds remitted to the account.
- Prohibits misrepresentations about material aspects of debt relief services, including success rates and a provider's nonprofit status; and
- Extends the TSR to cover calls consumers make to debt relief services in response to advertisements disseminated through any medium, including direct mail or email.

The final amended Rule adopted here is substantially the same in most respects to the proposed rule, but includes certain important modifications. The Commission bases these modifications on the entire record in this proceeding, including the public comments, the forum and workshop records, consumer complaints, recent testimony on debt settlement before Congress, and the law enforcement experience of the Commission and state enforcers. The major differences between the proposed amendments and the final amendments are as follows:

- The advance fee ban provision now explicitly sets forth three conditions before a telemarketer or seller may charge a fee: (1) the consumer must execute a debt relief agreement with the creditor; (2) the consumer must make at least one payment pursuant to that agreement; and (3) the fee must be proportional either to the fee charged for the entire debt relief service (if the provider uses a flat fee structure) or a percentage of savings achieved (if the provider uses a contingency fee structure);
- Notwithstanding the advance fee ban, the Final Rule allows providers to require consumers to place funds for the provider's fee and for payment to consumers' creditors or debt collectors into a dedicated bank account if they satisfy five specified criteria; and
- The Final Rule eliminates three of the proposed disclosures that the Commission has determined are unnecessary, and it adds one new disclosure.

A. Section 310.1: Scope

Many commenters raised concerns regarding the TSR's scope as applied to the debt relief industry, in particular its treatment of nonprofits, creditors, and debt collectors.[109] First, several commenters expressed concern that while nonprofit entities are a major part of the debt relief industry, the Rule does not apply to them, thus establishing a potential competitive imbalance. Some of these commenters requested that the FTC explicitly apply the Rule to nonprofits.[110] Others argued that the TSR is not an appropriate vehicle for regulating the debt relief industry because the FTC cannot regulate bona fide nonprofits through it.[111]

As stated above, the FTC Act exempts nonprofit entities, and, pursuant to the

[100] These 321 commenters consist of: 35 industry representatives, 10 industry trade associations and groups, 26 consumer groups and legal services offices, six law enforcement organizations, three academics, two labor unions, the Uniform Law Commission, the Responsible Debt Relief Institute, the Better Business Bureau, and 236 individual consumers. Of these commenters, three sought and obtained confidential treatment of data submitted as part of their comments pursuant to FTC Rule 4.9(c), 16 CFR 4.9(c).

[101] *See, e.g.,* TASC (Oct. 26, 2009) at 2; USOBA (Oct. 26, 2009) at 3. Two industry commenters supported a partial advance fee ban allowing debt relief providers to receive fees to cover administrative expenses before providing the promised services. CRN (Oct. 2, 2009) at 10-11; USDR (Oct. 20, 2009) at 2.

[102] MD (Oct. 26, 2009) at 4.

[103] ACCORD (Oct. 9, 2009) at 1; FCS (Oct. 27, 2009) at 1; CareOne at 1.

[104] NAAG (Oct. 23, 2009) at 1; NACCA at 1; CFA at 2; SBLS at 1; QLS at 2; AFSA at 3; ABA at 2.

[105] The public record in this proceeding, including the transcript of the forum, is available at (*http://www.ftc.gov/bcp/rulemaking/tsr/tsr-debtrelief/index.shtm*) and in Room 130 at the FTC, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, telephone number: 202-326-2222.

[106] The letters are posted at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*).

[107] The Commission's decision to amend the Rule is made pursuant to the rulemaking authority granted by the Telemarketing Act to protect consumers from deceptive and abusive practices. 15 U.S.C. 6102(a)(1) and (a)(3).

[108] *See infra* Section III.C.5.b.

[109] The proposed rule did not modify the scope of the TSR.

[110] SOLS at 3; Orion (Oct. 1, 2009) at 1; CareOne at 8; TASC (Oct. 26, 2009) at 29.

[111] USOBA (Oct. 26, 2009) at 40; MD (Mar. 22, 2010) at 16 n.9; TASC (Young), Tr. at 229; *see also* USOBA (Ansbach), Tr. at 231-32; ULC at 6.

Telemarketing Act, this jurisdictional limit applies to the TSR.[112] As a result, the Commission has no discretion to include nonprofits in the Final Rule.[113] Nonprofits, however, must comply with 49 state laws and stringent IRS regulations.[114] These regulations include strict limitations on fee income.[115] Additionally, based on examination of consumer complaints and other research, and in light of the IRS and EOUST programs, it appears many of the concerns about deceptive practices, including deceptive claims of nonprofit status, have been addressed.[116] Thus, the Commission does not believe that the TSR's exclusion of nonprofits is likely to create an unfair competitive disadvantage for for-profit debt relief services.[117]

Some commenters raised concerns that the proposed rule could be read to apply to creditors and others collecting on unsecured debts to the extent that they offer concessions to individual debtors. For example, a financial services industry association expressed concern that the proposed rule would potentially cover an affiliate entity servicing an unsecured loan or credit card account on behalf of a creditor.[118] A banking trade group stated that the FTC should clarify that the Rule is not intended to apply to the legitimate outreach and loss mitigation activities of creditors and their agents or affiliates.[119] Similarly, an association of debt collectors sought to clarify that the Rule would exclude routine communications between consumers and credit grantors or debt collectors about settling debts, restructuring debt terms, waiving fees, reducing interest rates, or arranging for other account changes.[120]

The TSR only covers the practice of "telemarketing," defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services . . . ."[121] The types of debt collection and debt servicing activities described by the commenters do not fall within this definition because they are not intended to induce purchases. Therefore, it is unnecessary to explicitly exempt creditors or debt collectors from compliance with this provision of the Final Rule.[122]

B. Section 310.2: Definitions

The Final Rule defines "debt relief service" as "any service or program represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." This definition is virtually unchanged from the proposed rule.[123]

The Commission received several comments about the definition of "debt relief service" with respect to its (1) breadth, (2) limitation to unsecured debts, (3) product coverage, and (4) application to attorneys.

1. Breadth of Definition of Debt Relief Service

Several commenters addressed the breadth of the debt relief service definition. For example, the National Association of Attorneys General ("NAAG") supported the proposed definition, stating that because the debt relief industry is constantly evolving, the definition of "debt relief" should be broad enough to account for future developments in the industry.[124] NAAG noted that in recent years, the debt settlement industry has engaged in particularly abusive practices, but the same concerns exist with respect to all forms of debt relief.[125] The National Association of Consumer Credit Administrators ("NACCA") emphasized that many providers of debt relief services purchase consumer contact information from so-called "lead generators" – intermediaries that produce and disseminate advertisements for debt relief services to generate "leads" that they then sell to actual providers.[126] NACCA recommended that lead generators be covered by the Rule.[127] A coalition of consumer groups commented that the definition should be broad and include debt management, debt settlement, and debt negotiation,[128] noting that some companies provide a range of debt relief options.[129] A consumer law professor also advocated a definition that covers credit counseling and debt settlement, asserting that many of the abuses are common to both types of services.[130] Moreover, some industry commenters

[112] 15 U.S.C. 6105(b) (providing that the jurisdiction of the Commission in enforcing the Rule is coextensive with its jurisdiction under Section 5 of the FTC Act).

[113] 15 U.S.C. 44 and 45(a)(2) (setting forth certain limitations to the Commission's jurisdiction with regard to its authority to prohibit unfair or deceptive acts or practices). Although nonprofit entities are exempt, telemarketers or sellers that solicit on their behalf are nonetheless covered by the TSR. *See TSR Amended Rule*, 68 FR at 4631. Indeed, several commenters requested that the Commission carve out an explicit exemption for nonprofits. See, *e.g.*, CareOne (Croxson), Tr. at 243. The Commission, however, believes it is unnecessary to state in the Rule what is already clear in the Telemarketing Act, and it therefore declines to include an express statement in the Rule that nonprofits are exempt. *See TSR Amended Rule*, 68 FR at 4586.

[114] *Supra* Section I.C.1; GP (McNamara), Tr. at 245-46. In addition, 158 nonprofit CCAs, including the largest entities, have been approved by the EOUST after rigorous screening.

[115] *Supra* note 33.

[116] The Commission is continuing to monitor this industry, particularly for evidence of a resurgence of sham nonprofits. *See* CareOne at 4 ("A wave of tough state debt management laws and increased federal oversight over the past several years has helped clean up the debt management side of the debt relief industry.").

[117] In any event, the government need not "regulate all aspects of a problem before it can make progress on any front." *FTC v. Mainstream Mktg. Servs., Inc.*, 358 F.3d 1228, 1238 (10th Cir. 2004) (holding that the FTC's Do Not Call Registry, which applies to commercial calls but not calls made by charities or politicians, was not unconstitutionally underinclusive under the First Amendment).

[118] AFSA at 7; *see also* FSR at 1-2 (the rule should clarify that the proposal does not include "the legitimate activities of servicers seeking collection on loans they own or service for others pursuant to *bona fide* servicing relationships.").

[119] ABA at 3.

[120] ACA at 6. NACCA also commented that it was not clear whether the Rule excludes holders of the debt or entities that are contracted to service the debt for the debt holder, and recommended that it exclude such entities. NACCA at 2.

[121] 16 CFR 310.2(dd).

[122] *See TSR Amended Rule*, 68 FR at 4615. In the event that a creditor or debt collector is engaging in the sale of a service to assist in altering debts of the consumer that it does not itself own or service, the entity would be subject to the Rule. More generally, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692, governs the debt collection practices of third-party collectors; creditors collecting on their own debts are not covered by the FDCPA, but are subject to the general prohibition of unfair or deceptive acts or practices in Section 5 of the FTC Act.

[123] The only difference is the addition of the word "program" to the definition to clarify that the term "service" is not intended to be limiting in any way. Thus, regardless of its form, anything sold to consumers that consists of a specific group of procedures to renegotiate, settle, or in any way alter the terms of a consumer debt, is covered by the definition. The definition is not intended, however, to cover services or products that offer to refinance existing loans with a new loan as a way of eliminating the original debts, as such a process would result in a new extension of credit that replaces the existing debts rather than altering them.

[124] NAAG (Oct. 23, 2009) at 4.

[125] Id.

[126] NACCA at 3 (representing 49 state government agencies that regulate non-depository consumer lending and debt relief companies); *see also* ULC at 7 ("The regulations go further than the UDMSA in reaching lead generation firms that solicit debtors for debt relief providers but provide no direct consumer services themselves. The ULC whole-heartedly supports this additional regulation."); *FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997 (D.D.C. filed June 15, 2010) (alleging that defendants misrepresented that they were the government, or were affiliated with the government, on multiple websites, then provided consumers toll-free numbers connecting them to third-party companies that marketed purported debt relief services for a fee).

[127] NACCA at 3; *see also* GP (Oct. 22, 2009) at 2.

[128] CFA at 7-8.

[129] *Id.* at 7.

[130] Greenfield at 1.

supported a broad definition that includes debt management plans and debt settlement arrangements.[131] On the other hand, a nonprofit credit counseling agency stated that CCAs and debt management plans should be excluded entirely from the debt relief services definition because they provide consumers with financial education.[132]

After considering the comments, and other than the addition of the word "program," as noted in footnote 123, the Commission has determined not to change the proposed rule's definition of "debt relief service." The Commission believes that this definition appropriately covers all current and reasonably foreseeable forms of debt relief services, including debt settlement, debt negotiation, and debt management, as well as lead generators for these services.[133] This definition is consistent with the goal of ensuring that consumers are protected regardless of how a debt relief service is structured or denominated. The Commission does not believe there is sufficient basis for excluding CCAs and debt management plans from the definition. Indeed, the record shows that some for-profit CCAs have engaged in the types of deceptive or abusive practices that the Rule is designed to curtail.

2. Limitation to Unsecured Debts

Several comments related to the definition's limitation to *unsecured* debt. A creditor trade association expressed concern that the Rule would not cover relationships with most installment lenders, title lenders, auto finance lenders, secured card issuers, or residential mortgage lenders, all of which typically provide secured credit.[134] By contrast, a representative of an association of state legislators agreed with the limitation to unsecured debts because secured debts are governed by the Uniform Commercial Code, which may conflict with some elements of the Rule.[135]

The Commission has determined to keep the proposed rule's limitation of debt relief services to unsecured debt. The definition in the Final Rule covers all types of unsecured debts, including credit card, medical, and tax debts. There is no evidence in the record of deceptive or abusive practices in the promotion of services for the relief of non-mortgage secured debt.[136] The Commission notes that it is addressing the practices of entities that purport to negotiate changes to the terms of mortgage loans or avert foreclosure in a separate rulemaking proceeding.[137] Commenters generally agreed that concerns regarding mortgage relief services are appropriately addressed in a separate rulemaking.[138]

3. Coverage of Products

Some commenters recommended that the Commission add the term "products" to the term "debt relief services" to ensure that providers cannot evade the Rule by selling books, CDs, or other tangible materials promising debt relief, or by including such products as part of the service.[139] Another commenter disagreed, stating that products should be excluded from the definition. This commenter noted that a consumer who purchases a product (*e.g.*, a book) intended to help relieve debt is himself responsible for taking the steps stated therein; in contrast, an individual who purchases a service is paying the seller to provide that service.[140]

The Commission declines to modify the Rule to include products in the definition of debt relief services. The Rule is targeted at practices that take place in the provision of services, and the record does not indicate that deceptive or abusive practices in the sale of products, such as books or other goods containing information or advice, are common. This limitation, however, should not be used to circumvent the rule by calling a service – in which the provider undertakes certain actions to provide assistance to the purchaser – a "product." Nor can a provider evade the rule by including a "product," such as educational material on how to manage debt, as part of the service it offers. The Commission further notes that deceptive or abusive practices in the telemarketing of products already are prohibited by the TSR and/or the FTC Act. Therefore, the Final Rule does not add the term "product" to the definition of "debt relief services."

4. Coverage of Attorneys

A number of commenters expressed views as to whether the Rule should cover attorneys who provide debt relief services. Several commenters argued that attorneys generally should be covered by the Rule when they are providing covered services.[141] One commenter stated that exempting attorneys would create a major loophole for providers engaged in deception or abuse.[142] A second commenter agreed that an exemption would make it easy for debt relief companies to ally themselves with lawyers to escape the Rule.[143] By contrast, two commenters argued that attorneys should be exempt from the Rule because state bars separately license them, and the bars' ethics rules and complaint systems

[131] CareOne at 3; USDR (Oct. 20, 2009) at 12.

[132] CCCS CNY at 1.

[133] Depending on the facts, lead generators for debt relief services may be covered under the TSR's primary provisions or its assisting and facilitating provision. *See* 16 CFR 310.3(b).

[134] AFSA at 7 ("There does not appear to be a reason in the Rule for limiting debt repair services to relationships only with unsecured creditors.").

[135] ULC (Kerr), Tr. at 252. In addition, the evidence in the record suggests that debt relief services generally do not seek to alter secured debts such as installment loans and title loans. NACCA (Keiser), Tr. at 250; *see also* USDR (Oct. 20, 2009) at 12 (supporting the definition's limitation to unsecured debts).

[136] To the extent any entity markets debt relief related to automobile title loans or other secured debts, Section 5 of the FTC Act covers such marketing.

[137] *Mortgage Assistance Relief Services Notice of Proposed Rulemaking*, 75 FR 10707 (Mar. 9, 2010). This rulemaking addresses the industry of for-profit companies purporting to obtain mortgage loan modifications or other relief for consumers facing foreclosure. Under the proposed rule in that proceeding, companies could not receive payment until they have obtained for the consumer a documented offer from a mortgage lender or servicer that comports with the promises they have made.

[138] FCS (Oct. 27, 2009) at 3; FDR (Linderman), Tr. at 115.

[139] CFA at 7; ULC (Kerr), Tr. at 258; AFSA (Sheeran), Tr. at 259-60; FDR (Linderman), Tr. at 256 (for products that are sold with a guarantee).

[140] Centricity (Manganiello), Tr. at 239; *see also* MP at 3 (stating that expanding the definition to products is "completely unnecessary," as "the FTC already has adequate authority to deal with deceptive marketing of such products." The commenter also stated that "where the true intention of the product offering is to 'up-sell' consumers to a full-service debt program, then the proposed rule-change would already govern.").

[141] TASC (Oct. 26, 2009) at 13 ("Consumers should be entitled to the same protections whether or not their provider is an attorney."); ACCORD (Noonan), Tr. at 236-37 (recommending an exception for attorneys who attempt to settle debts as a *de minimis*, incidental part of their primary businesses); *see also* CFA (Grant), Tr. at 240.

[142] MN LA (Elwood), Tr. at 233. Another commenter noted that the Commission has played an active role in policing unfair and deceptive practices by attorneys in other industries, such as credit repair and debt collection. ACCORD (Noonan), Tr. at 237.

[143] FDR (Linderman), Tr. at 234; *see also* TASC (Young), Tr. at 238; *FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. June 10, 2004) (Supplement to Report of Temporary Receiver's Activities, First Report to the Court at 2) (defendant would assign certain debt settlement contracts with consumers to a law firm because of certain state qualification restrictions). The FTC has filed a number of lawsuits against mortgage assistance relief service providers, in an analogous context, that affiliated themselves with attorneys in order to come within attorney exemptions in state statutes. In those cases, the Commission has named both the providers and the attorneys themselves as defendants. *See, e.g., FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009) ; *FTC v. LucosLawCenter "Inc.,"* No. 09-CV-770 (C.D. Cal. filed July 7, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

govern their behavior.[144] A different commenter, however, questioned whether state bar rules are effective in deterring unfair and deceptive practices.[145]

The existing TSR currently covers attorneys who engage in telemarketing.[146] Based on the record in this proceeding, the Commission has concluded that an exemption from the amended rule for attorneys engaged in the telemarketing of debt relief services is not warranted. The Commission believes that the final amended Rule strikes the appropriate balance between permitting attorneys to provide bona fide legal services and curbing deceptive and abusive practices engaged in by some attorneys in this industry. Several factors support this conclusion.

First, as a threshold matter, the TSR applies only to persons, regardless of their professional affiliation, who engage in "telemarketing" – i.e., "a plan, program, or campaign which is conducted to induce the purchase of goods or services" and that involves interstate telephone calls.[147] In general, attorneys who provide bona fide legal services do not utilize a plan, program, or campaign of interstate telephonic communications in order to solicit potential clients to purchase debt relief services. Thus, an attorney who makes telephone calls to clients on an individual basis to provide assistance and legal advice generally would not be engaged in "telemarketing."

Second, even if an attorney is engaged in telemarketing as defined in the TSR, it is common for the attorney to meet with prospective clients in person before agreeing to represent them. These attorneys would not be covered by the TSR under the Rule's exemption for transactions where payment is not required until after a face-to-face meeting.[148] It should be noted, however, that even in transactions falling within the face-to-face exemption, telemarketers must abide by certain restrictions in the Rule.[149]

Third, the Commission believes that attorneys acting in compliance with state bar rules and providing bona fide legal services already fall outside of the TSR's coverage in most instances. For example, state bar rules typically prohibit attorneys from making outbound telemarketing calls to prospective clients.[150] State bar rules also restrict another practice common to telemarketers – the provision of services to consumers in multiple states or nationwide.[151] State bar rules also require an attorney to provide basic, competent legal services and to charge a reasonable fee.[152] Accordingly, attorneys who limit their contact with clients to telemarketing calls and then charge hundreds or thousands of dollars for those services may also violate these rules. Finally, based on the Commission's experience, telemarketers frequently split fees, pay for referrals, and engage in other activity that would run afoul of other state bar rules.[153]

Fourth, it is important to retain Rule coverage for attorneys, and those partnering with attorneys, who principally rely on telemarketing to obtain debt relief service clients, because they have engaged in the same types of deceptive and abusive practices as those committed by non-attorneys and that are proscribed by the Rule. For example, attorneys have been sued in numerous law enforcement actions alleging deceptive practices in violation of the TSR.[154] In some cases, law enforcement authorities have alleged that a law firm served as a referral service for a non-attorney third party, and many consumers selected the company believing they would be represented by a law firm.[155] Some public comments also detailed deception and abuse by attorneys.[156] State bar rules, while important and

[144] USOBA (Ansbach), Tr. at 231; USOBA (Oct. 26, 2009) at 42; MD (Oct. 26, 2009) at 28, 38, 57-58.

[145] MN LA (Elwood), Tr. at 232-33.

[146] In fact, the only exemption for attorneys found in the TSR is a very limited one that permits attorneys who help consumers recover funds lost as a result of telemarketing fraud to collect an upfront fee. *See* 16 CFR 310.4(a)(3); *TSR Final Rule*, 60 FR at 43854 ("[T]he Commission does not wish to hinder legitimate activities by licensed attorneys to recover funds lost by consumers through deceptive telemarketing.").

[147] 16 CFR 310.2(cc).

[148] *See* 16 CFR 310.6(b)(3). The Commission considered whether it should explicitly exempt attorneys representing clients in bankruptcy proceedings from the Rule's coverage, as attorneys in such proceedings generally advise their clients about handling their debt. The Commission determined that such an exemption was unnecessary, because bankruptcy attorneys typically would not be involved in "telemarketing," and, in any event, likely would meet with their clients face-to-face.

[149] *See* 16 CFR 310.6(b)(3). Sellers engaged in telemarketing that qualify for the face-to-face exemption must not fail to comply with the National Do Not Call Registry provisions; call outside permissible calling hours; abandon calls; fail to transmit Caller ID information; threaten or intimidate a consumer or use obscene language; or cause any telephone to ring or engage a person in conversation with the intent to annoy, abuse, or harass the person called. *Id.*

[150] *See, e.g.*, Model Rules of Prof. Conduct 7.3(a); Cal. Rules of Prof. Conduct 1-400; Florida Rules of Prof. Conduct 4-7.4(a).

[151] *See, e.g.*, Model Rules of Prof. Conduct 5.5 (prohibiting attorneys from providing legal services to consumers outside of the state in which he or she is licensed).

[152] *See, e.g.*, Model Rules of Prof. Conduct 1.1, 1.3, & 1.5. For example, some state bars recently suggested that attorneys who refuse to meet in person with prospective clients may be violating some of these basic requirements. *See* Press Release, CA Bar, *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Sept. 18, 2009) ("The State Bar suggests that consumers be wary of attorneys offering loan modification services ... [who are] too busy or not willing to meet personally with prospective clients."), *available at* (*http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395*); Helen Hierschbiels, *Working with Loan Modification Agencies*, Oregon State Bar Bulletin, Aug./Sept. 2009 (attorneys who join companies that "do not contemplate the lawyer ever meeting or speaking with the client ... risk violating the duties of competence, diligence and communication"). Additionally, the Ohio Supreme Court has sanctioned attorneys hired by a foreclosure "rescue" company for, *inter alia*, failing to engage in adequate preparation and failing to properly pursue 'clients' individual objectives. In so doing, it noted that the attorneys relegated responsibility for meeting with clients to non-attorneys at the company and "did not as a rule meet with [the company's] clients." *See Cincinnati Bar Ass'n v. Mullaney*, 894 N.E. 2d 1210 (Ohio 2008).

[153] *Id.* Model Rules of Prof. Conduct 5.4, 7.2(b). *Cf.* Supreme Court of New Jersey Adv. Comm. Professional Ethics & Comm. on Unauthorized Practice of Law, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners*, 197 N.J.L.J. 59 (June 26, 2009) (noting that attorneys are being approached by mortgage loan modification entities and asked to enter impermissible fee sharing agreements).

[154] *See, e.g.*, *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007) (a Florida attorney, his debt management services company, and a telemarketer charged with using abusive telemarketing and deception to sell debt management services to consumers nationwide); *Florida v. Hess*, No. 08007686 (17th Jud. Cir., Broward Cty. 2008); *Alabama v. Allegro Law LLC*, No. 2:2009cv00729 (M.D. Ala. 2009); *North Carolina v. Hess Kennedy Chartered, LLC*, No. 08CV002310, (N.C. Super. Ct., Wake Cty. 2008); *California Dep't of Corps. v. Express Consolidation, Inc.*, No. 943-0122 (2008); *In re The Consumer Protection Law Ctr.* (California Dep't of Corps. Amended Desist and Refrain Order filed Jan. 9, 2009); *(WV) State ex rel. McGraw v. Hess Kennedy Chartered LLC*, No. 07-MISC-454 (Cir. Ct., Kanawha Cty. 2007); *see also, e.g.*, Alabama State Bar, *The Alabama Lawyer*, 71 Ala. Law. 90, 91 (Jan. 2010) (noting suspension of attorney purporting to provide debt settlement services to over 15,000 consumers nationwide); Press Release, Maryland Attorney General, *Richard A. Brennon Jailed for Contempt: Brennon Ordered to Pay More Than $2.5 Million in Restitution* (July 31, 2009), *available at* (*http://www.oag.state.md.us/Press/2009/073109.htm*).

[155] Press Release, Alabama Attorney General, *A.G. King and Securities Commission Sue Prattville Companies Operating Alleged National Debt Settlement Scheme, available at* (*http://www.ago.state.al.us/news_template.cfm?Newsfile=http://www.ago.alabama.gov/news/07102009.htm*).

[156] For instance, a legal services lawyer identified six consumers who were harmed by law firms offering debt relief services or partnering with companies that offered the services. SBLS at 2-4; *see also* TASC (Young), Tr. at 229. A consumer advocate noted that public websites contain numerous complaints about law firms engaging in unfair or deceptive debt relief practices. CFA (Grant), Tr. at 241.

effective when enforced, have not eliminated these practices.

Finally, the Commission's determination not to extend a special exemption to attorneys is consistent with the existing scope of the TSR and several other statutes and FTC rules designed to curb deception, abuse, and fraud. For example, the Credit Repair Organizations Act ("CROA") contains no exemption for attorneys.[157] The fact that the CROA and TSR cover attorneys reflects the reality that the number of attorneys who have engaged in unfair, deceptive, and abusive acts that fall within the Commission's law enforcement authority is not *de minimis*.[158]

In light of the above factors, the Commission concludes that attorneys who choose to offer debt relief services using telemarketing should be treated no differently under the TSR than non-attorneys who do the same.

C. Section 310.4: Abusive Telemarketing Acts or Practices - Advance Fee Ban

As noted earlier, the existing TSR bans the abusive practice of collecting advance fees for three other services–credit repair services, recovery services, and offers of a loan or other extension of credit, the granting of which is represented as "guaranteed" or having a high likelihood of success.[159] Section 310.4(a)(5) of the proposed rule would have prohibited as "abusive" the request or receipt by a debt relief provider of payment of any fee from a consumer until the provider obtained a valid settlement contract or agreement showing that the particular debt had been renegotiated, settled, reduced, or otherwise altered. The Final Rule includes an advance fee ban, but in a form modified from the proposed rule. In short, the Final Rule sets forth three conditions before a debt relief provider may collect a fee for resolving a particular debt: (1) the consumer must execute a debt relief agreement with the creditor or debt collector; (2) the consumer must make at least one payment pursuant to that agreement; and (3) the fee must be proportional, *i.e.*, the same fraction of the total fee as the size of the debt resolved is of the total debt enrolled, or, alternatively, the fee collected must be based on a percentage of savings that the debt relief company achieves for the consumer. In addition, the Final Rule allows the provider to require consumers to place funds in a dedicated bank account for fees and payments to their creditor(s) or debt collector(s) in advance of securing the debt relief, provided certain conditions are met.[160]

The Commission concludes that the collection of advance fees in transactions that frequently are characterized by deception is an abusive practice. In reaching this conclusion, the Commission has applied the unfairness analysis set forth in Section 5(n) of the FTC Act,[161] finding that this practice: (1) causes or is likely to cause substantial injury to consumers that (2) is not outweighed by countervailing benefits to consumers or competition and (3) is not reasonably avoidable.[162] The Commission's decision to adopt the advance fee ban is based on its review of the entire record in this proceeding, including the public comments, the forum and workshop records, consumer complaints, recent testimony on debt settlement before Congress, and the law enforcement experience of the Commission and state enforcers. In this section, the Commission: (1) reviews comments supporting the advance fee ban, (2) reviews comments opposing the advance fee ban, (3) sets forth its legal analysis, and (4) describes the operation of this provision of the Final Rule.

1. Comments Supporting the Proposed Ban on Advance Fees

Numerous commenters supported the proposed ban on advance fees.[163] In supporting the advance fee ban, NAAG, representing over forty state attorneys general, cited its law enforcement experience in this area. Over the past decade, 29 states have brought at least 236 enforcement actions against debt relief companies, at least 127 of which targeted debt settlement providers.[164] Typical allegations in these cases targeted deceptive television and radio advertising, deceptive telemarketing pitches, and failure to provide promised services. In 2009, the New York and Florida Attorneys General announced investigations of 19 debt settlement companies, which are still pending.[165]

NAAG further stated that prohibiting the collection of advance fees would provide regulators and enforcement authorities a bright line method to identify entities that merit immediate investigation and prosecution.[166] NAAG further asserted that debt relief providers currently have minimal incentives to perform promised services because they collect substantial advance fees whether or not they negotiate debt reductions for the consumer.[167] NACCA also filed a comment supporting the advance fee ban.[168]

The Colorado Attorney General filed a supplemental comment supporting the Commission's advance fee ban. It cited data supplied by debt relief providers showing that only 7.81% of Colorado consumers who had entered a debt settlement program since the beginning of 2006 had completed their programs

[157] 15 U.S.C. 1679-1679j.

[158] *See, e.g., FTC v. Credit Restoration Brokers, LLC*, No. 2:10-cv-0030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (alleging, inter alia, violations of CROA by attorney engaged in credit repair); *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009)(alleging violations of FTC Act and TSR against attorney purporting to provide mortgage assistance relief services); *FTC v. Rowlins & Rivera, Inc.*, No. 07-146 (M.D. Fla. filed Jan. 31, 2007) (alleging violations of the FDCPA against attorney); *U.S. v. Entrepreneurial Strategies, Ltd.*, No. 2:06-CV-15 (WCO)(N.D. Ga. filed Jan. 24, 2006) (alleging violations of TSR against attorney assisting debt relief entity); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007) (alleging violations of the FTC Act and TSR against attorney engaged in debt relief); *U.S. v. Schrold*, No. 98-6212-CIV-ZLOCH (S.D. Fla. filed Mar. 3, 1998) (alleging violations of the FTC Act and CROA against attorney credit repair provider); *FTC v. Capitol City Mortgage Corp.*, No. 98-237 (JHG) (D.D.C. Sec. Am. Compl. filed Mar. 19, 2003) (alleging FDCPA violations against attorney); *FTC v. Watson*, No. 98-C-1218 (N.D. Ill. filed Feb. 26, 1998) (alleging violations of CROA and FTC Act against attorney); *FTC v. Gill*, No. 98-1436 LGB (Mcx) (C.D. Cal. filed Mar. 2, 1998) (same).

[159] 16 CFR 310.4(a)(4).

[160] *See infra* Section III.C.5.c.

[161] The Telemarketing Act authorizes the Commission to promulgate Rules "prohibiting deceptive telemarketing acts or practices and *other abusive telemarketing acts or practices*." 15 U.S.C. 6102(a)(1) (emphasis added). In determining whether a practice is "abusive," the Commission has used the Section 5(n) unfairness standard. *See TSR Amended Rule*, 68 FR at 4614.

[162] *See* 15 U.S.C. 45(n) (codifying the Commission's unfairness analysis, set forth in a letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction, *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1079, 1074 n.3 (1984)) ("Unfairness Policy Statement").

[163] As explained below, the advance fee ban in the Final Rule differs from that in the proposed rule in certain respects. The discussion of the commenters' views refers to the proposed version.

[164] NAAG (Oct. 23, 2009) at 1-2 & NAAG (July 6, 2010), supplemented by Commission staff research; see State Case List, *supra* note 27. Of the 127 state debt settlement cases, 84 were brought by state attorneys general and 43 by state regulatory agencies. In addition, state attorneys general have brought 21 cases against credit counseling companies and 14 cases against debt negotiation companies. States have also brought 64 actions against debt relief companies for failure to file requisite state registrations or obtain proper licenses.

[165] *See* State Case List, *supra* note 27, for names of companies under investigation by New York and Florida.

[166] NAAG (Oct. 23, 2009) at 10; NAAG (July 6, 2010) at 1 ("A prohibition on advance fees for debt settlement services is the most essential element of the proposed Rule.").

[167] NAAG (Oct. 23, 2009)at 9.

[168] NACCA at 2 (providing general statement of support without elaboration).

by the end of 2008.[169] At the end of that period of less than three years, 39% of the consumers were still active, while 53% had dropped out of the program.[170] Thus, over half of enrolled consumers had dropped out in less than three years.

A coalition of 19 consumer advocacy groups filed a comment stating that an advance fee ban is "essential" to protect consumers who pay fees in advance but receive few, if any services.[171] According to this comment, debt settlement firms often mislead consumers about the likelihood of a settlement and the consequences of the settlement process on debt collection activities and the consumer's creditworthiness. The coalition asserted that having to pay advance fees prevents consumers from saving enough money to fund settlement offers satisfactory to creditors or debt collectors.[172]

Three legal services offices also submitted comments supporting the advance fee ban.[173] The comment by SBLS highlighted eight consumers whose financial situations had deteriorated as a result of entering debt settlement programs; each of them paid over $1,000 in fees to debt settlement companies while receiving virtually no benefits.[174] QLS commented that consumers who leave debt settlement programs after several months typically have accumulated little, if any, money to fund settlements because of the large upfront fees they were required to pay.[175] QLS recounted the experience of a husband and wife who paid $3,200 in fees to a debt settlement provider, only to be sued by a creditor within five months. The provider refused to refund the fees, even though it had not settled any of the couple's debts.[176]

A law professor commented in support of the advance fee ban, stating that debt settlement companies should not be allowed to collect and retain a fee before any beneficial service is provided.[177] Two creditor trade groups also supported the advance fee ban.[178] One group stated that its members often get one or two letters from a debt settlement service provider, but then stop hearing from the provider entirely, even when the creditor requests a response.[179]

Some debt relief industry commenters also supported the proposed rule's advance fee ban. One debt settlement company (CRN) credits its success in obtaining settlements to its practice of not charging fees until the service is performed and the creditor is paid.[180] Another debt settlement company (FCS) stated that it has been implementing a debt settlement program that does not require any advance fees.[181] A small trade association, ACCORD, of which FCS is a member, also supported the advance fee ban.[182] It stated that a ban on advance fees and a requirement that fees be based on the savings achieved would protect consumers from debt settlement programs that leave them in worse financial shape than when they started.[183]

A third debt settlement company (USDR) commented that, if an advance fee ban were imposed, consumers would be able to evaluate debt relief companies more easily, and poorly performing companies would need to improve their service levels in order to get paid.[184] Moreover, consumers would be able to change providers if they were dissatisfied with a company's services without forfeiting the large sums they had paid in fees, thus increasing competition in the debt relief market.[185]

For-profit debt relief company CareOne Services also supported a form of an advance fee ban,[186] noting that the predominant business model of the debt settlement industry has been based on significant upfront fees that make it difficult for consumers to amass funds for a settlement, while forcing them to endure extensive creditor collection efforts.[187] CareOne posited that it would be economically feasible for it to provide effective debt settlement services even with an advance fee ban.[188]

Two associations of nonprofit credit counselors, NFCC and AICCCA, supported the advance fee ban.[189] AICCCA stated that its member CCAs saw the victims of debt settlement scams on a regular basis,[190] and asserted that an advance fee ban would both protect consumers from paying for promised benefits that may prove entirely illusory, and force debt settlement providers to deliver on their promises if they wish to be compensated. Other commenters opined that an advance fee ban would motivate providers to engage in a more robust qualification process to ensure that the program is suitable for the consumer.[191]

2. Comments Opposing the Proposed Ban on Advance Fees for Debt Relief Services

Numerous commenters – in particular, members of the debt settlement industry – opposed the advance fee ban.[192] The overall theme of most of these comments can be summarized as follows: many enrollees in debt settlement programs (including some who drop out before completing the

[169] CO AG at 5. These consumers executed a total of 1,357 consumer agreements with about 13 companies.

[170] *Id.* at 5.

[171] CFA at 8; *see also* NC AG Testimony, *supra* note 25, at 5 ("the advance fee ban . . . is the key to preventing fraud and ensuring that debt settlement services will be performed.").

[172] CFA at 4-5.

[173] QLS at 2-3; SBLS at 8; SOLS at 2. In addition, two additional legal services offices, Mid-Minnesota Legal Assistance and Jacksonville Area Legal Aid, were part of the coalition of consumer groups discussed above.

[174] SBLS at 2-4.

[175] QLS at 3.

[176] Id.

[177] Greenfield at 1-2.

[178] AFSA at 3; ABA at 2.

[179] AFSA at 9. The second group claimed that an average of 63% of identified accounts enrolled in debt settlement programs are charged off, as compared to only 16% of accounts placed by a credit counseling agency into a debt management plan. ABA at 4. Charged off debt is the term used to describe debt that is written off as a nonperforming asset by a creditor because of severe delinquency, typically after 180 days. If a creditor charges off the debt or sends it to a collection agency, it "will likely have a severe negative impact" on a consumer's credit score. *See* Fair Isaac Corp., *Credit Q&A, What are the different categories of late payments and how does your FICO score consider late payments?, available at (http://www.myfico.com/CreditEducation/Questions/Late-Credit-Payments.aspx).*

[180] CRN (Oct. 8, 2009) at 1. CRN recommended allowing a nominal monthly service fee. *Id.* at 10-11.

[181] FCS (Oct. 27, 2009) at 2.

[182] ACCORD (Oct. 9, 2009) at 1. Another debt settlement industry association asserted that ACCORD only has one member. USOBA (Oct. 26, 2009) at 48. As of July 2010, the ACCORD website lists six members. *See (http://www.accordusa.org/members-area.html).*

[183] ACCORD (Oct. 9, 2009) at 2.

[184] USDR (Oct. 20, 2009) at 2, 12. USDR encouraged the FTC to allow an initial set-up fee and monthly fees consistent with the Uniform Act.

[185] *Id.* at 2.

[186] CareOne at 4-5. CareOne has traditionally provided consumers with credit counseling and DMP services. In 2009, CareOne began a pilot debt settlement program designed for consumers who do not qualify for a DMP and who are not candidates for bankruptcy. *Id.* at 2.

[187] *Id.* at 4.

[188] *Id.* at 5.

[189] NFCC at 1, 12; AICCCA at 6. AICCCA supported the ban on the condition that the Final Rule explicitly exempt nonprofit debt relief providers. AICCCA at 6.

[190] AICCCA at 2. Other CCAs stated that they, too, regularly counsel consumers who paid debt settlement companies but never received the promised services. FECA (Oct. 26, 2009) at 4; GP (Oct. 22, 2009) at 1.

[191] CRN (Oct. 8, 2009) at 4; WV AG (Googel), Tr. at 222; ACCORD (Noonan), Tr. at 275-76.

[192] Twenty companies, five trade associations, two employees of debt settlement companies, three other entities, and over 190 consumers filed comments opposing the proposed advance fee ban. Of these commenters, two industry members supported a partial ban that would allow debt relief providers to receive fees to cover administrative expenses in advance of delivering settlements. CRN (Oct. 2, 2009) at 10-11; USDR (Oct. 20, 2009) at 2; *see also* CSA at 14 ("if the FTC chooses to regulate the fees charged for debt settlement services," it should follow the UDMSA framework and allow specific set-up fees and monthly fees).

program) obtain significant reductions in their debt. Therefore, debt settlement is a useful product for many people, the benefits of which would be lost if providers went out of business because they could not collect fees necessary to fund their operations until they settled the debts.

The commenters advanced a number of specific arguments in support of this position, including the following: (1) debt settlement and other forms of debt relief services provide significant benefits to consumers, which, according to industry's comments, is demonstrated by survey data and the numerous consumers who are satisfied with their debt settlement programs; (2) consumers obtain better outcomes from debt settlement services than other debt relief options; (3) advance fees provide needed cash flow for debt settlement providers to fund their operations; (4) advance fees compensate debt settlement providers for services undertaken before settlement occurs; (5) advance fees ensure that debt settlement providers get paid; (6) the advance fee ban violates the First Amendment; (7) state regulation of debt relief services is preferable to federal regulation; (8) the TSR is not the appropriate mechanism for regulating debt relief services; (9) the problematic practices in the debt settlement industry are limited to a relatively few "bad actors," and the services are not "fundamentally bogus;" and (10) an advance fee ban does not provide proper incentives for debt settlement companies. The following section addresses each point in turn.

a. Point 1: Debt Relief Services Provide Benefits to a Significant Number of Consumers

Several industry commenters sought to demonstrate that debt relief services provide benefits to a significant proportion of their customers.[193] Some debt settlement providers and their representatives submitted data about the number of debts that they or their members have settled in recent years.[194] Several credit counseling companies also submitted information about the number of DMPs they have arranged for their customers.[195] In contrast, no debt negotiation company provided any data or other information showing that it successfully achieved interest rate reductions or other debt alterations for consumers.

Debt Settlement Data

With respect to debt settlement, some commenters submitted specific data purporting to show that they obtain substantial savings for a significant share of their customers. The industry association TASC submitted results from a 2009 survey covering 75% of customer debt enrolled in its members' programs ("TASC survey"). In addition, 17 commenters provided individual debt settlement company data. Collectively, these data fall into five primary categories:[196] (1) completion and dropout rates, (2) outcomes for dropouts, (3) average percentage savings and savings-to-fee ratios, (4) settlement rates for all enrollees, and (5) testimonials from satisfied consumers. Each category is examined in turn in the following section.

(1) Completion and Dropout Rates

Completion and dropout rates are important measures of the effectiveness of a debt settlement program; only consumers who complete the program are able to eliminate their debts by using the service.[197] Only a small number of parties submitted company-specific completion rate data, however, even after FTC staff sent letters to commenters in late December 2009 asking detailed follow-up questions relating to completion rates.[198]

The TASC member survey and seven individual commenters provided some information about debt settlement completion and dropout rates. The TASC survey estimated that 24.6% of consumers who remained in a debt settlement program for three years completed the program – defined as having settlements for at least 75% of their overall debt amount – with another 9.8% still active at the three-year point.[199]

The TASC survey methodology has several limitations. First, the survey is not representative of the entire industry's performance. Only 12 debt settlement companies reported sufficient data to determine a three-year dropout rate, a very small number relative to the hundreds of operating debt settlement providers.[200] These companies may not be representative of the industry as a whole and, in fact, may have been comparatively more successful.[201] Indeed, it is unlikely that providers that have low success rates would identify themselves by participating in a survey the results of which will be provided to a federal agency with enforcement authority over

[193] The FTC has sought data on this issue from the industry since July 2008. *See* (*http://www.ftc.gov/opa/2008/07/debtsettlement.shtm*) (Topics for Comment link). In response to the July 2008 request, only TASC provided some information about success and cancellation rates. It submitted a so-called "preliminary study" purporting to show "completion rates" ranging from 35% to 60% for consumers in TASC member debt settlement programs. TASC, *Study on the Debt Settlement Industry*, at 1 (2007). The study's probative value, however, was limited due to methodological issues. *See TSR Proposed Rule*, 74 FR at 41995 n.104; *see also* NAAG (Oct. 23, 2009) at 8-9.

[194] *E.g.*, TASC (Oct. 26, 2009) at 2 (respondents to a TASC survey settled in the aggregate almost 95,000 accounts in 2008); FCS (Oct. 27, 2009) at 1 (FCS and its family of companies have obtained over 70,000 settlements since 2003); FDR (Oct. 26, 2009) at 3 (FDR has obtained more than 100,000 settlements); Loeb at 1-2 (10 companies settled 23,586 accounts between 2003 and 2009); Confidential Comment at 2 (company has obtained 21,651 settlements for 24,323 active clients from March 2007 to Sept. 2009). Although the absolute number of debts that providers have settled over the years may be sizable, as discussed below, the record indicates that many consumers either receive no settlements or save less than the fees and other costs that they pay.

[195] Cambridge (Jan. 15, 2009) at 1 (171,089 accounts enrolled in DMPs between July 1, 2004 and December 31, 2009); GP (Jan. 15, 2010) at 1 (75,485 accounts enrolled in a total of 13,328 DMPs in 2009); CareOne at 1 (over 225,000 consumers enrolled in DMPs); AICCCA at 1 (member CCAs serve about 500,000 clients enrolled in DMPs).

Only two for-profit credit counseling companies, CCC and CareOne, commented in this proceeding. Only CareOne provided data, stating that (1) over 700,000 consumers have called the company for counseling assistance; (2) over 225,000 customers enrolled in a DMP; (3) nearly 700,000 customer service calls have been made; (4) over nine million creditor payments were processed; (5) nearly $650 million in payments have moved from consumers to their creditors; and (6) fewer than 35 Better Business Bureau complaints were filed in the previous year on approximately 70,000 new customers, and all had been successfully resolved. CareOne at 1-2.

[196] Most of these commenters did not submit data in all five categories.

[197] *See* USDR (Oct. 20, 2009) at 3 (citing retention rates and graduation rates as important indicators of debt relief service success); RDRI at 6 (the percent of customers that complete the program within 39 months is an "essential metric").

A commenter stated that the Commission should not impose a "100% standard" on debt settlement companies. FDR (Oct. 26, 2009) at 8; *see also* Franklin at 17; MD (Mar. 22, 2010) at 13. Nothing in the Final Rule would require providers to achieve any particular completion rate; rather, they must deliver whatever they claim. For example, if a provider expressly or by implication represents that it will eliminate consumers' debt, consumers have a right to expect that all of the debts they enroll in the program will be resolved.

[198] The request was in connection with the November 2009 public forum. The letters are posted at (*http://www.ftc.gov/os/comments/tsrdebtrelief/index.shtm*).

[199] TASC (Oct. 26, 2010) at 10.

[200] TASC (Mar. 15, 2010) at 4-5. TASC stated that the survey as a whole was based on 75% of customer debt enrolled in its members' programs, as several very large members participated in the survey. TASC sent the survey questionnaires only to the 20 largest TASC members, representing approximately 80% of the debt settlement consumers served by TASC members. TASC (Mar. 15, 2010) at 4. The survey included data on over 43,000 consumers who had enrolled in a debt settlement plan offered by one of the 12 firms that responded to the survey. TASC (Oct. 26, 2009) at 9.

[201] TASC stated that its membership represented about 25% of the industry. TASC (Housser), Tr. at 61.

them.[202] Second, many of the consumers counted as "completed" had significant debts left after exiting the program.[203] Third, TASC members themselves reported the data to an accountant hired by the organization; neither the accountant nor any other entity validated that the data were complete or accurate.[204]

In any event, even assuming that (1) the survey accurately represents overall industry performance, (2) 75% of debts settled is an appropriate demarcation of "success," and (3) the 9.8% "still active" consumers ultimately receive the promised results, nearly two-thirds of enrolled consumers dropped out of the programs within the first three years.[205]

In addition to the TASC survey, individual debt settlement providers reported a range of dropout rates. A paper by Dr. Richard Briesch reported on a sample of 4,500 consumers from one company, finding that the cancellation rate was 60% over two years.[206] Three other commenters reported dropout rates of 71.9%,[207] 54.4%,[208] and 20%.[209] Some debt settlement providers reported that careful screening, strong customer service, and full disclosure greatly reduced the number of dropouts.[210]

As several commenters noted, not all dropouts are attributable to the failure of the provider.[211] Several commenters, on the other hand, asserted that providers are primarily responsible for the dropouts, because they enroll consumers who are not financially suitable for the program, collect large fees in advance that are not adequately disclosed, and ultimately fail to settle the debts.[212] Several commenters provided survey information about the reasons consumers drop out, finding that consumers drop out for various reasons, *e.g.*, because they paid off the debts themselves, settled the debts themselves, failed to save enough money for settlements, filed for bankruptcy, or experienced "buyer's remorse."[213]

In any event, the relevant issue for purposes of determining whether the advance fee ban is justified is the extent to which enrollees receive a net benefit

[202] In general, self-selection and self-reporting bias can result in an over-representation of successful respondents. *See, e.g.*, Alyse S. Adams, et al., *Evidence of Self-report Bias in Assessing Adherence to Guidelines, International Journal for Quality in Health Care* 11:187-192 (1999). In addition, providers that join trade associations may tend to conform to higher standards than nonmembers. USOBA (Anshach), Tr. at 106; TASC (Oct. 26, 2009) at 4-5.

[203] As noted above, "completion" was defined as settlement of at least 75% of the individual's total debt amount enrolled. TASC (Oct. 26, 2009) at 9. *See* CU (Hillebrand), Tr. at 55 ("[c]onsumers are not getting what they expected to get, if only 25 percent are even getting close.").

[204] TASC (Housser), Tr. at 60. *See FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999) (holding that defendant's weight loss claims were unsupported where, inter alia, defendant failed to obtain proper scientific validation of those claims); *FTC v. Cal. Pac. Research, Inc.*, 1991 WL 208470, at *5 (D. Nev. Aug. 27, 1991) (holding that defendants failed to properly substantiate hair loss claims because studies they cited did not meet basic scientific requirements demonstrating validity and reliability).

Law enforcement authorities' experience has shown that self-reported data may not be reliable. For example, the New York Attorney General reported to the GAO that a consumer testified that she received a "congratulations" letter from the company for completing a debt settlement program, citing to settlements on four small accounts, even though the largest balance included in the program was not settled, and the creditor sued the consumer for the full amount of that debt, plus penalties and interest. GAO Testimony, *supra* note 50, at 26. In addition, the GAO reported that some consumers who finished a debt settlement program "complained of being deceived and harmed by the group. Nearly half of them actually paid more than they owed." *Id.* at 25.

[205] The Commission analyzes industry data on outcomes for dropouts in the following subsection, Section III.C.2.a.(2).

[206] JH (Oct. 24, 2009) at 20 (*see* attached paper, Richard A. Briesch, *Economic Factors and the Debt Management Industry* 2 (Aug. 2009) ("Briesch paper")). The paper is based on data from Credit Solutions, identified on page 15 of the Briesch paper in a footnote.

[207] SDS (Jan. 22, 2010) at 2. Of consumers enrolled in the program at least 36 months earlier, fewer than 17% had completed the program and 11.2% were still active.

[208] DMB (Feb. 12, 2010) at 6. Of consumers who had enrolled in the program at least 36 months earlier, about 40% had completed the program and about 5% were still active.

Debt settlement provider FDR provided data about completion rates, but its data also comprised a very substantial part of the TASC data; accordingly, its data are not a separate reference point. Specifically, FDR stated that 32% of the enrollees who remained in its program for three years or more completed the program with 100% of debts settled, while 10.3% were still active. These numbers were based on 7,803 consumers who had enrolled in the FDR program at least 36 months before the analysis was performed. FDR (Oct. 26, 2009) at 10. Therefore, 57.7% of consumers dropped out within three years of entering the program. *See id.*

Debt settlement company Orion also provided some completion data. It stated that out of 825 customers who had made at least one payment, approximately 29% had completed the program, and 12.7% were still active. Orion (Jan. 12, 2010) at 5. It noted that the numbers were based upon its former business model, in which customers saved funds to be used for settlements in their own bank accounts, rather than in special purpose accounts monitored by the company. *Id.*

[209] JH (Jan. 12, 2010) at 5. Of consumers who had enrolled in this debt settlement program at least two years and nine months earlier, about 41% had completed the program and about 39% were still active. The company considered fewer than 1,000 consumers in calculating the dropout rate, as it had only been providing services for two years and nine months at the time of the response. Summary of Communications with FTC Staff Placed on the Public Record (Apr. 13, 2010).

[210] ACCORD (Oct. 9, 2009) at 3. In addition, debt settlement provider CRN reported that of all consumers that had enrolled in its program from April 2007 through September 2009, 39% had completed the program. CRN (Jan. 21, 2010) at 6. CRN has enrolled 1,218 consumers in total, and it stated that its practice of refraining from charging fees other than the initial membership fee of $495 allows its customers to achieve success sooner. *Id.* at 2, 4; CRN (Oct. 8, 2009) at 1. CRN's business model is unique; after receipt of the initial membership fee, it provides instructions to consumers on how to achieve debt settlements by calling creditors themselves. Subsequently, if the consumer specifically requests help, the company negotiates on the customer's behalf and charges additional fees if it obtains successful settlements. CRN (Oct. 8, 2009) at 1. CRN did not provide data separately for consumers using its do-it-yourself model and those using its negotiation services. *See* CRN (Jan. 21, 2010) at 2, 6.

[211] JH (Oct. 24, 2009) at 34 (*see* attached Briesch paper at 16); Loeb at 4 (citing Briesch paper); Arnold & Porter (Mar. 17, 2010) at Exhs. 4 & 5; MD (Mar. 22, 2010) at Exhs. E-8 & E-9; *see also FTC v. Connelly*, 2006 WL 6267337, at *11-12 (C.D. Cal. Dec. 20, 2006) (holding that the reasons for the approximately 75% dropout rate for a debt settlement program were genuine issues of fact. Defendants claimed that consumers dropped out because of their inability to save money for settlement purposes, whereas the FTC contended that consumers dropped out because of lawsuits, garnishments, property liens and other negative, undisclosed consequences of participation in the program.).

[212] NAAG (Oct. 23, 2009) at 4-8, CFA at 9; SBLS at 1-4; CareOne at 4; *see* GP (Oct. 22, 2009) at 3; ACCORD (Feb. 5, 2010) at 3 ("the more the fee structure is weighted toward the settlement fee, the higher the completion rate.").

[213] JH (Oct. 24, 2009) at 34 (*see* attached Briesch paper at 16). This survey does not establish how many borrowers fall into each category, as 56% of consumer respondents chose "other" as the reason they dropped out. *Id.* In any event, the survey responses do not establish who is responsible for the dropouts. Indeed, if a consumer cannot afford to make the payments or files bankruptcy, it is not clear whether the consumer failed to complete the program because the provider misled the consumer about the amount of the monthly payments or the timing of the fees; the provider failed to engage in an effective suitability analysis; or the consumer took on new debt that made the program unsustainable.

A different survey of 129 consumers who enrolled with a particular debt settlement provider and dropped out of the program after completing 50% of the program found that: 32% cancelled because they decided to settle the debts on their own; 42% could no longer afford or were not paying the monthly payment; 9% were generally dissatisfied; 9% were categorized as "account lost through collection activity; could no longer collect;" 5% were categorized as "unwilling to go through the legal process," and 5% were categorized as "other." QSS (Oct. 22, 2009) at 2.

A third provider submitted survey information about 20,166 consumers who dropped out of the program. The most frequent responses were: customer decided to file bankruptcy (24.9%); customer made other arrangements (16.8%); and customer did not have sufficient money in bank account for payments (11%). Arnold & Porter (Mar. 17, 2010) at Exhs. 4 & 5.

Finally, a provider submitted results of a customer exit survey of an unspecified number of consumers who dropped out of the provider's program; the most frequent responses were: customer did not have sufficient money in bank account for payments (28.6%); customer could not afford payments (15.9%); customer decided to file bankruptcy (14%); and customer made other arrangements (9.5%). MD (Mar. 22, 2010) at Exh. E-8.

from the program. The net benefit takes into account whether consumers save more money than they paid in fees and other costs; it also considers other harms to consumers that result from participation in the program, such as harm to creditworthiness and continued collection activity in many cases. In addition, by enrolling in a debt settlement program, consumers forgo other alternatives, such as filing for bankruptcy, borrowing money from a relative, negotiating directly with creditors, or enrolling in a credit counseling program that may be better alternatives for them. Thus, many consumers suffer an opportunity cost when they enroll in debt settlement programs that do not benefit them.[214] As discussed below, consumers who drop out of the program prior to completion generally do not obtain a net benefit.[215]

(2) Outcomes for Dropouts

As stated above, a major concern with debt settlement services is that most consumers drop out of the program after paying large, unrefunded fees to the provider. In response, industry commenters provided data purporting to show that a significant number of their dropouts obtained at least some value from the program in the form of one or more settled debts, prior to dropping out. It is true that some consumers who enroll in debt settlement programs, including some of those who subsequently drop out, may obtain some savings. For the reasons explained below, however, the submitted data provide little information about the proportion of dropouts who receive a net benefit from the program. To the extent that the net benefit can be estimated, it appears that dropouts generally pay at least as much in fees and other costs as they save in reduced debts.

Several industry members or groups provided statistics on the number of settlements that dropouts obtained prior to exiting the program. TASC reported that 34.8% of the dropouts in its survey received at least one settlement – which means that 65.2% of the dropouts (representing over 42% of all consumers who enrolled) received no settlements.[216] It also reported that the dropouts saved $58.1 million in the aggregate (based on debt amounts at the time of settlement).[217] These dropouts paid $55.6 million in fees, however, which alone virtually cancel out the savings. When the other costs associated with the program (*e.g.*, creditor late fees and interest) are factored in, it is likely that the costs exceed the benefits.[218] Moreover, as described earlier, there are a number of methodological concerns about this survey that likely skew the results in the direction of showing greater success.

Dr. Briesch also analyzed a second company's data regarding dropouts. In that analysis, 43% of the dropouts settled at least one account.[219] The 57% of dropouts who did not settle any accounts clearly did not obtain a net benefit from the program, having paid and forfeited at least some amount of fees. Even as to those consumers who did obtain one or more settlements before dropping out, Dr. Briesch did not report how much consumers paid in fees, nor did he report how many accounts were settled out of the total number of accounts enrolled in the program.

Another debt settlement provider reported that it had settled at least one account for 30% of its dropouts.[220] In that company's case, 70% of dropouts did not receive any benefit from the program, and even as to the remaining 30%, there is no evidence that the consumers received savings significantly greater than the fees and costs they paid.

(3) Average Percentage Savings and Savings-to-Fee Ratios

Many debt settlement providers advertise that consumers using their services achieve debt reductions within a range of percentages, often 40% to 60%.[221] In their public comments, debt settlement providers reported that they achieved average savings ranging from 39% to 72%.[222] The Commission

[214] Summary of Communications (June 16, 2010) at 2 (consumer group comments).

[215] SBLS (Tyler), Tr. at 187-88; *see* discussion of industry data on outcomes for dropouts in Section III.C.2.

[216] TASC (Oct. 26, 2009) at 10; CRL at 4.

[217] TASC (Mar. 15, 2010) at 3.

[218] To this point, TASC asserted that because interest and fees continued to accrue during the course of the program, if a consumer is in the program for two years and settles his debt for the amount that he owed at enrollment, he received a large benefit from the program. TASC (Young), Tr. at 56-57. Consumers reasonably expect, however, that the program will substantially reduce the debt they carry when they enter the program, not that much or all of the "benefit" is from a reduction in the additional debt that accrues during the program. In one case, the Commission found that a telemarketer represented that the company could "negotiate your debt down to about 50 cents on the dollar . . . [so that] you're looking at about $15,000, $16,000 in debt as opposed to [the] $30,000" owed at the time of the call. *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM, Mem. Supp. Mot. T.R.O. at 9-10 & Exh. D (D. Colo. Mar. 20, 2007); *see also id.* Exh. N (telemarketer representing that "on $30,000 [owed], our settlement would be about $19,500"); *see also FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O., Exh. PX-6 (E.D.N.Y. Sept. 28, 2007) (consumer stating that "[a]fter telling [the telemarketer] what my credit card balances were, [he] informed me that [defendant] could settle my $18,882 debt for $11,880").

In a similar example, a large TASC member, FDR, reported that the 4,496 customers who dropped out of its program before completion reduced their debt by approximately $9.1 million, based on their debt at the time of enrollment, and paid $8.7 million in fees. FDR (Jan. 13, 2010) at 4; *see also* FDR (Oct. 26, 2009) at 10. Thus, on average, each of the 4,496 terminated customers during this period saved $89.

[219] According to Dr. Briesch, dropouts received settlements at a similar rate to consumers who stayed active in the program. *See* Briesch (dated Oct. 27, 2009, and filed with the FTC on Nov. 5, 2009) at 1-2 (stating that these dropouts settled at least one account, and the average settlement percentage on the settled accounts was 58%, meaning that the average savings percentage was 42%).

[220] SDS (Jan. 22, 2010) at 3.

[221] In its review of 100 debt settlement websites, *supra* note 50, FTC staff found that 86% of websites made specific savings claims. The most frequently used percentage claims were 40% to 60%, 50%, and up to 70%; *see also* GAO Testimony, *supra* note 50, at 19.

[222] TASC (Oct. 26, 2009) at 11 (average debt reductions were 55% of outstanding balances in 2008 and 58% in the first six months of 2009 for 14 respondents in TASC survey); USOBA (Jan. 29, 2010) at 3 (51 respondents provided information to the trade association; the average percentage reduction from the amount owed at enrollment ranged from 27.9% to 72%, and the mean percentage reduction for all respondents was 53.23%); FDR (Oct. 26, 2009) at 3 (55.3% in 2008); JH (Oct. 24, 2009) at 35 (*see* attached Briesch paper at 17) (among consumers who received settlement of at least one account, savings were over 50% of the original amount owed); FCS (Oct. 27, 2009) at 1 (49% reduction of the debt calculated from the time of enrollment); CRN (Jan. 12, 2010) at 3 (savings of 67% of the debt at the time of enrollment); SDS (Jan. 22, 2009) at 1 (savings of 51.19% of the debt at the time of enrollment); Orion (Jan. 12, 2010) at 4 ("For those consumers who have completed the program, the settlements have typically been between 50-75% of their incoming debt."); Loeb at 9 (providing raw numbers for ten unnamed companies without any description of the methodology; percentage saved ranged from 38.73% to 71.66% and averaged 45.15%); DRS (Jan. 21, 2010) at 1 (savings of 44% of the debt at the time of enrollment; 53% at the time of settlement).

In addition, QSS conducted surveys on behalf of TASC and NWS. The QSS-TASC survey consisted of 691 exit interviews of former customers of "certain TASC members," including both dropouts and successful graduates, and reported that 69% of settled accounts experienced a balance reduction of at least 40%. QSS (Oct. 22, 2009) at 7. The QSS-NWS survey consisted of 329 exit interviews and reported that 79% of consumers settled their credit card debts at a discount of at least 40% or more of the outstanding balance. *Id.* at 18. In reporting on these surveys, QSS provided limited information about the sample surveyed, such as the proportion of the relevant consumer population the interviewees represented or whether the TASC members involved were representative of the industry generally. NWS (Feb. 17, 2010) at 2-3. Moreover, the labels on the electronic files submitted by QSS indicate that the interviews were conducted with consumers from no more than five companies. QSS requested and received confidential treatment pursuant to FTC Rule 4.9(c), 16 CFR 4.9(c), for the recorded interviews contained on the electronic files.

The USOBA comment provided selected data about one of its member companies, which it claimed to have verified. The comment asserted that this member had settled significant numbers of consumer debts for 53 cents on the dollar, based on

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believes, however, that the methodology used to calculate these percentages is fundamentally flawed. Specifically, the calculations do not account for (1) interest, late fees, and other creditor charges that accrued during the life of the program; (2) the provider's fees; (3) consumers who dropped out or otherwise failed to complete the program; and (4) debts that were not settled successfully. By failing to account for these factors, the providers substantially inflate the amount of savings that consumers generally can expect. The following paragraphs discuss each of these points in turn.

First, some commenters calculated "savings" without accounting for the additional debt and losses consumers incur as a result of interest, late fees, and other charges imposed by the creditor(s) or debt collector(s) during the course of the program. For example, if a consumer enrolls $10,000 in debt, and the provider represents that it can achieve a 40% reduction, the consumer reasonably expects to have to pay $6,000 to completely resolve his debts. If, however, the size of the debt increases over the course of the program due to interest and creditor fees of $2,000, the consumer will have to pay $6,000 *plus* an additional $1,200 to cover the additional creditor charges (the 40% reduction would apply to the $2,000 in creditor charges as well as the original balance). Accordingly, the consumer must actually pay a total of $7,200 to settle the $10,000 in debt he enrolled, and he saves $2,800. Thus, the percentage of actual savings is lower than the 40% represented by the provider. In this example, putting aside the other issues, the percentage of savings would be 28%.

Second, the industry data generally exclude provider fees in calculating percentage savings and thereby inflate the actual amount consumers saved. For example, if the provider charges $3,000 in fees to consumers with $10,000 in debt and represents that the consumers will obtain a 40% reduction, consumers who expected to be debt-free with the payment of $6,000 actually must pay $9,000, not counting possible penalties and interest. The actual percentage savings would be 10%, putting aside the other issues. Although consumers likely presume the provider charges some fees, it is unlikely they would realize that the fees are so substantial that they exceed savings for many consumers, especially because debt settlement advertisements and websites generally do not disclose the fees.[223] Even an industry representative has stated that the various debt settlement fee models are confusing.[224]

Third, commenters often considered only the savings associated with consumers for whom settlements were obtained and excluded all those who dropped out of the programs.[225] One analysis removed 78% of the provider's customers from the sample and merely reported the settlements received by the remaining customers, excluding those who had dropped out of the program and those who were still active but had not yet settled a debt.[226] Fourth, even among the group that had settled at least one debt and therefore was included in the analysis, the savings calculations accounted only for those individual accounts that actually were settled, excluding those that were not.[227]

No commenter provided the information necessary for the Commission to calculate actual average savings amounts using an appropriate methodology. Because the savings amounts reported by commenters were calculated using methodologies that substantially overstate the savings,[228] the Commission concludes that the actual savings, if any, generally achieved by consumers in a debt settlement program are significantly lower than the average savings amounts commenters reported.[229]

In addition to savings percentages, several commenters provided "savings-to-fee ratios." These ratios purport to compare the debt reductions consumers have received from debt settlement programs to the amount consumers have paid in fees to show the value provided to consumers.[230] The ratios, however,

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the amount of the debt at the time of enrollment, which would equate to savings of 47%. USOBA reported that this company had settled 32,450 accounts totaling $174 million in debt settled. USOBA provided no other information about the methodology used to arrive at these figures, making it difficult to evaluate its reliability. USOBA (Oct. 26, 2009) at 28-29.

Another debt settlement company stated that it had settled between 257 and 992 accounts with each of ten creditors and that debt reductions ranged from 58.07% to 61.57%. MD (Mar. 22, 2010) at Exh. E-8. The company provided information only for the "top ten" largest creditors; it did not explain whether these creditors were representative or why it chose to highlight results from these creditors. The comment provided virtually no information about the total population of accounts, nor any information about the amount of fees that consumers paid to the provider.

[223] Of the 100 websites FTC staff reviewed, *supra* note 50, staff found that only 14% of debt settlement websites disclosed the specific fees that a consumer will have to pay upon enrollment in the service. An additional 34 out of the 100 websites mentioned fees but did not provide specific fee amounts. The Commission's law enforcement experience bears this out as well. *See, e.g., FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007); *see alsa New Yark v. Credit Salutians*, No. 401225 (N.Y. Sup. Ct. N.Y. Cty. filed May 19, 2009) (Complaint, ¶ 17).

[224] Smart Money, *Debt Settlement: A Castly Escape* (Aug. 6, 2007)(quoting Jenna Keehnen, the executive director of USOBA, as saying, "I have seen every kind of (fee) model you can think of .... It's very confusing."), *available at* (*http://articles.maneycentral.msn.cam/SavingandDebt/ManageDebt/DebtSettlementACastlyEscape.aspx*).

[225] *See supra* note 222.

[226] JH (Oct. 24, 2009) at 33 (*see attached* Briesch paper at 15). In Dr. Briesch's comment to the FTC following publication of the paper, he reported that among active consumers in the sample, only 55.7% had obtained at least one settlement. Briesch (dated Oct. 27, 2009 and filed with the FTC on Nov. 5, 2009) at 6-7. In arriving at the 78% figure stated in the text, the FTC calculated that 60%, or 2,700, of the 4,500 consumers in the database had dropped out; out of 1,800 active consumers, 44.3%, or 797, had not obtained any settlements at the time the data were collected. Thus, only 1,003, or 22.3% of the sample, were actually included in the analysis. *See* CU at 6.

[227] For example, Dr. Briesch stated that on average, about 50% of the consumer's debts were settled. JH (Oct. 24, 2009) at 35 (*see* attached Briesch paper at 17).

[228] *See supra* note 222.

[229] In further support of their contention that debt settlement service providers obtain successful outcomes for consumers, some commenters asserted that debt settlement providers obtain more favorable settlements than consumers could obtain on their own. *See* Figuliuolo at 4 ("Debt settlement companies generally have substantial experience dealing with creditors, have access to large quantities of data, can engage in sophisticated analysis of those data, have a good understanding of what sorts of deals can realistically be struck with particular creditors. develop ongoing relationships with those creditors, and importantly their clients generally have the capital to fulfill the negotiated settlement at the time of negotiation."); Franklin at 8-13. These commenters provided limited evidence in support of their assertions. Moreover, even if the assertions were true, they do not support the sorts of specific savings claims that providers have made, nor do they counsel against imposition of an advance fee ban.

[230] The TASC survey reported that customers of the companies that participated in the survey, including dropouts, received $245 million in savings at a cost of $126 million in fees, a savings-to-fee ratio of nearly 2 to 1. TASC (Oct. 26, 2009) at 10. The calculations, however, do not account for interest, late fees, and other creditor charges that accrued during the life of the program.

FDR asserted that active customers who had been in the program for at least three years reduced their debt by $6.5 million and paid $3.3 million in fees, a 1.97 to 1 ratio; completed customers reduced their debt by $25.2 million and paid $8.8 million in fees, a 2.86 to 1 ratio; and terminated customers reduced their debt by $9.1 million and paid $8.7 million in fees, a 1.05 to 1 ratio. On average, each of the 4,496 terminated customers saved $89. FDR also calculated that enrollees as a whole reduced their debt by $40.8 million and paid $20.8 million in fees, a 1.96 to 1 ratio. FDR (Jan. 14, 2010) at 4-5. In these calculations, FDR estimated the amount consumers owed at enrollment to determine the savings.

NCC reported that its savings-to-fee ratio was 1.5 to 1. Arnold & Porter (Mar. 17, 2010) at Exh. 1. Total fees paid were approximately $3 million, and total customer savings were approximately $4.5 million, a 1.5 to 1 savings-to-fee ratio. *Id.* NCC provided no information regarding whether the calculations use balances at enrollment or at settlement, the number of consumers who completed the program, or whether the data covered all consumers who completed the program.

A debt settlement company provided confidential information, pursuant to FTC Rule 4.9(c), 16 CFR only account for debts that are settled; they fail to account for increased balances on debts that were not settled. Assessing whether consumers benefitted from the programs would require review of individual consumer circumstances, as well as determining harm to creditworthiness and harm resulting from continued collection activity. Additionally, neither the TASC survey respondents nor the individual commenters are representative of the industry; TASC selected its largest members, and only some of them provided responsive information. Thus, although the savings-to-fee ratios provided to the Commission suggest that some consumers of debt relief services may have benefitted to a certain extent, they do not establish that consumers generally achieved more in savings than they paid in fees and other expenses for their debts as a whole.

(4) Settlement Rates for All Enrollees

Several commenters asserted that many consumers receive settlement offers soon after enrollment and before they pay substantial fees to the provider.[231] The CSA comment reported that among consumers who remained in CSA's program for one month or more, 56% received at least one settlement offer.[232] The CSA comment, however, did not provide any information as to whether consumers accepted, or were able to fund, the offers.[233] Moreover, the data do not measure the drop out rate or the success of enrollees as a whole.[234] The CSA comment also did not disclose the amounts of the debts that were the subjects of the early offers, and it may be the case that the early settlements tended to be for relatively small debts.[235] Finally, as was true with the Briesch study, CSA did not provide the amount of savings from the early settlements, nor the amount paid in fees by consumers. Thus, the data do not show whether consumers in CSA's program experienced a net benefit or net loss.

A second provider stated that in recent years, 40.4% of its customers had settled at least one debt within the first year after enrolling.[236] Thus, almost 60% failed to settle even one debt within that first year. Furthermore, the company provided no information about the amount of savings dropouts obtained from settlements, nor the amount consumers paid in fees.[237]

(5) Testimonials from Satisfied Consumers

Two-hundred thirty-nine consumers filed comments about their experiences with debt settlement companies, 193 of which expressed positive views. Several industry commenters also incorporated positive consumer testimonials into their comments.[238]

The Commission does not question that some consumers have had favorable experiences with debt settlement. That fact, however, does not establish that consumers generally benefit from these programs, or that they receive the results they were promised.[239] Individual consumer testimonials are, by their nature, anecdotal; they do not constitute a representative sample of consumers who have enrolled in debt settlement programs.[240] Moreover, it is not clear for many of the testimonials in the record that the individual consumer actually benefitted financially from the program. Many of the consumers did not provide any specific information about their debt settlement experiences,[241] and, for some other consumers, it was not clear that they had obtained any settlements at the time they submitted their comment.[242]

In addition to the individual consumer comments, the QSS-TASC customer survey discussed previously included a satisfaction question. The survey concluded that 88% of consumers said they were "satisfied" or "very satisfied" with their settlement amounts.[243] As explained above, however, QSS did not provide any information as to whether the consumers were representative in any sense of the population of consumers who use debt settlement services.[244]

b. Point 2: Debt Settlement is Superior to Other Debt Relief Services

Several industry commenters argued that the Commission should not impose an advance fee ban on debt settlement services because they provide better outcomes for consumers than other types of debt relief, particularly bankruptcy and DMPs.[245] The Briesch paper contended that consumers pay less overall in payments and fees in a successful debt settlement plan than in

4.9(c), reporting that its savings-to-fee ratio was 1.2 to 1, as total fees paid were almost $900,000 and total customer savings were slightly over $1 million. The company provided no information regarding whether the savings calculation used balances at enrollment or at settlement, the number of consumers who completed the program, or whether the data covered all consumers who completed the program.

[231] If consumers obtain settlements soon after enrollment, providers should not be adversely affected by a ban on collecting fees before they procure settlements. As explained below, however, the record does not support this assertion.

[232] For consumers who stayed in the program for a minimum of three months, 67% received at least one offer (and 47% received at least three); among consumers who stayed in the program for a minimum of six months, 77% received at least one offer and 58% received three or more offers. All consumers who stayed in the program for 36 months received five or more offers. CSA at 5-6; *see also* CSA (Witte) at 29-30 ("And in the first month, we're able to get 56 percent of the people one offer and 28 percent of the people five or more offers, just in the first month. And I think everyone can agree that's pretty remarkable and sort of stands against what was in the [NPRM] that no work is being done at the beginning.").

[233] *See* SBLS (Tyler), Tr. at 40 ("I had a client who got three offers. She had no money in the escrow account. She had no money to pay the offer.").

[234] The comment only reported results for consumers who remained in the program until – or beyond – each time interval. Therefore, consumers who dropped out of the program by the end of each interval were excluded from the calculations of the next group of consumers.

[235] *See* RDRI at 5 (noting that settlement companies may begin with customer accounts that have the smallest balances or with "friendly" creditors).

[236] SDS (Jan. 22, 2010) at 3.

[237] Another commenter stated that its figures were difficult to estimate but provided rough figures. The commenter estimated that of its customers who stayed in the program for at least four months, 75% received at least one settlement in the first year. It also estimated that, of customers who stayed in the program for at least one year, more than 95% had at least one debt settled within two years. Finally, it estimated that about 15% to 20% of its customers drop out without settling any debts. The commenter noted that a significant portion of customers revoke their enrollment before six months and receive a refund; these individuals were not counted in any of the above statistics. Orion (Jan. 12, 2010) at 5.

[238] USOBA (Oct. 26, 2009) at 85-212; CSA at 22-47; DRS (Sept. 29, 2009) at 3-13; *see also* Franklin at 7-8.

[239] Similarly, in assessing whether a success or performance claim is deceptive under Section 5 of the FTC Act, courts consistently have held that the existence of some satisfied consumers is not adequate substantiation. *See, e.g., FTC* v. *Amy Travel Serv.*, 875 F.2d 564, 572 (7th Cir.1989), *cert. denied*, 493 U.S. 954 (1989); *FTC* v. *Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000); *FTC* v. *SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla. 1999).

[240] This is especially true here, where some providers actively solicited positive comments from specific consumers. Ho at 2 (attaching email from debt settlement company encouraging the consumer to send positive comments to the FTC).

[241] *See, e.g.*, Allen at 1; Clement at 1; Garner at 1; Gecha at 1; Houghton at 1; Kaiser at 1; McInnis at 1; Neal at 1; Seigle at 1; Taillie at 1.

[242] *See, e.g.*, Wheat at 1; Silverman at 1; Paquette at 1; Pratt at 1. Although an industry association argued that positive comments from consumers before they achieve any settlements shows that the companies provide value aside from obtaining settlements (USOBA (Oct. 26, 2009) at 33-34), the overriding purpose for which consumers enroll in debt relief programs is to resolve their debts, not to receive other "benefits." *See* WV AG (Googel), Tr. at 45; SBLS (Tyler), Tr. at 38. Indeed, in some of the consumer comments, it was not even clear that the consumer had actually participated in a debt settlement program. *See, e.g.*, Atkins at 1; Brodie at 1; Cheney at 1; Hargrove at 1; Hinksor at 1.

[243] QSS (Oct. 22, 2009) at 8. In addition, the survey reported that 82% of consumers had an "Excellent" or "Good" experience in the debt settlement program. *Id.* at 9.

[244] *Supra* note 222.

[245] In fact, the Final Rule applies to for-profit DMPs as well as debt settlement and other debt relief services.

a DMP.[246] The paper included a hypothetical example of a consumer with $10,000 in debt who is on a DMP that lowers his credit card interest rates to 10%, requires the consumer to pay his debt over a period of five years, and charges a fee of $15 per month. Based on these assumptions, that consumer would pay $13,648 in total payments and generate $1,537 in revenue for the CCA.[247] In contrast, if the consumer enrolls in a debt settlement program that reduces his debt by 50%[248] and imposes a fee of 15%, that same consumer would pay $6,500 in total payments and generate $1,500 in fees for the debt settlement provider.

However, credit counseling and debt management provide entirely different benefits from debt settlement, and it is misleading simply to measure how much a hypothetical consumer saves from each program.[249] Dr. Briesch's analysis does not account for a significant advantage of DMPs: consumers enrolled in DMPs receive the benefits – in the form of creditor concessions – within a short time, providing more certainty than debt settlement and eliminating additional collection efforts. Late fees and other penalty fees generally stop accruing on a DMP. In contrast, consumers who enter a debt settlement program typically do not receive benefits (*i.e.*, settlements) for many months, if not years. During that extended period, the consumer has no certainty that he or she will be successful, and creditor collection efforts are likely to continue.[250] In addition, consumers obtain some benefits from a DMP even if they do not complete the programs because most of each monthly payment goes to their creditors and reduces their overall debt balance. In contrast, in the typical debt settlement plan, most of the money, for the first several months, goes to the non-refundable fees of the provider.

Dr. Briesch's analysis also failed to consider the relative impact of debt settlement and DMPs on consumers' creditworthiness, a significant factor in determining under which type of program a consumer would obtain a better "outcome."[251] Indeed, Dr. Briesch employed very optimistic assumptions in the debt settlement examples – either the consumer can afford monthly payments of $625 for one year (if the debt reduction is 40% of the original debt balance) or the consumer can obtain debt reductions in the amount of 60% of the original debt balance and can make monthly payments of $458 over one year.[252] These high monthly payment amounts are likely to be unrealistic for many consumers. In contrast, Dr. Briesch estimated that a consumer with $10,000 in debt would pay only $227 per month on a DMP for five years.

Other debt settlement providers similarly argued that, on average, consumers who complete debt settlement plans pay lower monthly payment amounts and lower amounts overall than consumers who complete DMPs.[253] Where consumers actually obtain debt settlements, this may be true, but the comparison fails to examine fully the costs and benefits of each type of program with respect to consumers who fail to complete them. As described above, DMPs offer more certainty than debt settlement, provide a reprieve from collection efforts, and result in decreasing debt balances with every payment.

Several debt settlement commenters also argued that their programs help

[246] JH (Oct. 24, 2009) at 39 (*see* attached Briesch paper at 21); *see also* USOBA (Oct. 26, 2009) at 25-26. Dr. Briesch also asserted that credit counseling has a higher dropout rate which, at different points, he asserts is 65% or 74%. The paper provides no citation to support the 65% number and cites to an unnamed NCLC report that relies on a National Foundation for Credit Counseling report for the 74% figure. A 2003 NCLC report actually cites a 79% dropout rate, citing to an earlier report published in 1999. National Consumer Law Center & Consumer Federation of America, *Credit Counseling in Crisis* 23 (April 2003). However, the dropout rates on DMPs are not comparable to dropout rates on debt settlement plans, as the initial fees are generally much lower for DMPs, and consumers have received the promised service – a creditor-approved plan that allows them to pay modified amounts if they make all of the required payments.

[247] JH (Oct. 24, 2009) at 39 (*see* attached Briesch paper at 21).

[248] Dr. Briesch assumes the savings are based on the debt owed at the time of enrollment.

[249] GP (Oct. 22, 2009) at 2 ("With a DMP, the consumer is receiving ongoing benefits each month in the form of waived fees, lower interest rates and lower balances. In debt settlement, the consumer does not receive any benefits until a settlement is actually made, if it occurs at all.").

Additionally, Dr. Briesch's comparison of the relative costs to consumers of credit counseling and debt settlement was skewed. In calculating the "total fees paid" for credit counseling, he included the full amounts of fair share payments that creditors make to the agency. JH (Oct. 24, 2009) at 39 (see attached Briesch paper at 21); *see also* CSA at 9; Loeb at 2-3. Consumers do not make these payments, however. Moreover, the author offered no evidence that fair share payments are equivalent to the forgiven principal balance either in terms of dollar amounts or in overall benefits to the creditor. Nor did he consider whether creditors place value on the educational services that most credit counseling services provide, such as advice on budgeting. CU at 3; *see also* Consumer Federation of America, American Express, & Georgetown University Credit Research Center, *Evaluating the Effects of Credit Counseling*, (2006) (finding that effective debt management plans contain a meaningful educational component, "significantly improved credit profiles," and a reduced risk of bankruptcy filing, which the report attributed to "the DMP experience itself, e.g., budgeting to make regular DMP payments, continued interaction with and reinforcement from the counseling agency"); Cambridge (Oct. 26, 2009) at 1.

[250] *See* GP (Jan. 15, 2010) at 2.

[251] The record does not contain conclusive evidence on this issue. The GAO reported that according to FICO, stopping payments to creditors as part of a debt settlement program can decrease credit scores anywhere between 65 to 125 points. GAO Testimony, *supra* note 50, at 10. In addition, missed payments leading up to a debt settlement can remain on a consumer's credit report for seven years, even after a debt is settled. *Id.* A consumer testified that her credit score was harmed due to her enrollment in a debt settlement program. Haas Testimony, *supra* note 73, at 4 ("Our credit scores had gone from excellent to poor. All credit extended to us now is at a higher rate – if at all. Banks who once gladly financed our cars won't look at us. Insurance companies have given us higher quotes due to our credit history."). According to a CCA commenter, the presence of settled accounts on a credit report is "clearly a danger sign." Cambridge (Oct. 26, 2009) at 1.

In contrast, a debt settlement industry commenter asserted that debt settlement may lead to improved creditworthiness and improved credit scores, as compared to bankruptcy or credit counseling. JH (Oct. 24, 2009) at 15. However, the NERA Economic Consulting report cited and attached to the foregoing comment does not address the creditworthiness of consumers who completed credit counseling. *Id.* at 47-54. In addition, the comment acknowledges that the initial effect of a debt settlement program on a consumer's credit score will be negative; it then focuses on creditworthiness after completion of the program. *Id.* at 47-48.

[252] JH (Oct. 24, 2009) at 40 (*see* attached Briesch paper at 22). As stated above, according to the TASC survey results, based on information from 14 debt settlement companies, the average debt reduction for those consumers who obtained settlements was approximately 45.5% of the original debt amount in 2008, and 49.4% of the original debt amount in 2009. TASC (Mar. 15, 2010) at 3.

[253] As an example, a debt settlement provider calculated that a consumer with $39,000 in credit card debt could settle that debt for $30,038 in less than five years by making monthly payments of about $500, given specific assumptions set forth in the comment; by comparison, the same consumer on a DMP would have to pay $775 per month and total payments of $51,150. The stated assumptions were: (i) a 60 month program, (ii) no interest rate adjustments by creditors (that is, the interest rate stays at 24.9%), (iii) the consumer obtained a 40% debt reduction "on current balance," and (iv) the following fee structure: first two months payments of $34.95 per month, plus 25% of the savings amount negotiated. DMB (Oct. 29, 2009) at 3 nn. 7 & 11. Putting aside the question of whether the provider's assumptions were unbiased and realistic, it appears that the provider may not have followed its own assumptions in doing its calculations. Specifically, the assumptions included an interest rate on the debt of 24.9% that continues to accrue throughout the program, as would typically be the case. With that assumption, however, the calculation for the debt settlement plan yields a monthly payment of $1,650 with a total payment over 60 months of over $96,800, substantially more costly than the DMP. The Commission asked the commenter whether it had assumed that interest and fees stopped accruing for a consumer enrolled in debt settlement, but the commenter did not respond to that question. DMB (Feb. 12, 2010) at 8. Alternatively, the commenter actually may have assumed a 40% debt reduction from the balance at the time of enrollment, not on the "current balance," which presumably would be the balance at the time of settlement.

consumers avoid bankruptcy, which, they assert, has consequences that are worse for consumers.[254] One commenter submitted a research paper stating that debt settlement may result in a better credit rating for the consumer than would bankruptcy.[255] Even if that were true, however, the relative benefits and costs of bankruptcy and debt settlement cannot be gauged on the basis of a single characteristic. In particular, if a consumer files for bankruptcy, creditors must cease collection efforts.[256]

USOBA argued that completion rates for debt settlement are better than for bankruptcy.[257] Although many consumers do not complete Chapter 13 bankruptcy plans,[258] there are many reasons for this that are unique to bankruptcy proceedings and are not indicative of a "failure." In some instances, a Chapter 13 bankruptcy is converted to a Chapter 7; in other cases, the debtor might not be eligible for a discharge because of previous discharge or misconduct, or the debtor could have filed a Chapter 13 bankruptcy simply to decelerate and cure a mortgage default without intending to seek a discharge of other debts.

In short, the relative costs and benefits of debt settlement programs and bankruptcy cannot be generalized. Whether one or the other option is best depends entirely on the individual consumer's circumstances, and, most importantly, whether the consumer has sufficient assets to fund settlements.

c. Point 3: Numerous Debt Settlement Companies Will Go Out of Business

Representatives and members of the debt settlement industry argued that many providers will go out of business if the FTC imposes an advance fee ban.[259] The trade association USOBA submitted a survey of its members who reported that the following would occur if an advance fee ban were imposed:

- 84% would "almost certainly" or "likely" have to shut down their operations;
- 95% would "certainly" or "likely" lay off employees; and
- 85% would stop offering debt settlement services to new and existing customers.[260]

The Commission concludes that this survey is not reliable and is of little probative value. USOBA did not provide the number of its members or their employees who responded to the survey, what proportion of the industry they comprise, or whether they were in any sense a representative sample.[261] The survey elicited self-reported, conclusory, and possibly self-serving statements of opinion without any evidence to support those opinions, such as data on the financial impact of a ban. Furthermore, it appears that the survey respondents were reacting to a complete advance fee ban, without the option of requiring consumers to place funds in a dedicated bank account until services are performed and receiving appropriate fees from the account as each debt is settled, as the Final Rule permits.

The trade association TASC submitted a cash flow analysis, presumably based on its members' historical experience, that purports to show that it would take 49 months for a provider to break even under an advance fee model.[262] The Commission finds this analysis unpersuasive for at least three reasons.

First, TASC assumes that providers will find it profitable to continue to follow the same marketing strategy that many of them follow today. Many debt settlement providers currently incur significant costs to acquire customers through general audience advertising, even though a large portion of the consumers drawn in by the advertisements are unsuitable for the program and subsequently drop out. For example, TASC's analysis assumes that sales, general, and administrative expenses ("SG&A") and "support" expenses total $1,326 per consumer in the first two months. It is not clear exactly what costs are included in these expense figures, but they appear to be based on an extensive advertising campaign of the kind that many debt settlement providers employ under the existing business model. Although the impact of the advance fee ban in the rule cannot be predicted with precision, one reasonable outcome could be that providers will have to improve the cost-effectiveness of their customer acquisition strategies by more narrowly tailoring them to the segment of the population that may be suitable for debt settlement services, rather than to the general population. In a competitive market, those providers that are more efficient in targeting their advertising to consumers who are most likely to enroll and stay in the programs will spend less on advertising and, thus, be able to make a profit sooner.

Second, the predicted break even point in TASC's analysis also depends crucially on what is assumed about the dropout rate and the amount of the contingency fee. With a lower dropout rate or a higher contingency fee, the break even point occurs earlier.[263] In fact, dropout rates are likely to decrease once the advance fee ban is in place because, among other reasons, providers will have the incentive to carefully screen borrowers before enrolling them.[264]

Finally, the model assumes that the provider is a new entrant that does not have any cash flow from existing

254 USOBA (Oct. 20, 2009) at 23-24; Palmiero (employee of Century Negotiations, Inc.) at 1; CSA at 3; JH (Jan. 12, 2010) at 1; Weinstein (Oct. 26, 2009) at 8 (see attached Weinstein paper at 7).

255 JH (Oct. 24, 2009) at 47-54. In fact, the report acknowledges that, because the algorithms used in determining a consumer's credit score are proprietary, the author cannot really determine how debt settlement – or bankruptcy – would affect a consumer's credit score.

256 Filing bankruptcy stays collection efforts, including on delinquent mortgage accounts.

257 USOBA (Oct. 26, 2009) at 28; see *also* Franklin at 19. Relying on the preliminary TASC study discussed in footnote 194, USOBA stated that the purported debt settlement completion rate of 45% to 50% exceeds the completion rates for both Chapter 13 bankruptcy (stated to be 33%) and credit counseling programs (stated to be 21%). USOBA (Oct. 26, 2009) at 28. In fact, the revised TASC data suggest much lower completion rates for debt settlement than are stated in TASC's "preliminary" study submitted in connection with the workshop – an average of 24.6% rather than 45% to 50%. TASC (Oct. 26, 2009) at 10.

258 Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 Creighton L. Rev. 473, 505 & n.70 (2006) ("The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third."); Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, 19 Am. Bankr. Inst. J. 22, 22 & 34-35 (July–Aug. 2000); Henry E. Hildebrand, III, *Administering Chapter 13—At What Price?*, 13 Am. Bankr. Inst. J. 16, 16 (July–Aug. 1994).

259 SDS (Oct. 7, 2009) at 2-3; MD (Oct. 26, 2009) at 25; RADR at 1; Orion (Oct. 1, 2009) at 2; CDS at 1; D&A at 2; see *also* ULC at 6; CSA at 10 (stating generally that the advance fee ban "could put a legitimate company out of business"); FDR (Oct. 26, 2009) at 16-17; Hunter at 1; MP at 3; CCC at 1 (for-profit credit counseling company would go out of business if the Commission promulgates the advance fee ban). One debt settlement company said that no other businesses can afford to operate by accepting payment "only **after** the customer has received and **agrees to be satisfied** with that service." JH (Oct. 24, 2009) at 6 (emphasis in original).

260 USOBA (Oct. 26, 2009) at 20.

261 *Cf. infra* note 576.

262 TASC (July 1, 2010) at 1-2. Specifically, TASC states that its model shows that the cumulative breakeven (which is the point at which the net of all losses as compared to gains in the prior months turns from negative to positive) occurs at 49 months if, where settlements involve multiple payments, providers collect their fee for each settlement after the *first* installment payment. *See id.* n.3. Providers may do so under the Final Rule and, thus, this is the applicable cumulative breakeven point in the TASC model. TASC also reports that, if providers cannot collect their fees until the last installment payment is received, the cumulative breakeven would not occur until month 74. However, as noted, the Final Rule imposes no such restriction, so this cumulative breakeven point is inapplicable.

263 For instance, the provider's cash flow would change significantly if it increased the fee amount to 40% of savings or experienced a 3% dropout rate in each of the first three months instead of a 6% dropout rate.

264 CU (July 1, 2010) at 4; ACCORD (Feb. 5, 2010) at 3 ("the more the fee structure is weighted toward the settlement fee, the higher the completion rate.").

customers. The model does not show what the impact of the advance fee ban would be on existing companies. Presumably, an existing company would already have significant monthly revenue associated with its current customers, and therefore would have a more favorable cumulative cash flow than a new entrant.

More generally, there is little reliable evidence in the record to substantiate the concerns raised by debt settlement providers about their future viability. Certainly, under an advance fee ban, providers would have to capitalize their businesses, at least initially, until they began settling debts and collecting their fees. After that initial period, however, providers presumably could fund their ongoing operations with the earnings from prior transactions.[265] This is not an unusual business model; for example, many professionals, such as realtors, obtain payment only after they have completed their services to the client.[266] These professionals often must expend considerable time and resources to perform those services. One debt settlement company commenter stated that, in its experience, using a business model that does not rely on advance fees is feasible for well-managed and well-capitalized firms,[267] and other commenters agreed.[268] Thus, the Commission is not persuaded that an advance fee ban would make it infeasible for legitimate debt settlement providers to operate their businesses.

d. Point 4: Debt Settlement Companies Incur Significant Costs in Providing Pre-Settlement Services

Related to the financial viability questions discussed in the previous section, many commenters addressed the issue of the types and quantity of services that debt settlement providers must perform, and the costs they must finance, before settling a debt. Industry commenters asserted that they provide substantial services and incur significant costs well before obtaining settlements and need advance fees to pay for those services. Several commenters stated that debt settlement is labor-intensive and that a substantial amount of a debt settlement company's work occurs before the first settlement is finalized.[269] For example, a large debt settlement company stated that it employs approximately 500 people, 150 of whom are responsible for communicating with consumers, compared to 130 who are responsible for negotiating with creditors.[270] Another debt settlement provider stated that the vast majority of its expenses are incurred within the first 12 months of the program to attain new customers and provide customer service.[271]

Several commenters provided estimates of debt settlement providers' pre-settlement costs. A researcher estimated that a provider's average administrative cost to enroll a consumer is $112.53.[272] A provider estimated that the combined cost to acquire a customer and engage in required administrative work to set up the account ranges from $715 to $1,365, depending on the advertising and marketing media used.[273] According to this commenter, in order to properly service a customer on an ongoing basis, the provider must handle basic customer inquiries, input data entry changes to the customer's file, provide assistance on creditor harassment concerns, call customers to assist them in fulfilling their commitment to the program, handle calls involving emotionally distraught customers, and provide access to an attorney network to advise about possible violations of the FDCPA.[274] The commenter estimated that $50 per month would cover these services.[275] The commenter also pointed to the significant costs involved in negotiating settlements, stating that it may make as many as 50 phone calls to negotiate with a single creditor.[276] Another provider submitted an analysis showing that 22% of its expenses were dedicated to the intake of new customers. These expenses included marketing, payroll, office and related occupancy expenses, other general and administrative expenses, professional fees, depreciation, and taxes.[277]

The comments indicate that a large percentage of the pre-settlement costs incurred by providers is for marketing and other customer acquisition efforts.[278] One provider estimated that marketing costs range from $500 to $1,200 per customer.[279] A researcher stated that average marketing costs per customer at the company he studied were $987.50.[280] Overall, the record shows that advertising and marketing constitute the largest portion – and in many cases a substantial majority – of upfront costs for debt settlement providers.

Some industry commenters also claimed that they provide services to customers other than settling debt.[281] One provider asserted that it provides education and support to consumers well before any debt settlements are finalized.[282] USOBA asserted that its

[265] In addition to funding ongoing operating expenses, providers may have to fund debt payments if they borrowed money to pay costs before they began collecting their fees.

[266] *See* ACCORD (Noonan), Tr. at 21.

[267] FCS (Oct. 27, 2009) at 4.

[268] ACCORD (Oct. 9, 2009) at 1; CareOne at 5; Summary of Communications (June 30, 2010) at 1 (assistant state attorney general stated that some companies that do not charge advance fees are doing business in North Carolina); *see alsa* Terry Savage, *Debt Manager Put to the Test*, Chicago Sun Times, June 28, 2010, *available at* (*http://www.suntimes.com/business/2439574,terry-savage-debt-manager-062810.article*) (discussing provider that collects a relatively small amount of 3% of the original debt owed over the first two months and 15% of the original debt owed when a successful settlement is obtained; the consumer gets a 1% refund for completing the program).

[269] CDS at 1; Figliuolo at 5; ART at 1; Orion (Oct. 1, 2009) at 2; Franklin at 24-25; MD (Mar. 22, 2010) at 4-6; *see alsa* ULC at 5. However, in investigations by state at ~rneys general, debt settlement companies nave not demonstrated any justification for advance fees based on the effort required to set up an account. NAAG (Oct. 23, 2009) at 10.

[270] FDR (Oct. 26, 2009) at 6.

[271] According to this commenter, the expenses include personnel costs for the following employees: the representative who explains all of the options to the customer, a second representative who reviews the program a final time with the customer, the processors who handle the paperwork and help establish the account, the assigned negotiator who reviews the accounts and formulates a plan, and the representatives who conduct a 30 to 60 minute "Welcome Call" and bi-weekly coaching calls thereafter. CDS at 1. CDS did not provide any breakdown of the cost by individual service.

[272] This amount is comprised of $59.45 for processing the enrollment paperwork, $16.05 for the Welcome Packet, and $37.02 for three compliance calls. NWS (Oct. 22, 2009) at 11 (*see* attached Walji paper at 11).

[273] ART at 1.

[274] Id.

[275] Id.

[276] *Id.* at 2; *see also* CSA at 8 ("The settlement of one account with one creditor may require more than 30, 40, or 50 phone calls.").

[277] Confidential Comment at 10.

[278] USDR (Oct. 20, 2009) at 11; CRN at 2 (60% to 70% of fees support the sales side of the business); CDS at 1; TASC, *Study an the Debt Settlement Industry* 4 (2007) ("One of the primary costs is the client acquisition. . . . Since the concept of debt settlement is not well-known to the public, debt settlement companies must spend more time, effort and money marketing their services. The lead cost for acquiring one debt settlement client ranges from $300 to $400. Once the intake costs associated with contacting the potential clients and the overhead costs are factored into the lead costs, the cost to acquire and set up a single debt settlement client can range from approximately $425 to $1,000. The data reveals that most debt settlement companies report this cost at $700 to $1,000 range. This necessitates debt settlement companies to charge a greater portion of fees during the initial phase of the program.").

[279] Orion (Oct. 1, 2009) at 2.

[280] NWS (Oct. 22, 2009) at 10 (*see* attached Walji paper at 10); *see alsa* CRN (Bovee), Tr. at 28 (lead generators receiving commissions of more than 25% of revenue).

[281] Summary of Communications (June 14, 2010) at 1 (industry groups stated that providers conduct a budget analysis of each consumer to determine "fit" with the debt settlement model and provide budgeting advice and educational information about consumers' rights with respect to debt collection calls and harassment).

[282] SDS (Oct. 7, 2009) at 2. It also asserted that it speaks with 30 potential customers (that it does

members offer budgeting advice, financial literacy information, emotional support, and education on debtor rights.[283] In a survey commissioned by USOBA, 86% of employees of debt settlement companies reported that they provide value or service to consumers other than settling debt, and 72% stated that they talk to consumers every day as part of their job.[284]

Based on the above and other evidence in the record, the Commission has reached the following conclusions about the cost issues:

- Debt settlement providers must perform certain tasks prior to settling their customers' debts, ranging from customer acquisition to recordkeeping to customer support. These tasks entail costs.[285]
- In most cases, the largest component of pre-settlement costs that providers incur is for customer acquisition, *i.e.*, advertising and marketing.[286]
- Some providers may offer ancillary services such as education and financial advice, but there is no reliable evidence in the record to establish how many providers offer these services, how extensive they are, or what they cost.[287]
- The types and amounts of services providers perform and the costs of performing them appear to vary widely. Frequently, the nonmarketing costs are relatively small.[288]

Even accepting the commenters' cost estimates at face value, the record does not support the assertions by some industry members that initial costs are so substantial that they could not operate without collecting their fees in advance. Charging large advance fees is not the only business model in the debt settlement industry. Several providers use payment schedules that are less front-loaded and entail payments over a longer term, require no advance fees at all, or tie payments to successful outcomes for consumers.[289] The record shows that these business models are feasible and that at least some debt settlement providers have adopted such models successfully.

As noted, the bulk of the upfront costs that providers incur are for advertising and customer acquisition, which are within the control of the provider and do not confer any direct benefit on consumers. To a large extent, providers have funded their marketing efforts with money forfeited by consumers who enrolled in these programs as a result of that marketing, paid large advance fees, and then dropped out, because they were financially unsuitable to be in a debt settlement program in the first place. The Commission has concluded that the interests of providers in obtaining advance fees primarily to fund their marketing efforts is outweighed by the likelihood of substantial injury to many of these financially-distressed consumers from paying hundreds or thousands of dollars without obtaining a commensurate benefit, or any benefit at all.

e. Point 5: Advance Fees Are Necessary to Ensure that Companies Get Paid and Consumers Fulfill Their Obligations

Industry commenters also contended that charging fees in advance is needed to protect them against the risks of nonpayment by consumers after delivery of the services.[290] One commenter stated that relegating the debt settlement provider to the position of other unsecured creditors would hinder its ability to service its customers.[291]

The risk of nonpayment may be significant given the precarious financial situation of consumers who enroll in debt relief programs. Accordingly, the Final Rule permits debt relief providers to require consumers to make payments into a dedicated bank account, assuming certain conditions are satisfied, from which the consumer can pay the provider's fee as each of the consumer's debts is settled. The specific operation of this provision of the Final Rule is explained in Section III.C.5.c. below.

Other commenters expressed concern that, under an advance fee ban, consumers could avoid having to pay the provider by refusing reasonable settlement offers, failing to save money, or otherwise taking actions to prevent settlements.[292] Although this may be theoretically possible, most consumers would have an incentive to agree to reasonable settlement offers. In any event, providers can take these risks into account in their screening procedures and pricing policies.[293]

f. Point 6: The Advance Fee Ban Violates the First Amendment

An industry association argued that an advance fee ban would run afoul of the First Amendment.[294] The association stated that the ban targets protected speech, preventing debt relief providers from receiving fees for speaking to their customers and providing educational, coaching, and counseling information.[295]

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not accept) for every one it accepts and spends at least 45 minutes with each of these consumers providing free advice. *Id.* at 3.

[283] USOBA (Oct. 26, 2009) at 30, 33. Industry groups also argued that if the Commission imposes an advance fee ban, the companies that provide customers with extensive counseling, coaching, and assistance during the period in which they accumulate sufficient savings to enter into debt settlements will be at a competitive disadvantage compared to companies that do not provide these additional services. *Id.* at 34; Summary of Communications (June 14, 2010) at 1. The Commission believes, however, that companies will have incentives to provide customers with counseling and other assistance so that they stay in the program and receive settlements, at which time the provider will get paid.

[284] USOBA (Oct. 26, 2009) at 31; *see also* Palmiero (employee of Century Negotiations, Inc.) at 1 ("I hear the tears of relief that someone is available to listen as well as offer options and solutions to the concerns as they arise."). As discussed above, the USOBA survey consists of self-reported and potentially self-serving responses from an unspecified sampling of employees of an undefined sampling of providers. Thus, the Commission does not accord this survey significant weight.

[285] FDR (Oct. 26, 2009) at 6; CDS at 1; NWS (Oct. 22, 2009) at 11 (see attached Walji paper at 11); ART at 1.

[286] USDR (Oct. 20, 2009) at 10-11; CRN at 2; CDS at 1; MD AG (Sakamoto-Wengel), Tr. at 105 ("And in complaints and the investigations that we have had, at the state level, what we have found is that rather than the trained counselors . . . a lot of the people that are hired as counselors are really salespeople, without counseling experience, without financial experience, but they're there to sell a product."); TASC, *Study on the Debt Settlement Industry* 4 (2007).

[287] See TASC (Oct. 26, 2009) at 18; USOBA (Oct. 26, 2009) at 30.

[288] CDS at 1; NWS (Oct. 22, 2009) at 11 (*see* attached Walji paper at 11); ART at 1.

[289] FDR (Oct. 26, 2009) at 14 (fees are collected over the first 18 months or longer of the program); JH (Jan. 12, 2010) at 4 (entire first payment is collected as a fee; the remainder is collected in installments over one-half of the program); Hunter at 3 ("[I]t is becoming more common for companies to charge a one-time, flat enrollment fee and prorate the remaining percentage of the fee over at least half the life of the program."); CRN (Jan. 21, 2010) at 4 (company charges an "initial membership fee" of $495 and, for consumers seeking additional assistance, $100.00 per account, a $50 monthly membership fee, and 15% of savings for any debt settled); FCS (Oct. 27, 2009) at 1 ("FCS has two program types, a blended fee approach and a settlement fee-only approach. The Debt Negotiation Company is a registered trade name of Financial Consulting Services. It offers only The Simple Plan, the settlement fee-only program."); *see also* ACCORD (Feb. 25, 2010) at 2-3 ("ACCORD supports the collection of a fee after a creditor agrees to a negotiated settlement amount and when the consumer transmits the funds to the creditor").

[290] *See, e.g.*, Patel at 1; Orion (Oct. 1, 2009) at 2; Loeb at 6-7; CSA at 9.

[291] RADR at 1.

[292] CSA at 9; D&A at 2.

[293] Other service providers who charge upon delivery of results experience the same risk. For example, realtors may spend considerable time and money unsuccessfully trying to sell a client's home and never get paid for those efforts.

[294] USOBA (Oct. 26, 2009) at 43-47.

[295] *Id.* at 43 ("advice or legal assistance" is communication entitled to full First Amendment protection, especially because information regarding statutory rights is "vital"). It is worth noting that this "communication" portion of the service is a relatively minor part of a commercial transaction.

The Commission concludes that the advance fee ban adopted here is permitted under the First Amendment. The advance fee ban does not restrain advertising, educational services, or other forms of communications, but is simply a restriction on the timing of payment. In denying a similar challenge to an advance fee ban in the TSR for certain offers of credit, a federal court found that it merely regulated "when payment may be collected" and did not impair the sale of educational materials produced by the company.[296]

Even assuming the advance fee ban were a restriction on speech, it would be scrutinized under the commercial speech test. Commercial speech is communication related solely to the economic interests of the speakers, in this case for-profit debt relief companies.[297] The First Amendment accords a lesser degree of protection to commercial speech than to other constitutionally guaranteed expression.[298] In *Central Hudson*, the Supreme Court established an analytical framework for determining the constitutionality of a regulation of commercial speech that is not false or misleading, and does not otherwise involve illegal activity.[299] Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance that interest; and (3) may extend only as far as the interest it serves – that is, it must be "narrowly tailored to achieve the desired objective."[300] In explaining the framework, the Court has said that the fit between the restriction's purpose and the means chosen to accomplish it must be "reasonable" but "not necessarily the least restrictive means" available to achieve the desired objective.[301]

The advance fee ban in the Final Rule comports with this test. First, preventing abusive sales practices is a substantial governmental interest.[302] Hundreds of thousands of financially distressed consumers have lost large sums of money to debt relief providers engaged in such practices.[303] Second, the advance fee ban directly advances this interest by protecting consumers from paying fees for services that are not rendered as promised. Thus, it will prevent the substantial harm, described in detail in this SBP, that arises when consumers pay in advance for debt relief services.[304] Finally, the advance fee ban is narrowly tailored to protect consumers from abuse, while nonetheless permitting legitimate firms to receive timely payment for services they provide to consumers. Without the carefully crafted advance fee ban adopted here, vulnerable consumers who enroll in debt settlement programs must pay hundreds or thousands of dollars in fees months or years before they receive any benefit from those payments, if they ever receive a benefit at all. This constitutes substantial consumer injury. As discussed below, therefore, charging an advance fee for debt settlement services is an abusive practice.[305] The modified advance fee ban, crafted to be no broader than absolutely necessary to remedy the identified significant consumer harm, will stop that abuse.[306] In addition, the advance fee ban provides enforcement authorities an efficient and essential law enforcement tool to ensure that practices in this burgeoning industry do not continue to harm consumers.[307] Accordingly, the advance fee ban, even if it is considered a regulation of "speech," is an appropriate restriction under the First Amendment.

g. Point 7: State Regulation Is Preferable to Federal Regulation

Several commenters discussed whether the Commission should forgo federal regulation and leave regulation of the debt relief industry to state governments. USOBA argued that the Commission should not impose an advance fee ban because it would usurp state regulatory prerogatives and prevent states from experimenting with diverse approaches to fee regulation.[308] On the other hand, several commenters asserted that FTC regulation was preferable to state regulation because (1) the FTC, with its regulatory expertise regarding advertising and telemarketing claims, is in a better position than state regulators to regulate debt relief firms, especially in that such marketing frequently crosses state lines;[309] (2) state law enforcement activity is uneven;[310] and (3) a state that finds a law violation can only protect and provide restitution to that state's residents, unless the company happens to reside within the enforcing state.[311]

The Commission believes that state law enforcement agencies play a valuable role in enforcing state laws against deceptive or abusive debt relief providers. A number of states have enacted laws or regulations restricting industry members in various ways, including setting maximum fees and, in some cases, even banning certain debt relief services. The Commission agrees with the commenters who noted the advantages of a federal standard that is enforceable both by the FTC and the states, in particular the ability to obtain nationwide injunctive relief and consumer redress.[312]

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296 *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 457 (D.N.J. 1998). USOBA's comment in this proceeding criticized the court's reasoning and instead cited to a case invalidating fee regulations applicable to for-profit companies soliciting money on behalf of nonprofit charities. USOBA (Oct. 26, 2009) at 44 (citing *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 789 n.5 (1988)). USOBA ignored the distinction, however, between the established speech interests at stake when charitable solicitations are at issue (*see Riley*, 487 U.S. at 788) as opposed to what is entirely commercial speech relating to the sale of debt relief services. *See Bd. of Trs v. Fox*, 492 U.S. 469, 474-75 (1989) (where speech proposing a commercial transaction touched on educational subjects, such speech was not converted into educational speech).

297 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).

298 *Fox*, 492 U.S. at 475; *Fla. Bar v. Went for It*, 515 U.S. 618, 623 (1995).

299 *Cent. Hudson*, 447 U.S. 557.

300 *Id.* at 566.

301 *Fox*, 492 U.S. at 480.

302 *See Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993) ("[T]here is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 854 (10th Cir. 2003); *see also TSR Amended Rule*; 68 FR at 4635 n.669 ("In some instances, the 'do-not-call' registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers.").

303 GAO Testimony, *supra* note 50, at 21 ("We identified allegations of fraud, deception and other questionable activities that involve hundreds of thousands of consumers.").

304 *Infra* Section III.C.3.a.

305 *Infra* Section III.C.3.

306 CFA at 10 ("[D]esperate consumers will tend to focus most on the representations made in the advertisements about how these services can relieve them of their debt worries. We see the required disclosures and prohibited misrepresentations as good complements to, but not substitutes for, the proposed ban on advance fees."); CareOne at 4 (the advance fee ban "is likely to have the greatest impact."); Summary of Communications (June 24, 2010) at 1 (state attorney general representatives said that an advance fee ban is the most important provision in the FTC's proposed rule and is necessary to stop abusive practices of debt relief companies). Disclosures are often of limited benefit in inoculating consumers from being deceived. *See, e.g.*, FTC, Letter to Jennifer L. Johnson, Secretary, FRB, in response to a request for public comments regarding the "Home Equity Lending Market," Docket No. OP-1253, Sept. 14, 2006, *available at* (*http://www.ftc.gov/os/2006/09/docketop-1253commentfedreservehomeeqlenditextv.pdf*).

The TSR prohibits the collection of advance fees by purveyors of credit repair services, money recovery services, and guaranteed loans or other extensions of credit even though the Rule also bans deceptive claims and requires disclosures in marketing those products and services. *See* TSR, 16 CFR 310.1.

307 NAAG (Oct. 23, 2009) at 10.

308 USOBA (Oct. 26, 2009) at 36; *see also* Weinstein (Oct. 26, 2009) at 12 (see attached Weinstein paper at 11) (state regulation "is a better approach because it preserves the states' traditional prerogatives of overseeing the provision of financial services while establishing a flexible regulatory structure for an evolving industry").

309 ULC at 4.

310 SOLS at 2.

311 SBLS at 9-10.

312 Where, as here, Congress has not totally foreclosed state regulation, a state statute is

h. Point 8: The TSR Is Not the Appropriate Vehicle for Regulating Debt Relief Services

Some commenters argued that debt relief services should not be regulated through the TSR. One commenter stated that amending the TSR is not warranted "merely because the industry uses telephones in its business."[313] It also stated that the FTC had brought all of its enforcement actions against debt relief companies under Section 5 of the FTC Act and, thus, that any rules should be promulgated under that section as well.[314] This statement is incorrect. The Commission and other law enforcement agencies have investigated and charged a number of debt relief providers with violations of the Telemarketing Act and the TSR.[315]

Two commenters recommended that the FTC expand the scope of its proposed regulations to cover Internet and face-to-face transactions.[316] A third commenter questioned whether issuing these rules as part of the TSR might encourage debt relief providers to switch to an entirely online business model.[317]

The Commission has determined that regulation of the deceptive and abusive practices of debt relief providers can be accomplished appropriately through amendments to the TSR. The record shows that debt relief companies primarily sell their services through national telemarketing campaigns as defined in the TSR.[318] Currently, prevalent forms of advertising (television, radio, Internet, and direct mail) instruct consumers to call a toll-free number for more information.[319] Debt relief service providers then utilize telemarketing to conduct the full sales pitch and obtain consumers' consent to purchase their services.[320] Thus, the Commission concludes that the abusive and deceptive practices in the debt relief services industry should be addressed through amendments to the TSR.

i. Point 9: Very Few Debt Relief Companies Are Engaged in Abuse, and the Services Are Not "Fundamentally Bogus"

Industry representatives have argued that the Commission should not impose an advance fee ban because only a few "bad actors" have engaged in deceptive or abusive practices.[321] To the contrary, the record in this proceeding—including the Commission's law enforcement experience,[322] actions by state law enforcement agencies,[323] consumer complaints,[324] the public comments, and the GAO study—demonstrates that, in fact, debt relief providers commonly fail to produce the results they promise, causing substantial consumer injury.[325] Indeed, the industry's own data show that most consumers who enroll in debt relief services covered by the Final Rule exit the program in worse financial condition than when they started.[326]

Further, some commenters asserted that the Commission should not adopt the ban on advance fees because the services are not "fundamentally bogus," the phrase that the Commission used when promulgating the advance fee bans for credit repair services, recovery services, and offers of certain loans.[327] Nothing in the Commission's statements suggests, however, that advance fee bans are legally permissible only when the services at issue are "fundamentally bogus." The Telemarketing Act does not require that the Commission meet any standard other than "abusive," and the Commission uses the unfairness test to determine which practices are abusive.[328] Here, the Commission has determined that the practice of charging advance fees for debt relief services satisfies the unfairness standard based on the rulemaking record.

j. Point 10: An Advance Fee Ban Will Not Establish the Proper Incentives for Debt Settlement Companies

Certain commenters argued that an advance fee ban will only serve to motivate debt settlement providers to enroll as many consumers as possible, regardless of their suitability for a debt settlement program, in the hope that at least some will complete the program and pay the fees.[329] There is no

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preempted if it conflicts with a federal statute. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978). State laws are preempted only to the extent there is a conflict—compliance with both federal and state regulations is impossible or the state law is an obstacle to effectuating the purposes and objectives of Congress. *Id.* The Commission has emphasized that state laws can impose additional requirements as long as they do not directly conflict with the TSR. *TSR Final Rule*, 60 FR at 43862-63; 16 CFR 310.7(b). State laws regulating debt relief services that contain fee caps permit, rather than mandate, that fees for debt relief services be collected before the promised services are provided. *See supra* note 86. As a result, there is no conflict with the Rule and no conflict preemption. Therefore, providers may not charge initial or monthly fees in advance of providing the services, even if state laws specifically authorize such fees.

[313] TASC (Oct. 26, 2009) at 3.

[314] *Id.* at 4. The FTC has the general authority to promulgate rules addressing unfair or deceptive practices under Section 18 of the FTC Act, 15 U.S.C. 57a. The Commission also enacts rules pursuant to specific Congressional mandates, as it did with the TSR.

[315] *See* FTC Case List, *supra* note 27. While the Commission has sued credit counselors and debt negotiators under the Telemarketing Act and the TSR, it has not specifically brought such actions against debt settlement providers. Nevertheless, some state law enforcement agencies have done so. *See, e.g.*, Press Release, Florida Attorney General, *Attorney General Announces Initiative to Clean Up Florida's Debt Relief Industry* (Oct. 15, 2008), *available at* (*http://myfloridalegal.com/newsrel.nsf/newsreleases/BD3AB29E6DDAF150852574E3004DFACD*) (subpoenas served by Florida on debt settlement firms as part of a sweep to assess violations, among others, of Florida laws regulating telephone solicitations, telemarketing, credit counseling organizations, and credit service organizations); *In re PDM Int'l* (Assurance of Voluntary Compliance filed May 29, 2008) (case brought by the West Virginia Attorney General alleging, among other things, that defendant engaged in telemarketing sales without a business license or surety bond).

[316] ULC at 6; Orion (Oct. 1, 2009) at 1; *see also* GP (Oct. 22, 2009) at 2.

[317] Loeb (Mallow), Tr. at 155-56 (acknowledging that he had not personally seen debt relief companies operating solely online, but some clients had told him that they were aware of companies conducting most, if not all, of their marketing online).

[318] CFA (Grant), Tr. at 157; NFCC (Binzel), Tr. at 157. Similarly, other industries regulated by the TSR, such as credit repair services, may market their services through other media in some cases, although the predominant business model at present relies on telemarketing.

[319] *Supra* note 52. As a result of the Final Rule in this proceeding, these calls are inbound calls covered by the TSR.

[320] *See, e.g.*, *FTC v. Debt-Set, Inc.*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007)(Complaint, ¶¶ 16-19); FTC Case List, *supra* note 27; CU (Hillebrand), Tr. at 183 ("We heard the TASC folks say four phone calls over two weeks to sign up the client, we heard the Freedom Debt folks in the prior panel say eight phone calls. Phone conversations, signing up the client, telemarketing and telephone communications are a big piece of how consumers get signed up.").

In addition, USOBA asserted that the Commission does not have authority to regulate fees through the Telemarketing Act, stating that the Telemarketing Act focuses on communications that are harmful because of their content, and those issues are distinct from concerns relating to payment or other parts of the commercial relationship. USOBA (Oct. 26, 2009) at 40-41. The Commission believes, however, that regulating the timing of fee collection constitutes a reasonable exercise of authority under the Telemarketing Act under these facts. *See* 16 CFR 310.4(a); *Nat'l Credit Mgmt. Group*, 21 F. Supp. at 457 (upholding advance fee ban on credit repair services).

[321] *See, e.g.*, TASC (Apr. 30, 2010) at 2 (arguing that a possible advance fee ban would be "predicated upon the experience, as described in the NPR, of a very few 'bad actors' and a disproportionately small number of injured consumers."); USOBA (Oct. 26, 2009) at 27; DRS (Sept. 29, 2009) at 1; DS at 12; Franklin at 23.

[322] *See* FTC Case List, *supra* note 27.

[323] *See* State Case List, *supra* note 27.

[324] *See infra* Section III.C.3.a.

[325] The GAO identified allegations of fraud, deception, and other questionable activities involving hundreds of thousands of consumers. GAO Testimony, *supra* note 50, at 21. Moreover, GAO's own survey of 20 debt settlement firms found that 17 of them were making highly dubious success rate and other claims. *Id.* at 9-21.

[326] *See supra* Sections III.C.1. & III.C.2.a.(1)-(2).

[327] CSA at 12; TASC (Oct. 26, 2009) at 16; Smith, Tr. at 263; *see TSR Amended Rule*, 68 FR at 4614.

[328] *TSR Amended Rule*, 68 FR at 4614.

[329] Summary of Communications (June 16, 2010) at 2.

evidence in the record to support this assertion. Given that enrolling and servicing consumers entails at least some costs, it is more likely that, under an advance fee ban, providers will be more discriminating in enrolling those consumers most likely to be successful and thus generate fees.[330] This would represent an improvement over the predominant fee structure in place currently – in which providers get paid no matter how, or if, they perform – which provides little incentive for providers to expend the resources necessary to obtain settlements quickly or effectively.

Debt settlement industry representatives also stated that an advance fee ban would encourage employees of debt settlement companies, when negotiating with creditors or debt collectors, to accept the first offer extended, regardless of whether it is the best possible offer for the consumer.[331] They further argued that banning advance fees would result in a power shift to the creditors and debt collectors, who would be able to offer less favorable settlements on the assumption that the debt settlement provider would take any settlement in order to get paid.[332] Again, there is no evidence in the record to substantiate these predictions. Moreover, it is based on the unsupported assumption that it is the provider, rather than the consumer, who makes the decision on whether a particular settlement offer is acceptable and affordable. Creditors and debt collectors should still have substantial incentives to settle debts at amounts that consumers can afford.

3. The Commission's Conclusion that Advance Fees for Debt Relief Meet the Test for Unfairness

The Commission uses the unfairness test set forth in Section 5(n) of the FTC Act to determine whether an act or practice is "abusive" under the Telemarketing Act.[333] An act or practice is unfair if: (1) it causes or is likely[334] to cause substantial injury to consumers, (2) the injury is not outweighed by any countervailing benefits to consumers or competition, and (3) the injury is not reasonably avoidable by consumers. Based on the record in this proceeding, the Commission concludes that the collection of advance fees by debt relief services meets the unfairness test and, thus, is an abusive practice.

a. Advance Fees Charged by Debt Relief Services Cause or Are Likely to Cause Substantial Injury

The record shows that collecting fees for debt relief services prior to delivering services causes or is likely to cause substantial injury to consumers. Consumers in the midst of financial distress suffer monetary harm – often in the hundreds or thousands of dollars – when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that, in most cases, never materialize.[335] Further, in the case of debt settlement as currently structured, providers often instruct or advise consumers to stop paying their creditors and begin paying the provider's fees instead.[336] These consumers not only suffer direct monetary injury from the late charges and interest that accrue when creditors are not paid, but they also suffer lasting harm to their creditworthiness such that future efforts to obtain credit, insurance, or other benefits will become more difficult and more expensive.

The Commission received many comments on the unfairness analysis in the NPRM. These comments are discussed in the following sections as they relate to consumer injury.

(1) Consumers are injured because they pay for services that are promised but not provided

Many commenters supported the injury analysis in the NPRM, contending that most consumers who purchase debt relief services pay in advance for promised benefits they never receive.[337] The Commission also has considered federal and state law enforcement actions, consumer complaints received by government and private organizations, and certain statewide data reported to the Colorado Attorney General. The evidence shows that the number of injured consumers is substantial. First, the FTC's cases have helped over 475,000 consumers who have been harmed by deceptive and abusive practices by debt relief companies.[338] Moreover, with respect to debt settlement companies alone, federal and state law enforcement agencies have brought actions challenging the practices of dozens of companies with, in the aggregate, hundreds of thousands of customers.[339] Twenty-nine states have brought at least 236 enforcement actions against debt relief companies.[340] These cases consistently have alleged that the defendants employed deception in order to enroll consumers, and then did not produce the results they promised.[341] As an example, the New York Attorney General filed cases against two debt settlement companies alleging that these entities had provided the represented services to only one percent and one-third of one percent (0.33%), respectively, of their customers.[342] Undoubtedly, many more consumers have been injured by providers that have not been the subject of formal law enforcement action. Thus, the Commission has determined that debt relief companies engage in widespread deception, frequently fail to produce the results they promise, and have caused injury to a large number of consumers.

Second, a significant and growing number of consumers have filed complaints about debt relief companies. Complaints to the FTC about debt relief increased approximately 18% from 2008 to 2009, rising from 1,073 to 1,263.[343]

[330] *See* ACCORD (Oct. 9, 2009) at 3 ("The debt settlement company will bear the risk that the consumer will not see the program through to the settlement of her debts."); NAAG (Oct. 23, 2009) at 9.

[331] Summary of Communications (June 16, 2010) at 2.

[332] Id.

[333] *TSR Amended Rule*, 68 FR at 4614.

[334] Thus, the Commission need not demonstrate *actual* consumer injury, but only the *likelihood* of substantial injury. In this proceeding, however, there is sufficient evidence that the practice of collecting advance fees causes actual injury.

[335] *Supra* Section III.C.2.a. According to TASC, the median fee under the predominant debt settlement model calls for a consumer to pay the equivalent of 14% to 18% of the debt enrolled in the program; thus, a consumer with $20,000 in debt would pay between $2,800 and $3,600 for debt settlement services. Consumers complaining to the FTC have reported paying fees in very substantial amounts – often $2,500 to $11,000, depending on the company, the amount of the debt, and the length of time the consumer participated in the program.

[336] *Supra* note 73.

[337] *Supra* Section III.C.1. (citing NAAG (Oct. 23, 2009) at 2-5; MN AG at 1; CFA at 4; AFSA at 4).

[338] *Debt Settlement: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers: Hearing on The Debt Settlement Industry: The Consumer's Experience Before the Sen. Comm. On Commerce, Science, & Transportation*, 111th Cong. (2010) (testimony of the Federal Trade Commission) at 2.

[339] GAO Testimony, *supra* note 50, at 21 (tallying customers of debt settlement companies subject to enforcement actions, not all types of debt relief companies); *see* FTC and State Case Lists, *supra* note 27; *supra* Section III.C.1.

[340] *Supra* Section III.C.1.

[341] NAAG (Oct. 23, 2009) at 2-5.

[342] Press Release, New York Attorney General, *Attorney General Cuomo Sues Debt Settlement Companies for Deceiving and Harming Consumers* (May 20, 2009), *available at* (*http://www.oag.state.ny.us/media_center/2009/may/may19b_09.html*). Similarly, in one FTC case, the Commission alleged that only 1.4% of consumers enrolled in the defendants' debt settlement plan obtained the results defendants promised. *See FTC v. Nat'l Consumer Council, Inc.*, No. SACV04-0474 CJC(JWJX) (C.D. Cal. filed Apr. 23, 2004) (calculating completion rates over a 40-month period without controlling for the time of enrollment).

[343] Commission staff used the following method to analyze debt relief complaints in the Commission's Consumer Sentinel database. FTC

NAAG reported that the number of complaints the states have received against debt relief companies, particularly debt settlement companies, has been rising and has more than doubled since 2007.[344] Moreover, consumers have filed numerous complaints with the Better Business Bureaus ("BBB") about debt settlement and debt negotiation companies.[345] The BBB categorizes these companies as "Inherently Problematic Businesses," indicating that it has fundamental concerns about the industry as a whole.[346] In March 2009, the BBB reported that complaints against debt consolidation and negotiation companies had risen by almost 19% in 2008 over the previous year.[347] Based on the complaints it had received, the BBB concluded that debt settlement and negotiation companies often charge substantial advance fees, make promises that cannot be fulfilled, mislead consumers about the impact of the services on their credit scores, and exaggerate the negative effects of bankruptcy to make their own services seem more appealing.[348] The BBB also found that some customers of debt negotiation and debt settlement providers stopped communicating with their creditors only to find that the providers, even after accepting payment, never contacted their creditors.[349]

The Commission recognizes that consumer complaints do not constitute a statistically representative sample of the population of purchasers of debt relief services. At the same time, such complaints usually are the "tip of the iceberg" in terms of the actual levels of consumer dissatisfaction.[350] In any event, the conclusion that collecting advance fees causes substantial consumer injury is not based on this body of evidence alone. The Commission has decades of experience in drawing inferences from the number and types of consumer complaints it receives. Complaint trends often are used for purposes of focusing law enforcement resources and identifying targets for prosecution. In this matter, the sheer number and consistency of the complaints received by the Commission and others, in the context of the Commission's overall Consumer Sentinel database, raise, at minimum, a strong inference of widespread consumer protection problems in the debt relief industry, including frequent misrepresentations and, ultimately, nonperformance, and that the collection of advance fees causes substantial injury to large numbers of consumers. Therefore, the Commission relies on the consumer complaint data as corroborative of the other types of evidence in the record.

Finally, as part of its injury analysis, the Commission considered the evidence regarding consumer outcomes in the record. Debt negotiation companies, which often operate through robocalls offering purported interest rate reductions, did not provide any data at all. Consumers who accept these offers are confronted with advance fees of hundreds or thousands of dollars and typically do not receive any services beyond placement of a single call to a creditor or providing a document instructing the consumer to accelerate their debt payments.[351]

Similarly, no member of the for-profit credit counseling industry submitted any kind of comprehensive data on the extent to which members of their industry provide the promised counseling services, or the extent to which they endeavor to screen out consumers for whom a DMP is unsuitable.[352] In fact, statewide data from Colorado suggest that most consumers who start DMPs do not finish them. In its comment, the Colorado Attorney General submitted data collected directly from debt relief providers, as required by statute. Of Colorado consumers who had been on DMPs for two to three years, less than nine percent had completed them.[353] The data do not distinguish between for-profit and nonprofit credit counseling providers, however.

With respect to debt settlement, as described at length above, the data that industry members provided showed that

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staff identified all complaints coded under "Debt Management/Credit Counseling" that were received directly by the Commission and limited those search results to only those complaints that included specified key words in the complaint comments field. Staff also excluded complaints with certain keywords that produced false hits, such as "credit repair" and "foreclosure," as well as those that were coded as Do Not Call registry and Identity Theft complaints.

In preparing the NPRM, FTC staff utilized the same method, reviewing a computer-generated sample of 100 debt relief complaints received between April 1, 2008, and March 31, 2009, that met the search criteria above. *TSR Proposed Rule*, 74 FR at 42001 n.166. In its comment, AADMO stated that the "evidence in the record" upon which the FTC based its proposed rule was flawed. Via a Freedom Of Information Act request, AADMO obtained all complaints coded under "Debt Management/Credit Counseling" for January 1, 2008, through August 2009, and pointed out that many of the complaints in the Consumer Sentinel database were incorrectly designated as debt relief. AADMO at 2; *see also* CSA at 18. FTC staff did not merely rely on the Consumer Sentinel designations to determine the number and substance of relevant complaints, but substantially refined its analysis as described.

[344] NAAG (Oct. 23, 2009) at 4; NAAG (July 6, 2010) at 2 ("We previously commented that the number of consumer complaints the States have received against debt relief companies, particularly debt settlement companies, have consistently risen. This trend has continued.").

[345] According to data provided to the GAO, the BBB has received thousands of complaints about debt settlement companies in recent years, with the number increasing from eight in 2004 to nearly 1,800 in 2009. GAO Testimony, *supra* note 50, at 12; *see also* Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans, supra* note 62; BBB at Attachment A. The BBB defines debt negotiation and debt settlement companies as those claiming to negotiate with creditors to lower the total amount of a consumer's debt in exchange for an upfront fee.

[346] NAAG (Oct. 23, 2009) at 4 n.5. According to information provided to the GAO, the BBB's rating system incorporates information known to the BBB and its experience with the industry under assessment. Companies can apply to be removed from the category by demonstrating they deliver what they promise, make certain disclosures to consumers, have adequate procedures for screening out customers who are not appropriate candidates for debt settlement, and that a majority of its customers successfully complete its program. No debt settlement firm had successfully demonstrated that it met these criteria as of March 2010. GAO Testimony, *supra* note 50, at 12-13; *see also* Candice Choi, *Beware: Debt-Settlement Firms Often Promise More Than They Can Deliver*, The Boston Globe, Nov. 6, 2009, *available at* (*http://www.boston.com/business/personalfinance/articles/2009/11/06/beware_debt_settlement_firms_often_promise_more_than_they_can_deliver/*).

[347] Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans, supra* note 62.

[348] Better Business Bureau, *Debt Settlement and Debt Negotiation: Buyer Beware, It's a Jungle Out There*, May 21, 2009, *available at* (*http://louisville.bbb.org/article/debt-settlement-and-debt-negotiation--buyer-beware-its-a-jungle-out-there-10569*); *see also* Orion (Jan. 12, 2010) at 1-2 (acknowledging that, after contact from the BBB, it sought to eliminate systemic sales issues such as (1) selling a "Client Service Agreement" as an application; (2) guaranteeing or over-promising the product; (3) failing to fully disclose service fees; and (4) discussing only positive effects on consumer credit scores).

[349] Better Business Bureau, *BBB on Differences Between Debt Consolidation, Debt Negotiation and Debt Elimination Plans, supra* note 62.

[350] *See, e.g.*, Dennis E. Garrett, *The Frequency and Distribution of Better Business Bureau Complaints: An Analysis Based on Exchange Transactions*, 17 Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior 88, 90 (2004) (noting that only a small percentage of dissatisfied consumers complain to third-party entities or agencies); Jeanne Hogarth et al., *Problems with Credit Cards: An Exploration of Consumer Complaining Behaviors*, 14 Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior 88, 98 (2001) (finding that only 7% of consumers having problems with their credit card company complained to third party entities or agencies).

[351] NAAG (Oct. 23, 2009) at 3; CFA at 4, 8-10; SBLS at 4; QLS at 2; SOLS at 2; MN AG at 2 ("many debt relief services companies have no intention of delivering the services that they promise."); *see* FTC and State Case Lists, *supra* note 27.

[352] *Supra* note 195 (describing data from one for-profit credit counseling company about the number of consumers who called for counseling assistance and the number who enrolled in DMPs).

[353] Of the remaining consumers, 43.87% were categorized as still active, and 47.78% had dropped out of the program. CO AG at 4. The average program length was 40 months. *Id.*

most consumers drop out of these programs before receiving benefits commensurate with the fees they pay at the outset.[354] For example, the industry-sponsored TASC survey concluded that over 65% of consumers dropped out of the respondents' programs within the first three years.[355] Based on the data collected by the Colorado Attorney General, of those consumers who had been in a debt settlement program for two to three years, barely 8% had completed their programs.[356]

Thus, consumers have suffered substantial injury by paying in advance for debt relief services that were promised but not provided.

(2) The amount and timing of front-loaded fees in the debt relief context cause significant injury

The record demonstrates that collecting fees in advance of providing the represented services is the most common business model in the debt negotiation, for-profit credit counseling, and debt settlement industries.[357] The record, including the Commission's law enforcement experience, further demonstrates that advance fees have been an integral part of the widespread deception and abuse in the debt settlement industry. In the context of debt relief transactions, advance fees create incentives for providers that fundamentally are at odds with the interests of consumers: (1) to enroll as many applicants as possible, without adequate regard to their suitability, (2) to deceive consumers about fundamental aspects of the program in order to entice them to enroll, and (3) to direct more resources to promotion and marketing rather than settling debts.[358]

Indeed, the advance fee requirement impedes the ultimate purpose of the service – helping consumers resolve their debts and restore their financial health.[359] Debt settlement providers, for example, represent the settlement process as a way to pay off each unsecured debt with a one-time, lump sum payment as the consumer accumulates sufficient money to fund the settlement. Financially distressed consumers generally will find it difficult, if not impossible, to pay large advance fees while accumulating the necessary funds for a settlement and enduring extended creditor collection efforts.[360] The practice of taking substantial advance fees makes it far more difficult for consumers to save the money necessary for settlements.[361] In many cases, providers misrepresent or fail to disclose material aspects of their programs, causing consumers to make payments to the providers for several months, not realizing that most of the payments go towards fees, rather than settlement offers.[362] Moreover, not paying creditors leads to late fees, penalties, impaired credit ratings, lawsuits and other negative consequences.[363] Moreover, creditors may garnish consumers' wages, forcing consumers to abandon their debt relief programs.[364] Charging advance fees thus impedes the goal of debt relief and contributes to consumers having to drop out of programs and forfeit the fees already paid.[365]

Commenters also stated that in debt settlement programs, significant numbers of consumers drop out once they realize, contrary to many telemarketers' representations, that their initial payments are going to the provider's fees, not to pay off their debts.[366] Once they drop out, these consumers often end up with higher debt balances than they had before, among other detrimental results, thereby suffering substantial injury.[367] An organization of nonprofit credit counselors reported that, in most cases, after dropping out of a debt settlement service, the consumer's financial position has been so badly damaged that nonprofit CCAs are unable to provide assistance, and often bankruptcy is the consumer's only option.[368] Similarly, legal services lawyers reported that low-income consumers often are more in debt with their original creditors when they leave the debt relief program than before they enrolled.[369] In sum, debt settlement is a high-risk financial product that requires consumers simultaneously to pay significant fees, save hundreds or thousands of dollars for potential settlements, and meet other obligations such as mortgage payments. Failure leads to grave consequences – increased debt, impaired credit ratings, and lawsuits that result in judgments and wage garnishments.[370]

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[354] *Supra* Section III.C.2.a.

[355] *Id.*; *infra* III.C.2.a. The evidence shows that consumers generally dropped out before receiving savings commensurate with the fees, if they received any savings at all.

[356] Of the remaining consumers, 39% were categorized as still active, and 53% had dropped out of the program. CO AG at 5. The average program length was 32.3 months. *Id.* Debt settlement plans are typically 36 months in length. DSA/ADE at 8.

[357] *Supra* Section I.C.; CFA at 9; CRN at 2; GAO Testimony, *supra* note 50, at 7 (discussing debt settlement); *see also, e.g., FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006) (alleging that consumers paid an advance fee of between $329 and $629 before any debt negotiation was attempted); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-806-SCB-TGW(M.D. Fla. filed May 2, 2006) (alleging that defendants charged between $99 and $499 as an initial fee for credit counseling services that were not, in fact, provided).

[358] See CU (July 1, 2010) at 4.

[359] *See* ULC at 5 ("The UDMSA drafting committee likewise recognized that debt settlement firms often charge excessive up-front fees, to the detriment of consumers and to the viability of their efforts to avoid bankruptcy.").

[360] SBLS at 2-4; CFA at 9; CareOne at 4.

[361] USDR (Oct. 20, 2009) at 5 ("The proposed Rule change would have the effect of allowing the consumer to save and settle debt faster since the predatory upfront fees charged by settlement companies would not be restricting of or burdensome to settlement activity."); USDR (Johnson), Tr. at 188; *see also* CFA at 9.

[362] Summary of Communications (June 30, 2010) (teleconference with state attorneys general representatives); QLS at 4; see *also, e.g., FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (alleging that defendant obfuscated the total costs for the products and services by separately reeling off various fees, such as retainer fees, monthly fees, and fees correlated to the percentage of money that a customer saves using the services, without ever disclosing the total cost, which sometimes was in the thousands of dollars); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging that, in numerous instances, defendants represented that there would be no upfront fees or costs for their debt settlement program, when in fact the defendants required consumers to pay an upfront fee of approximately 8% of the consumer's total unsecured debt); *see also, e.g., Illinois v. SDS West Corp.*, No. 09CH368 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. filed May 4, 2009); *Illinois v. Debt Relief USA, Inc.*, No. 09CH367 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. filed May 4, 2009); *North Carolina v. Commercial Credit Counseling Servs., Inc.*, No. 06CV014762 (Sup. Ct. Wake Cty. filed Oct. 9, 2006); *North Carolina v. Cambridge Credit Counseling Corp.*, No. 04CVS005155 (Sup. Ct. Wake Cty. filed Apr. 15, 2004); *North Carolina v. Knight Credit Servs., Inc.*, No. 04CVS8345 (Sup. Ct. Cumberland Cty. filed Feb. 17, 2004).

[363] NAAG (Oct. 23, 2009) at 3; CFA at 4-5; QLS at 3; SBLS at 3; SOLS at 1; *see also* USDR (Johnson), Tr. at 188. Notably, a banking trade group commented that an average of 63% of accounts known to be part of a debt settlement program ultimately are charged off, likely indicating that the consumer's credit score has suffered. *See supra* note 179. The comparable figure for accounts in a DMP was 16%. ABA at 4.

[364] SBLS at 2-4; CFA at 4; NFCC at 4, 6.

[365] QLS at 3; SBLS at 3.

[366] NAAG (Oct. 23, 2009) at 7; SOLS at 2.

[367] *See, e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087 (E.D.N.Y. filed Sept. 28, 2007); *see also FTC v. Debt-Set, Inc.*, No. 07-558, Mem. Supp. Mot. T.R.O. at 16-19 (D. Colo. Mar. 20, 2007); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ, Pls. Mem. Law Supp. T.R.O. at 17 (S.D. Fla. Dec. 11, 2006); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4), Pls. Mem. Law Supp. T.R.O. at 8-9 (D. Mass. filed Nov. 2, 2004); *see also* State Case List, *supra* note 27.

[368] AICCCA at 3.

[369] *See, e.g.,* SOLS at 1.

[370] NAAG (Oct. 23, 2009) at 8 ("[C]onsumers may be led to believe debt settlement is a relatively risk free process with little or no negative consequences, when in fact consumers risk growing debt, deteriorating credit scores, collection actions, and lawsuits that may lead to judgments and wage garnishments."); *see* NC AG Testimony, *supra* note 25, at 4 ("Three months of nonpayment and non-communication lead not only to increased debt, but also increased collection efforts and legal action."); Haas Testimony, *supra* note 73, at 4 ("We joined the program on March 10, 2008. In 6 months time we were about $13K behind from where we started.").

Consumers drop out of debt relief programs for many reasons, but the record shows that providers' practice of charging substantial advance fees is a significant cause.[371] The injury that results from consumers paying in advance for promised services that frequently do not materialize is substantial.

(3) The context in which debt relief services are offered has contributed to the substantial injury

The Commission concludes that several aspects of debt relief transactions have contributed to the substantial injury caused by advance fees in the debt relief context. First, debt relief services are directed to financially distressed consumers, who are particularly vulnerable to the providers' claims.[372] The Commission has long recognized that sellers may exercise undue influence over highly susceptible classes of purchasers.[373] For this reason, the TSR prohibits advance fees for credit repair services and certain loan offers, services that also target financially distressed consumers.[374]

Second, debt relief services, as they are currently marketed, frequently take place in the context of high pressure sales tactics, contracts of adhesion, and deception. For example, many Commission cases have alleged that telemarketers of debt relief services have exhorted consumers to fill out the enrollment documents and return the papers as quickly as possible.[375] Notably, these enrollment documents typically include a power of attorney form, which providers use to cut off communication between the consumers and their creditors or debt collectors.

Third, as Congress recognized in enacting the Telemarketing Act, telemarketing calls are more susceptible to deception than face-to-face transactions because consumers do not have the opportunity to assess credibility or visual cues.[376] Indeed, the record shows that there has been a high level of deception in the telemarketing of debt relief services. For example, in its investigation, the GAO found numerous instances of companies providing fraudulent or deceptive information in telemarketing sales calls, such as debt reduction guarantees or government affiliation claims.[377] As described above, the Commission has charged 23 debt relief firms with deceptive practices in recent years, and the states have charged numerous additional firms with such violations.[378] Thus, the manner in which debt relief services have been sold has impeded the free exercise of consumer decisionmaking. The Commission historically has viewed such an impediment as one of the hallmarks of an unfair practice.[379]

A final factor in the injury calculation with respect to this industry is that charging an advance fee requires consumers to bear the full risk of the transaction, when the seller is in a better position to assume that risk. Consumers often have limited means to evaluate whether they are good candidates for debt relief, and therefore, consumers rely on the sellers' claims. Providers frequently hold themselves out as experts in determining the right course of action for the indebted consumer.[380] Moreover, only the provider knows the historic dropout rate for the service, as providers do not disclose their actual success rates. Thus, providers are better situated than individual consumers to know which consumers are likely to be able to complete the programs. The Commission long has held that consumers are injured by a system that forces them to bear the full risk and burden of sales-related abuses, particularly, as in this context, where the seller is in a better position to know and understand the risks.[381]

b. The Harm to Consumers Is Not Outweighed by Countervailing Benefits

The second prong of the unfairness test recognizes that costs and benefits attach to most business practices, and it requires the Commission to determine whether the harm to consumers is outweighed by countervailing benefits to consumers or competition.[382] In this proceeding, no debt negotiator provided any comments or evidence of countervailing benefits from advance fees. For-profit credit counselors provided only minimal evidence that they provide the promised services.[383]

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[371] *Supra* note 213 and accompanying text; SBLS at 2-4; CFA at 9; CareOne at 4; QLS at 3.

[372] CFA at 10.

[373] Unfairness Policy Statement, *supra* note 162, at 1074.

[374] *See* 16 CFR 310.4(a).

[375] *FTC v. Debt-Set, Inc.*, No. 1:07-CV-00558-RPM (D. Colo. filed Mar. 19, 2007); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (complaint alleging that "[d]uring sales conversation, consumers are instructed to immediately stop making any payments to their unsecured creditors"); *FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O., Exs. PX-2 – PX-4 (E.D.N.Y. filed Oct. 1, 2007) (telemarketer pressuring FTC investigators to quickly sign and return written contracts – e.g., within 24 to 48 hours – and misrepresenting aspects of the debt relief program); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR, App. T.R.O. at 9-10 (W.D. Wash. filed Mar. 6, 2006) (in a debt negotiation case, alleging that the defendants' telemarketers "aggressively push consumers to agree to scripted language, spoken very quickly, that either contradicts or omits material representations . . . made in their sales pitches."); *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP, Mem. Supp. Mot. T.R.O. at 9-10 (M.D. Fla. filed Feb. 27, 2009) (in a debt negotiation case, alleging that, in order to obtain consumers' consent to enroll, defendants play consumers a "difficult to understand pre-recorded verification [that] contains additional information that is not part of defendants' telemarketing sales pitch," including information on fees).

[376] *TSR Amended Rule*, 68 FR at 4655.

[377] GAO Testimony, *supra* note 50, at 13.

[378] *See* FTC and State Case Lists, *supra* note 27.

[379] Unfairness Policy Statement, *supra* note 162, at 1074; *In re Amrep*, 102 F.T.C. 1362 (1983), *aff'd*, 768 F.2d 1171 (10th Cir. 1985) ("[A] 100% forfeiture clause, appearing in an adhesion contract for the sale of land, signed in an atmosphere of high pressure sales tactics, unequal bargaining power and deceptive misrepresentations, violated Section 5's proscription of unfair practices."); *In re Horizon Corp.*, 97 F.T.C. 464 (1981) (same); *In re Sw. Sunsites*, 105 F.T.C. 7, 340 (1985), *aff'd*, 785 F.2d 1431 (9th Cir. 1986) ("Respondents' practices resulted in substantial monetary injury to consumers, because they induced consumers to continue paying substantial amounts. . . through a variety of continuing misrepresentations.").

[380] *See FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo., final order Apr. 11, 2008); *FTC v. Nat'l Consumer Council, Inc.*, No. ACV04-0474CJC (JWJX) (C.D. Cal., final order Apr. 1, 2005). A debt settlement industry association stated that, based on its members' experiences, there are certain characteristics that make it more likely that a consumer will be able to achieve the benefits offered by a debt settlement program. TASC (Apr. 30, 2010) at 3; FDR (Linderman), Tr. at 96 (stating his company employs "25 to 30 people who do nothing more than analyze the information we receive from consumers regarding the appropriateness of the program for these consumers").

[381] *See Cooling Off Period For Door-to-Door Sales; Trade Regulations Rule and Statement of Basis and Purpose*, 37 FR 22934, 22947 (Oct. 26, 1972) (codified at 16 CFR 429); *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose*, 40 FR 53,506, 53,523 (Nov. 18, 1975) (codified at 16 CFR 433) (same); *In re Orkin Exterminating*, 108 F.T.C. at 263, 364 ("By raising the fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre-1975 contracts to its pre-1975 customers."); *In re Thompson Medical Co., Inc.*, 104 F.T.C. 648 (1984) (noting that marketers must provide a high level of substantiation to support "claim[s] whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves").

[382] Unfairness Policy Statement, *supra* note 162, at 1073-74 ("The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and similar matters."); *see also* J. Howard Beales III, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, *available at* (*http://www.ftc.gov/speeches/beales/unfair0603.shtm*) (noting that "[g]enerally, it is important to consider both the costs of imposing a remedy (such as the cost of requiring a particular disclosure in advertising) and any benefits that consumers enjoy as a result of the practice, such as the avoided costs of more stringent authorization procedures and the value of consumer convenience").

[383] CareOne was the only for-profit provider that submitted data; it stated that: (1) over 700,000 consumers have called the company for counseling assistance; (2) over 225,000 customers enrolled in a DMP; (3) nearly 700,000 customer service calls have

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The bulk of the comments and data submitted relating to the second prong of the unfairness test came from the debt settlement industry which essentially made two arguments.

First, members of the debt settlement industry commented that many consumers receive substantial benefits from debt settlement programs. In fact, as explained in Section III.C.2. above, the record shows that most consumers do not obtain a net benefit from debt settlement services. In any event, the Final Rule does not ban debt settlement services or restrict the amount of debt settlement company fees; it only bars collection of advance fees.[384] There is no empirical evidence in the record that paying large advance fees has any benefits for consumers.[385] Given the large percentage of consumers who drop out of debt settlement programs – in large part due to having to pay advance fees – the Commission concludes that any countervailing benefits to consumers that might possibly derive from paying advance fees is greatly outweighed by the substantial injury that practice causes.[386]

Second, several commenters, principally from the debt settlement industry, predicted that significant numbers of debt relief companies would be harmed or go out of business if the advance fee ban were implemented,[387] because (1) they would not have the cash flow necessary to administer settlement plans and provide customer service;[388] (2) they may not get paid for the services they rendered given their customers' already precarious financial condition;[389] and (3) scam operators would ignore the advance fee ban, profiting at the expense of debt settlement companies that complied with the law.[390] Other commenters posited that no new companies would enter the market, further injuring competition.[391]

Although the Commission cannot predict with precision what impact the advance fee ban will have on the debt relief industry, the Commission concludes, based on the record evidence, that any injury to competition resulting from the elimination of any companies unable to succeed under the modified advance fee prohibition adopted here would be outweighed by the benefits to consumers that would result from this provision. The record suggests that legitimate providers of debt relief services can operate their businesses without collecting advance fees.[392] The record contains scant evidence about the costs debt relief providers typically incur prior to settling debt, and the estimated costs appear to vary widely.[393] The large bulk of those costs, however, are for marketing and customer acquisition.[394] As in many other lines of business, debt relief companies would have to capitalize their businesses adequately in order to fund their initial operations. Further, the record indicates that they could start recouping their expenses relatively quickly. Providers only need sufficient capitalization to operate until they begin receiving fees generated by performance of the promised services.[395] The Final Rule allows providers to receive fees as they settle each debt.[396] CCAs generally will be able to collect fees at the beginning of the DMP, after the consumer enrolls and makes at least one payment.[397] With respect to debt settlement, if information submitted by commenters is accurate, providers often can start settling debts as early as five or six months into the program.[398]

The Commission acknowledges that the ban on advance fees will shift some of the transactional risk from the consumer to the provider. At present, however, consumers bear the full risk – they must pay hundreds or thousands of dollars with no assurance that they will ever receive any benefit in return.[399] Moreover, the transaction inherently is one in which many consumers are doomed to fail, because they are already financially distressed and cannot afford to pay the large advance fees, make payments to creditors, and save enough money to fund settlements. The record in this proceeding bears this out – a large majority of consumers drop out of the program, in most cases before they receive savings commensurate with the fees and other costs they paid.[400]

In any event, the Final Rule substantially mitigates the provider's risk of nonpayment. As described in more detail below, providers will be able to require customers to make payments into a dedicated bank account. As each debt is settled, the consumer can pay the provider's fee from that account.[401]

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been made; (4) over nine million creditor payments were processed; (5) nearly $650 million in payments have moved from consumers to their creditors; and (6) fewer than 35 Better Business Bureau complaints were filed in the previous year on approximately 70,000 new customers, and all had been successfully resolved. CareOne at 1-2.

384 In any event, as explained in Section III.C.2. above, the record shows that, in fact, most consumers do not obtain a net benefit from debt settlement services.

385 According to one commenter, research indicates that consumers have higher success rates when they pay some fees upfront and thereby have a "'stake in the game.'" Loeb at 5-6. Another commenter expressed concern that without advance fees, consumers may be more likely to misrepresent their financial status to get into the program and to drop out because of a lack of commitment. DMB (Feb. 12, 2010) at 5. Neither of these commenters cited any empirical data demonstrating that consumers who pay upfront fees have higher success rates than those who do not. In any event, even if upfront fees strengthened consumers' commitment to the program, requiring consumers to put fees into a dedicated bank account likely would have the same effect.

386 *Supra* Section III.C.2.a. Similarly, in considering the Holder In Due Course Rule, the Commission determined that readily available credit from a "'fly-by-night' salesperson who does not perform as promised does not benefit consumers." *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose*, 40 FR at 53,520.

387 *Supra* Section III.C.2.c.

388 *Supra* Section III.C.2.d. Moreover, a commenter argued that if existing providers' costs increase, they could be forced to increase the prices they charge consumers for their services in order to remain solvent. CSA at 9.

389 *Supra* Section III.C.2.e.

390 USOBA (Oct. 26, 2009) at 35; CSA at 10.

391 CSA at 9; Able (Oct. 21, 2009) at 28; SDS (Oct. 7, 2009) at 3; CRN (Oct. 8, 2009) at 5; TASC (Young), Tr. at 186-87.

392 *Supra* Section III.C.2.d.

393 Id.

394 Orion (Oct. 1, 2009) at 2 (marketing costs can be $500 to $1,200 per enrolled consumer); NWS at 10 (*see* attached Walji paper at 10) (marketing costs at one company averaged $987.50 per enrolled consumer).

395 *See infra* Section III.C.5.a. Some states already impose licensing and bonding requirements on companies and thus require some capitalization. *See*, e.g., Kan. Stat. Ann. § 50-1116, et seq.; Me. Rev. Stat. Ann. Tit. 17 § 701, et seq. & tit. 32 §§ 6171-82, 1101-03; S.C. Code Ann. § 37-7-101, et seq.

396 *See infra* Section III.C.5.a.

397 Id.

398 CRN (Bovee), Tr. at 28; *see* CSA at 6 (almost 78% percent of consumers receive at least one settlement offer in the first six months).

399 *See* WV AG (Googel), Tr. at 43; NC AG Testimony, *supra* note 25, at 4 ("Consumers are taking a big risk, while interest charges mount and the debt settler's fees are being collected, that they will eventually get relief from all their debts," and the debt settlement company "profits whether or not it accomplishes anything for its client."). Consumers clearly are injured by a system that forces them to bear the full risk and burden of sales related abuses. *See Cooling Off Period For Door-to-Door Sales; Trade Regulations Rule and Statement of Basis and Purpose*, 37 FR 22934, 22947 (Oct. 26, 1972).

400 As discussed above, industry data show that at least 65% of consumers drop out of debt settlement programs. *Supra* Section III.C.2.a.1.

401 *Infra* Section III.C.5.c. Under the Final Rule, consumers will own the account and be permitted to recoup the money they paid into it if they terminate their enrollment. Thus, some consumers may drop out of the program before receiving any settlements, causing the provider to lose the value of its services up to that point. Providers can limit that risk, however, by more carefully screening prospective customers to ensure that they are financially suitable for the program and by obtaining settlements more quickly. There is no reason to believe that consumers would attempt to "game" the system by dropping out of the program and getting their money back before the provider obtains any settlements; since the purpose of enrolling in the first place is to obtain settlements, consumers would have no incentive to drop out prior to obtaining them. Moreover, to the extent that consumers must pay fees to the bank or other entity holding their accounts, they will stand to lose at least some money if they later quit the program and

Given that most consumers who pay advance fees receive little, if any, benefit from the debt relief services covered by the Final Rule, any injury to individual providers resulting from the advance fee ban does not outweigh the consumer injury resulting from current fee practices.

c. Consumers Cannot Reasonably Avoid the Injury

The third and final prong of the unfairness analysis precludes a finding of unfairness in cases where the substantial injury is one that consumers reasonably can avoid.[402] The extent to which a consumer can reasonably avoid injury is determined in part by whether the consumer can make an informed choice. In this regard, the Unfairness Policy Statement explains that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary.[403] The Commission finds a practice unfair "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking."[404]

Consumers can reasonably avoid harm only if they understand the risk of injury from an act or practice.[405] In the context of debt relief service fees, consumers can avoid the injury only if they understand the payment arrangement, and its implications, and are aware of the risks of paying in advance. Consumers are unlikely to know that the services do not benefit most consumers who enroll and that they are at significant risk of losing the large sums of money they pay in advance fees.[406] This is especially true because of the widespread deception surrounding the marketing of debt relief services[407] and because purchasers of debt relief services typically are in serious financial straits and are thus particularly vulnerable to the providers' glowing claims.[408] Relying on the representations made in advertisements and in telemarketing calls, these vulnerable consumers have every reason to expect to receive the promised benefits from those who purport to be experts and have no way of knowing that, in fact, they are unlikely to receive those benefits, if they receive any benefits at all.[409] Consumers are unaware that when they purchase debt relief services, they are at high risk of failure and the concomitant loss of hundreds or thousands of dollars that they can ill afford to lose.[410] As described earlier, debt relief programs with large advance fees force consumers in financial distress to do what most of them cannot do: simultaneously pay the provider, save for settlements, and meet other obligations such as mortgage payments.

Moreover, consumers typically cannot mitigate their harm by seeking a refund. Debt relief providers often advertise generous refund policies, but frequently consumers lose much of their money.[411]

d. Public Policy Concerning Advance Fees

The Commission's unfairness analysis permits it to consider established public policies in determining whether an act or practice is unfair, although those policies cannot be the primary basis for that determination.[412] In this regard, nearly all states have adopted laws that regulate the provision of some or all debt relief services. In fact, six of these laws ban receiving any payment as a for-profit debt settlement company.[413] Consistent with these statutes and its law enforcement experience, NAAG filed comments strongly advocating that the Commission issue a rule prohibiting the charging of advance fees for debt relief services.[414] These state laws provide further support for the Commission's finding that this practice is unfair.

Accordingly, the Commission concludes that the practice of charging advance fees is an abusive practice under the Telemarketing Act because it meets the statutory test for unfairness – it causes or is likely to cause substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable.

4. Recommendations to Restrict Other Abusive Practices

A number of commenters proposed additional remedial provisions, as discussed below. The Commission declines to adopt these additional remedies in the Final Rule.

a. Suitability Analysis

A coalition of consumer groups and other commenters recommended that the Commission require providers to employ a suitability or screening analysis of prospective customers to ensure that only those who meet the financial requirements to successfully complete the offered debt relief program

withdraw their money. Ultimately, the risk of nonpayment will have to be factored into providers' pricing decisions. This should lead to a more competitive market. Providers that do better screening and are more effective in obtaining settlements quickly should be able to minimize their losses from dropouts. Such firms may choose to lower their prices and gain a competitive advantage.

[402] 15 U.S.C. 45(n); *see also* Unfairness Policy Statement, *supra* note 162, at 1073.

[403] Unfairness Policy Statement, *supra* note 162, at 1074.

[404] Id.

[405] *See id.*; *In re Orkin Exterminating Co.*, 108 F.T.C. 263, 366-67 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988); *In re Int'l Harvester*, 104 F.T.C. 949, 1066 (1984).

[406] CFA at 10; SOLS at 3 (advertisements lack specific disclosures; subsequent disclosures are buried in fine print contracts).

[407] *See In re Sw. Sunsites*, 105 F.T.C. 7, 81-93 (1985) (holding that land sale companies engaged in an unfair practice by continuing to collect payments on land sales contracts, and refusing to make refunds, for consumers who agreed to purchase land based on deceptive representations made by the companies), *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

[408] As the Commission has noted with respect to another group of vulnerable consumers desperate for a solution to their woes – individuals trying to lose weight – "the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance if not abstinence simply does not pass muster." *In re Porter & Dietsch, Inc.*, 90 F.T.C. 770, 865 (1977), *aff'd*, 605 F.2d 294, 297 (7th Cir. 1979) (approving FTC order with "minor exceptions").

[409] *See supra* Sections I.C.2. & III.C.2.; CFA at 10; CCCS CNY at 1; QLS at 2.

[410] Having paid in advance and having not received a refund, the only remaining recourse consumers would have for a nonperforming debt relief service provider is to file a lawsuit for breach of contract, hardly a viable option for financially distressed consumers. *Orkin*, 108 F.T.C. at 379-80 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury). The cost of litigating makes it impossible or impractical for many consumers to seek legal recourse. Many consumers who are in financial distress may not even be aware that filing an action against the provider for breach of contract is available as an alternative. Therefore, the possibility of taking legal action does not sufficiently mitigate the harm to consumers from paying an advance fee.

[411] MN AG at 2 (attaching complaints in cases against Priority Direct Marketing, Inc., Clear Financial Solutions, and Moneyworks, LLC); *see, e.g., FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (defendants advertised money-back guarantees, yet allegedly refused to honor them); *New York v. Credit Solutions*, No. 401225 (N.Y. Sup. Ct. N.Y. Cty. 2009 filed May 19, 2009); QLS at 3; CFA at 5, 9; WV AG (Googel), Tr. at 84. Moreover, a requirement that debt relief services honor refund requests is not sufficient to address this harm because obtaining a refund has a cost to consumers. *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002) ("This might be a tenable argument if obtaining a refund were costless, but of course it is not. It is a bother. No one would buy something knowing that it was worthless and that therefore he would have to get a refund of the purchase price.").

[412] 15 U.S.C. 45(n).

[413] La. Rev. Stat. § 14:331; N.D. Cen. Code § 13-06-02; Wyo. Stat. Ann. § 33-14-102; Mass. Gen. Laws Ann. Ch. 180 § 4A; N.J. Stat. Ann. § 17:16G-2; Haw. Rev. Stat. Ann. § 446-2.

[414] NAAG (Oct. 23, 2009) at 1.

are permitted to enroll.[415] Several commenters asserted that providers' failure to do such analyses contributes to consumers' inability to stay in the program, and thus to the injury they suffer when they drop out.[416]

The Commission has concluded that it is unnecessary at this time to institute explicit suitability requirements in the Final Rule. The existing provisions of the Final Rule should provide incentives for providers to screen out consumers who cannot afford both to save funds for settlement and to pay the provider's fee, because if a consumer cannot do both and drops out before settling or otherwise resolving any debts, the provider cannot collect its fees.[417] Certainly the Commission regards it as a best practice to implement screening procedures to maximize the likelihood that enrollees will have the wherewithal to complete and benefit from a service. The Commission will continue to monitor the industry to ensure that debt relief providers establish and maintain reasonable policies and procedures to screen prospective customers for suitability. If it finds that significant numbers of providers continue to enroll consumers who are unsuitable for their programs, the Commission may consider further amendments to the TSR to solve the problem.

b. Right of Rescission or Refund Provision

Several commenters also recommended that the Final Rule grant consumers a right to rescind their contracts within a certain period of time and receive a refund of fees paid to debt relief providers.[418] They argue that such a requirement would provide consumers with more time to assess whether the service is beneficial for them and also discourage providers from enrolling consumers who are unlikely to benefit from their services. The Commission also considered whether requiring providers to give consumers refunds for a certain period of time would mitigate any harm consumers suffered from advance fees.

The Commission concludes that the modified advance fee restrictions in § 310.4(a)(5) adequately address these concerns. A consumer who receives no benefit from a program will not be required to pay a fee and can simply terminate the program. Because any funds that the consumer pays into a dedicated bank account remain the property of the consumer until the debts are settled, enabling the consumer to cancel the program and recoup his money, the advance fee ban effectively provides a right of rescission and refund. Moreover, a rescission or refund right on its own leaves significant risk with consumers that the provider will not respond to a request for rescission or refund, or it will be out of business before providing the contract rescission or refund.[419] Finally, if a refund right only lasts until the consumer receives the first settlement, the company would have the incentive to settle a small debt very quickly in order to extinguish the refund right, which does not provide a substantial benefit to the consumer.[420]

c. Fee Caps

Industry representatives also have argued that, instead of prohibiting advance fees, the Final Rule should set limits or caps on such fees similar to those currently imposed by many states.[421] The Commission declines to set fee limits in this proceeding. While the Commission concludes that the collection of advance fees by debt relief providers is an abusive practice, it does not believe that the Telemarketing Act authorizes the Commission to regulate the *amount* of fees a provider charges, absent some other type of deceptive or abusive conduct that interferes with a competitive market.[422] In general, fee-setting is best done by a competitive market, and the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market. The provisions of the Final Rule, including the narrowly tailored ban on advance fees, are designed to ensure that the debt relief market functions properly and to eliminate the risk that consumers will pay thousands of dollars and receive little or nothing in return.[423] In any event, the Commission believes that any decision to set fees is made more appropriately by legislative bodies, as several states have done with respect to debt relief services.[424]

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415 *See* CFA at 21 ("[D]ebt relief providers should be required to conduct an individual financial analysis for all potential customers to determine whether the service is suitable for and will provide a tangible net benefit to them before enrolling them."); CareOne at 7 ("Providers should be required to . . . attest to and document the suitability of the service sold to the consumer."); TASC (Apr. 30, 2010) at 1-2; *see also* RDRI (Manning), Tr. at 220-21.

416 *See* NAAG (Oct. 23, 2009) at 2 ("The primary consumer protection problem areas that have given rise to the States' action include . . . lack of screening and analysis to determine suitability of debt relief programs for individual debtors."); CareOne at 7 ("One of the greatest concerns about abuse of consumers in the debt relief industry relates to whether consumers are appropriately placed into plans that represent the most suitable approach for addressing their debt problems."); MP at 2 ("The reality is that the majority of consumers being enrolled into traditional debt settlement programs are not suitable candidates for this strategy."); NACCA (Keiser), Tr. at 66 ("I think one problem might be is too many people might be getting into programs that aren't appropriate for them that they cannot afford, and that's where you hear the horror stories."); WV AG (Googel), Tr. at 84 ("[T]he classic complaint that I think most states have received is consumers who have paid thousands and thousands of dollars up front, who probably weren't even suitable candidates for debt settlement."). *But see, e.g.*, TASC (Housser), Tr. at 224 ("I do want to point out that we think we do a pretty good job and TASC members think they do a pretty good job of suitability analysis of consumers"); FDR (Linderman), Tr. at 95 (arguing that "we take the time to do a thorough suitability analysis").

417 Final Rule, § 310.4(a)(5). *See, e.g.*, ACCORD (Noonan), Tr. at 275-76 ("[I]f you have a ban on advance fees . . . no one will have an incentive to have a high drop-out rate, they won't be paid for those clients. . . . [E]veryone will continue to have an incentive, as we do now, to do a proper suitability study, because we won't want unsuitable people in our plans."); WV AG (Googel), Tr. at 222 ("[O]ne of the best ways to require or to bring about a suitability analysis, without even specifically requiring it, would be the advance fee ban, because then there would be that. you know, meeting of interest, it would be in everybody's interest to do it."); CRN (Bovee), Tr. at 120; CU (July 1, 2010) at 4.

418 *See, e.g.*, CFA at 19; CFA (Grant), Tr. at 209; NFCC at 13; CRN at 7; TASC (Apr. 30, 2010) at 6-7.

419 Summary of Communications (June 16, 2010) (meeting with consumer groups); *see supra* note 411.

420 Summary of Communications (June 16, 2010) at 1 (meeting with consumer groups).

421 *See, e.g.*, TASC (Apr. 30, 2010) at 1-2, 7-9. Additionally, TASC recommended that the Commission mandate that companies spread their collection of fees over a specified period of months. This fee structure, however, allows providers to collect fees regardless of whether they have achieved results and therefore suffers from the flaws discussed in this subsection and results in the abuse described in Section III.C.3. *See* SOLS at 2 (recommending fee caps in addition to an advance fee ban).

422 The purpose of the FTC's unfairness doctrine is not to permit the Commission to obtain better bargains for consumers than they can obtain in the marketplace. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 964 (D.C. Cir. 1985). Instead, it is to prohibit acts and practices that may unreasonably create or take advantage of an obstacle to the ability of consumers to make informed choices. *See id.* at 976.

423 Simply capping the fees might reduce the amount of consumer injury, but, so long as consumers are induced to pay some amount of money for services that may never be rendered, would not eliminate the injury.

424 Moreover, any federally established maximum advance fee might well become the de facto *actual* fee for debt relief services. F. M. Scherer, *Industrial Market Structure and Economic Performance* 190-93, 204 (1980); F.M. Scherer, *Focal Point Pricing and Conscious Parallelism, in Competition Policy, Domestic and International*, 89-97 (2000). Further, fee caps can quickly become obsolete, as changes in market conditions and technologies render the fixed maximum fee too low (*e.g.*, if the costs of providing the service rise) or too high (*e.g.*, if new technology lowers the cost of providing the service or if market participants would compete on price absent regulation). *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

5. The Advance Fee Ban – Final Rule Amendment

The amended Rule § 310.4(a)(5)(i) would prohibit:

(i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) the customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) to the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(1) bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(2) is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt.[425]

The Final Rule places no restriction on the *amount* of fees that providers can charge or mandate a formula for calculating fees,[426] but does establish rules about *when* they can collect them. In short, the Rule prohibits providers from charging any fee in advance of providing the debt relief services. If the provider settles, renegotiates, reduces, or alters debts sequentially, it may collect part of its fee after each individual settlement or other alteration. Four issues arising from this provision merit further discussion: the contractual agreement, fee requirements, bank account practices, and effective date.

a. The Contractual Agreement

The Final Rule specifies that, in order to collect a fee, providers must have obtained a settlement or other alteration of a debt, pursuant to a settlement agreement, DMP, or other valid contractual agreement between the consumer and the creditor or debt collector that is executed by the customer. The provider may obtain an oral or written execution of the agreement in order to allow providers to proceed efficiently. The consumer must execute the specific agreement, however; a contract signed at the outset specifying, for example, that any offer that involves the payment of a certain amount will be deemed acceptable to the consumer is **not** sufficient to comply with the Rule.[427] Moreover, the provider may not rely on authority obtained through a power of attorney to execute the contract on the consumer's behalf. The requirement that consumers execute the agreements is necessary to ensure that the offers are legitimate, final, and acceptable to the consumers.[428] The Rule further specifies that the provider cannot collect its fee until the consumer makes at least one payment to the creditor or debt collector to resolve the debt. This provision, which was not included in the proposed rule but was recommended by commenters, will help ensure that the consumer has the necessary funds to satisfy the offer.[429]

In order to collect its fee, the provider must have documentation evidencing the debt resolution, as specified by § 310.4(a)(5)(i)(A) of the Final Rule.[430] Different types of debt relief services may generate different types of documentation. With regard to debt negotiation, an executed contract showing that a creditor has agreed to the concession (*e g.*, a lower interest rate for a particular credit card), along with evidence that the consumer has made at least one payment under the new terms, would suffice. For a DMP, the CCA must provide a debt management plan containing the altered terms and executed by the customer that is binding on all applicable creditors. The CCA also must have evidence that the consumer has made the first payment to the CCA for distribution to creditors.[431] In the case of debt settlement, the provider must obtain documentation showing that the account at issue has been successfully settled and at least one payment has been made toward the settlement, before receiving the fee for that debt.[432] Examples of such documentation include a letter or receipt from the creditor or debt collector stating that the debt has been satisfied, or a payment has been made toward satisfaction and the amount of the payment received.[433] Once the consumer executes the agreement, the debt relief entity may collect the fee associated with the individual debt and need not wait until all debts have been settled or otherwise altered.

[425] The provisions currently contained in §§ 310.4(a)(5)-310.4(a)(7) will be renumbered to accommodate the new § 310.4(a)(5) and will shift to §§ 310.4(a)(6)-310.4(a)(8), respectively.

[426] The Final Rule does require providers to clearly and prominently disclose their fees. 16 CFR 310.3(a)(1).

[427] *See* CFA at 17.

[428] Commenters supported such a requirement. *See* CFA at 15-16; SOLS at 2.

[429] FCS (Oct. 27, 2009) at 4 ("If a company is permitted to collect its fee after merely negotiating a settlement, but before the creditor receives payment from the consumer, consumers may find themselves paying fees regardless of their ability to meet the settlement payment obligations to their creditors. This provision should be changed to allow the debt settlement company to collect its fee only when the consumer's payment is sent to the creditor."); ACCORD (Oct. 9, 2009) at 2.

[430] 16 CFR 310.4(a)(5)(i)(A) ("the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt **pursuant to** a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer") (emphasis added). *See* AFSA at 10 ("It is appropriate to require provision of documents proving that a debt has, in fact, been renegotiated, settled, reduced or otherwise altered."); Weinstein (Oct. 26, 2009) at 8 (*see* attached Weinstein paper at 7) ("When a consumer and a creditor reach a mutual agreement, the debt settlement company provides a written agreement to the consumer and assists with arranging the consumer's payment to the creditor.").

[431] CCAs renegotiate all of the consumer's eligible debts at one time, and creditors generally grant concessions immediately upon enrolling consumers in the DMP. GP (Mar. 5, 2010) at 1. Thus, CCAs do not renegotiate debts individually, and Final Rule § 310.4(a)(5)(i)(C) does not apply to them. CCAs commonly charge consumers not only an initial set-up fee, but also periodic (usually monthly) fees throughout the consumer's enrollment in the DMP. Laws in most states cap these fees. Final Rule § 310.4(a)(5) prohibits CCAs from charging a set-up or other fee before the consumer has enrolled in a DMP and made the first payment, but it would not prevent the CCA from collecting subsequent periodic fees for servicing the account.

[432] The "at least one payment" provision applies specifically to the case of bona fide installment settlements, in which a creditor or debt collector contracts to accept the settlement amount in installments over time. If the creditor or debt collector requires a single payment to satisfy the debt, the provider cannot divide the settlement into separate parts and collect its fees upon a payment from the consumer that only partially satisfies the debt. The Commission will monitor fee practices relating to installment settlements to ensure that providers are not manipulating settlement offers to collect their fee to the detriment of consumers.

[433] *See* CRN (Jan. 12, 2010) at 7 ("All creditors and their assignees provide documentation of settlement and/or payment agreements."). A letter containing an offer to settle by itself does not meet the Rule's requirements, but may be one part of the necessary documentation. Some commenters stated that some creditors or debt collectors may not provide a document confirming that the payment has been accepted and the debt has been satisfied. MD (Oct. 26, 2009) at 53 (some collection agents refuse to provide documentation that clearly establishes the debt has been extinguished); ART at 2 (some creditors do not provide timely documentation).

b. Fee Requirements

The purpose of the advance fee ban could be thwarted if debt settlement providers collect a disproportionately large percentage, or even the entire amount, of the fee after settling a single debt. The Final Rule addresses this concern: in situations in which providers settle debts individually over time, the fee collected by the provider must bear the same proportional relationship to the total fee as the individual debt bears to the entire debt amount. Further, the Final Rule requires that, in calculating this proportion, the provider must use the amount of the individual debt and the entire debt at the time the consumer enrolls in the program (i.e., before any interest or creditor fees have accrued).[434]

Alternatively, the provider can collect a percentage of savings achieved.[435] In that case, the fee for each debt settled or otherwise altered must be an unchanging percentage of the amount saved as a result of the service.[436] The amount saved must be based on the difference between the amount of debt at the time the consumer enrolls in the program and the amount of money required to satisfy the debt. Using either fee structure, the fee or consideration must be accurately disclosed in compliance with § 310.3(a)(1)(i).[437]

Two commenters recommended that the Commission *require* that the amount of the provider's fee be based on the percentage of savings realized by the consumer.[438] As stated earlier, the Final Rule does not set fee maximums or dictate a formula for calculating fees but simply governs when the fees can be collected. The provisions of the Final Rule, including the required disclosures, prohibitions on misrepresentations, and advance fee ban, should spur price competition in the market.[439]

c. Dedicated Bank Accounts

In the NPRM, the Commission stated that it did not intend the proposed rule to prohibit consumers from using dedicated bank accounts, and it requested comments on this issue.[440] In response, some commenters expressed views, assuming the Final Rule included an advance fee ban, on whether the Rule should permit consumers, or allow providers to require consumers, to put funds into a dedicated bank account until the services are delivered. A coalition of consumer groups stated that an advance fee ban should allow consumers to use legitimate bank accounts that they control.[441] An industry member stated that allowing providers to require consumers to set money aside in a dedicated bank account is "absolutely necessary" to ensure that the money available is adequate to cover the settlement amount and the provider's fee.[442] Additionally, a municipal consumer protection agency stated that dedicated bank accounts would ensure that a debt settlement company could collect its fees once it has settled a consumer's debt.[443]

Section 310.4(a)(5)(ii) of the Rule permits debt relief providers to require consumers to place funds designated for the company's fees and for payment to the consumer's creditors or debt collectors in a dedicated bank account, provided certain conditions are met. Once a settlement agreement is executed and the payment (or first payment, in the case of an installment agreement) is made, the provider may require that the appropriate fee payment be sent from the account to the company. This provision will assure providers that, once they settle a consumer's debt, they will receive the appropriate fee.

To ensure that consumers are protected, the Final Rule specifies five conditions that the provider must meet if it wishes to require the consumer to set aside funds for its fee and for payment to creditors or debt collectors in a dedicated bank account.[444] First, the account must be located at an insured financial institution.[445] Second, all funds in the account must remain the property of the consumer, and, if the money is held in an interest-bearing account, all interest that accrues must be paid to the consumer.[446] Third, the agent holding the funds must be independent – that is, not under the control of or affiliated with the debt relief provider.[447] Fourth, to further ensure that the account provider is truly independent, the debt relief provider may not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service.[448] The Commission intends this provision to be read broadly to prohibit all fee splitting between the entity or entities administering the

[434] In other words, if the amount of the debt that is settled is one-third of the entire debt amount enrolled in the program, the provider can collect one-third of its total fee.

For the purposes of calculating a proportional fee, the provider must include as part of the entire debt amount any additional debts that the consumer enters into the program after the original date of enrollment. Further, the provider must use the amount of the additional individual debt at the time the consumer entered that debt into the program. For example, suppose that a consumer enrolls in a debt settlement program with a total of two $10,000 debts – totaling $20,000. Six months after enrolling in the program, the consumer places one additional debt with a balance of $10,000 into the program. Under § 310.4(a)(5)(ii)(C)*(1)*, the consumer's entire debt amount is now $30,000. Thus, if the provider settles any one of the consumer's three debts, it may only collect one-third of its total fee ($10,000 divided by $30,000).

[435] This alternative can be used when the provider uses a contingency-based fee model.

[436] This requirement explicitly prevents providers from front-loading the fee by collecting a disproportionately large percentage of savings for any debts settled early in the program.

[437] 16 CFR 310.3(a)(1)(i).

[438] CareOne at 5; FCS (Oct. 27, 2009) at 4 ("We also urge the Commission to consider requiring fee structures that are based on the savings the company negotiates for the consumer. . . . Allowing companies to collect flat fees (even fees that are capped, as some states provide) disconnects the amount of the fee from the value the consumer receives. In contrast, success-based fees ensure the fee is proportionate to the benefit and still allow debt settlement companies to compete on price."). Several companies use a contingency fee model, charging consumers a specific percentage of savings that they obtain. CRN (Jan. 21, 2010) at 4 (15% of savings); FCS (Oct. 27, 2009) at 2; ACCORD (Oct. 9, 2009) at 2-3; TBDR at 1; *see also* SBLS at 4. One commenter raised concerns whether assessing fees based on settlement activity would lead to the best outcomes for consumers. FDR (Oct. 26, 2009) at 15-16 ("Where fees are based exclusively on settlement activity or on the timing of achieving settlements, the debt settlement services provider has an incentive to complete settlements with the creditor and on the account that creates the most revenue.").

[439] *See* USDR (Oct. 20, 2009) at 2.

[440] *TSR Proposed Rule*, 74 FR 41988, 42017 (Aug. 19, 2009).

[441] CFA at 17; CFA (Plunkett), Tr. at 141.

[442] CRN (Bovee), Tr. at 142 (stating that his company does not use escrow accounts and has outstanding uncollected fees of more than $100,000).

[443] NYC DCA at 2.

[444] If a provider is going to require a dedicated bank account, it may not require the use of a dedicated bank account solely to set aside funds for the provider's fees.

[445] This requirement does not prevent an intermediary that is not an insured financial institution from providing services in connection with the account as well. For example, GCS and Noteworld Servicing Center provide account management and transaction processing services relating to special purpose bank accounts that clients of debt settlement companies use. *See* GCS at 1. If such an intermediary is used, the bank and the nonbank both are "entities administering the account" under the Final Rule.

[446] *See* Summary of Communications (June 24, 2010) at 2 (state attorney general representative stated that consumers could be injured if they were not able to use money in the accounts for living expenses if necessary; a second state attorney general representative stated that if providers own the accounts, the money could be subject to claims by the company's creditors); Summary of Communications (July 9, 2010) at 1 (consumer group representative stated that the consumer should have control over the account, and it should be in the consumer's name).

[447] *See* Summary of Communications (June 24, 2010) at 2 (a state attorney general representative described risks of service provider collusion with fraudulent companies).

[448] *See* Summary of Communications (June 24, 2010) at 2 (a state attorney general representative stated that the rule should ensure that debt settlement companies do not split fees with the account providers or charge unreasonable fees for the accounts).

account and the debt relief service provider.

Fifth and finally, the provider must allow the consumer to withdraw from the debt relief service at any time without penalty; thus, the provider may not charge a termination fee or similar fee. The provider also must ensure that the consumer receives, within seven business days of the consumer's request, all funds in the account, less any money that the provider has earned in fees in compliance with the Rule's provisions, as a result of having settled a debt prior to the consumer's withdrawal from the program.[449] Therefore, the Rule allows the consumer to cancel the program and recoup the money in the account at any time to ensure that the consumer does not pay in advance for services that are not performed.

Moreover, the Commission's law enforcement cases show that there is a risk that providers will utilize funds in consumers' accounts for their own purposes.[450] Thus, the Rule includes five specific safeguards discussed in this section to guard against such illegal activity.[451]

The Rule does not prohibit an independent entity that holds or administers a dedicated bank account meeting the above criteria from charging the consumer directly for the account. However, the Commission will be monitoring practices related to these fees, and it may take further action, if needed, to address any deceptive or abusive fee practices in connection with the accounts.

d. Effective Date

The advance fee ban provision, § 310.4(a)(5) of the Final Rule, takes effect on October 27, 2010. The Commission is allowing debt relief providers an additional month after the effective date of the other provisions of the Rule, because compliance with the advance fee ban may entail adjustments to many providers' operations. The Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to the effective date.

D. Section 310.3: Deceptive Telemarketing Acts or Practices

The Final Rule mandates four debt relief-specific disclosures, which complement the existing, generally applicable disclosures currently in the TSR.[452] The Final Rule requires debt relief service providers to disclose, clearly and conspicuously, before the consumer consents to pay: (1) the amount of time necessary to achieve the represented results; (2) the amount of savings needed before the settlement of a debt; (3) if the debt relief program includes advice or instruction to consumers not to make timely payments to creditors, that the program may affect the consumer's creditworthiness, result in collection efforts, and increase the amount the consumer owes due to late fees and interest; and (4) if the debt relief provider requests or requires the customer to place funds in a dedicated bank account at an insured financial institution, that the customer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty, and receive all funds in the account. Together, these disclosure requirements will ensure that consumers have the material information they need to make an informed decision about whether to enroll in a debt relief program.

Section 310.3(a)(1)(viii) of the proposed rule contained three other debt relief-specific disclosures. After consideration of the record, the Commission has decided to delete those disclosures:

- that creditors may pursue collection efforts pending the completion of the debt relief service (proposed Section 310.3(a)(1)(viii)(D)), which has been combined with another required disclosure;
- that any savings from the debt relief program may be taxable income (proposed Section 310.3(a)(1)(viii)(F)); and
- that not all creditors will accept a reduction in the amount owed (proposed § 310.3(a)(1)(viii)(c)).

The Final Rule also modifies the preamble to the general disclosure requirements in § 310.3(a)(1) to clarify that sellers or telemarketers must make disclosures before a consumer **consents to pay** for the goods or services offered.

This section discusses: (1) the debt relief-specific disclosure obligations added as a result of this proceeding, (2) the disclosures in the proposed rule that were not adopted in the Final Rule, (3) the general disclosure obligations under the TSR, (4) the timing of the required disclosures, and (5) additional disclosures that commenters recommended, but which the Commission did not adopt in the Final Rule.

1. Amendments to Section 310.3(a)(1): Debt Relief-Specific Disclosure Obligations

In assessing the six new disclosures in the proposed rule, the Commission considered whether omitting the information would cause consumers to be misled, the need for those disclosures, and their likely effectiveness. The Commission applies its deception standard in determining the legal basis for disclosures: an act or practice is deceptive if (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation is material to consumers.[453] Injury is likely if inaccurate or omitted information is material.[454] A claim is deceptive if it either misrepresents or omits a material fact such that reasonable consumers are likely to be misled.[455] Application of

[449] *See* Summary of Communications (July 9, 2010) at 1 (consumer group representative stated that the consumer should be able to withdraw all funds from the account at any time).

[450] *See, e.g., FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (alleging that defendants regularly withdrew money from consumers' trust accounts to pay their operating expenses); *FTC v. Edge Solutions, Inc.*, No. CV-07-4087, First Interim Report of Temporary Receiver at 3 (E.D.N.Y. Oct. 23, 2007) (noting that "customer funds in the amount of $601,520 were missing from the receivership defendants' accounts and unaccounted for by the receivership defendants"); *see also* GAO Testimony, *supra* note 50, at 27 (discussing a case study in which the U.S. Department of Justice prosecuted a debt settlement company for using funds in customer escrow accounts to cover overdrafts from the defendant's operating account and make payments to his wife).

[451] The safeguards appear to be consistent with the practices of many industry members. For example, a service provider stated that it is an independent firm and the "special purpose" or dedicated bank accounts that its system manages are owned and controlled by consumers. GCS at 1-2.

[452] Pursuant to the pre-existing TSR, in an outbound telephone call or an internal or external upsell, sellers and telemarketers of debt relief services must promptly disclose several key pieces of information: (1) the identity of the seller; (2) the fact that the purpose of the call is to sell goods or services; and (3) the nature of the goods or services being offered. 16 CFR 310.4(d). They must also, in any telephone sales call, disclose cost and certain other material information before consumers pay. 16 CFR 310.3(a)(1). As discussed in Section III.D.2., the Commission received very few comments addressing these disclosures.

[453] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-83 (1984) ("Deception Policy Statement"); *see also FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001).

[454] Deception Policy Statement, *supra* note 453, at 171.

[455] *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 716 (9th Cir. 1976); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 300 (D.D.C. 1983).

In some circumstances, silence also may be deceptive. Silence associated with the appearance of a particular product, the circumstances of a specific transaction, or ordinary consumer expectations represents that the product is reasonably fit for its intended purpose. Deception Policy Statement, *supra* note 453, at 170. For example, in connection with the sale of a car, consumers assume in the absence of other information that the car can go fast enough for

Continued

this analysis leads the Commission to conclude that each of the four items of information that the provisions adopted herein require to be disclosed are material and that, absent disclosure of these items of information, consumers seeking debt relief draw reasonable but incorrect conclusions about the benefit of purchasing such service, and are therefore likely to be misled. Thus, failure to disclose any of these four items of information is a deceptive practice.

a. Need for Debt Relief-Specific Disclosures

Commenters generally supported the proposed rule's approach of requiring debt relief-specific disclosures in connection with the telemarketing of debt relief services or programs. NAAG supported the proposed disclosures, stating that although they alone might not be sufficient to curb abusive conduct by debt relief providers, consumers are entitled to the basic information that the proposed disclosures provide.[456] A coalition of 19 consumer advocacy groups "strongly" supported the proposed disclosures, noting that they will ensure that consumers understand how debt relief services work and whether the program will satisfy their needs.[457]

Most debt relief providers also supported the proposed disclosures.[458] One debt relief industry trade association recommended that the Rule require "full and complete disclosure" to consumers of the risks of debt settlement before a consumer enters a plan, noting that the FTC's proposed new disclosures were similar to the model disclosures contained in trade association guidelines.[459] Individual debt relief providers expressed support for the proposed disclosures because consumers who fully understand all aspects of a debt relief program are more likely to complete it successfully,[460] and because the disclosures would make it more difficult for fraudulent companies to operate.[461]

A comment submitted by an association of credit counseling agencies also supported the proposed disclosures for debt relief services.[462] An individual nonprofit CCA commented that the proposed disclosures are necessary to ensure that consumers understand that some of the money they pay to the provider goes towards the provider's fees rather than to pay creditors.[463]

b. Debt Relief-Specific Disclosures

As explained in the NPRM and in Section I above, consumers often do not understand the mechanics of debt relief, making them more susceptible to deception.[464] The debt relief-specific disclosures are intended to ensure that consumers have accurate information, thereby enabling them to make informed purchasing decisions and that they are not misled by the omission of key information. As modified in the Final Rule and discussed herein, § 310.3(a)(1) explicitly mandates that all of the required disclosures be made "[b]efore a customer consents to pay for goods or services offered." Language added to the existing Footnote 1 of the Rule clarifies that the provider must make the required disclosures before the consumer enrolls in an offered program.[465]

After review and analysis of the record, the Commission has adopted three of the six proposed disclosures in the Final Rule, having determined that the remaining three are duplicative or likely to detract from the efficacy of the required disclosures. It also has adopted one additional disclosure regarding the use of dedicated bank accounts.

The next three sections discuss the four disclosures adopted in the Final Rule.

(1) Sections 310.3(a)(1)(viii)(A) and (B)

The proposed rule would have required telemarketers of debt relief services to make the following disclosures:

- the amount of time necessary to achieve the represented results and, if the service entails making settlement offers[466] to customers' creditors, the specific time by which the provider will make a bona fide settlement offer to each creditor or debt collector;[467] and
- to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money, or the percentage of each outstanding debt, that the customer must accumulate before the provider will make a bona fide settlement offer to each creditor or debt collector.[468]

These disclosures were designed to prevent deception by ensuring that consumers understand the time and monetary commitment necessary for the plan to succeed, and thus the risks involved in enrolling in a debt relief program in which the provider may not begin to negotiate relief for months or even years.

The Commission received several comments on these two disclosures. Several commenters and forum participants recommended modifying the disclosures to allow estimates or projections of the time for program completion and the amount a consumer would have to save.[469] One industry trade association explained that it likely would be impossible for a provider to state with certainty the time by which it will achieve settlements or the amount of money the consumer would have to accumulate before the provider made a settlement offer.[470] Similarly, a debt relief provider objected to the time disclosure in proposed § 310.3(a)(1)(viii)(A) because it failed to account for market conditions that are "beyond anyone's range of knowledge other than a best guess."[471] Other commenters echoed these views.[472]

ordinary use on a freeway. If the car cannot, the seller's silence on this point may have been deceptive.

[456] NAAG (Oct. 23, 2009) at 11.

[457] CFA at 2-3, 20; *see also* MN AG at 2.

[458] FCS (Oct. 29, 2009) at 3; Able (Oct. 21, 2009) at 30; CareOne at 4; CSA at 1; DS at 18; DMB (Oct. 29, 2009) at 5; DSA/ADE at 1-2.

[459] TASC (Oct. 26, 2009) at 15. TASC, however, objected to the proposed disclosures on the ground that they were targeted primarily to the risks of debt settlement and did not inform consumers adequately of the risks of nonprofit credit counseling and bankruptcy. *Id.* As explained above, the FTC does not have jurisdiction to regulate the activities of bona fide nonprofit credit counselors. Moreover, the Commission believes that the revised debt relief-specific disclosures in the Final Rule adequately address the most harmful conduct by debt relief providers, including debt settlement providers, for-profit credit counselors, and debt negotiators.

[460] FCS (Oct. 29, 2009) at 3.

[461] CSA at 1.

[462] AICCCA at 2; *see also* CCCS CNY at 2 (full disclosures will give consumers accurate information on which they can base their financial decisions and possibly help consumers put money they would have spent on debt relief toward more pressing bills).

[463] GP (Oct. 22, 2009) at 1.

[464] *TSR Proposed Rule,* 74 FR at 42001.

[465] 16 CFR 310.3(a)(1) & n.1.

[466] A settlement offer is an offer to extinguish an unsecured debt for less than what the debtor owes the creditor or debt collector. *See* Weinstein (Oct. 26, 2009) at 6 (*see* attached Weinstein paper at 5).

[467] *TSR Proposed Rule,* 74 FR at 42019. In so doing, the provider would have to disclose the fact that negotiations will not take place with all creditors simultaneously but rather sequentially, if such is the case. The record supports disclosure of this information because consumers may not understand the amount of time necessary to achieve the represented results or that there may be prerequisites to obtaining debt relief. *See* CFA (Grant), Tr. at 175.

[468] *TSR Proposed Rule,* 74 FR at 42019.

[469] Loeb (Mallow), Tr. at 204; TASC (Housser), Tr. at 202; CFA (Grant), Tr. at 207; USOBA (Oct. 26, 2009) at 15-17; FCS (Oct. 29, 2009) at 3.

[470] USOBA (Oct. 26, 2009) at 15-16; *see also* FCS (Oct. 29, 2009) at 3; DS at 19 ("the exact amount a given creditor will settle a debt account for and the precise time the same will be accomplished varies.").

[471] Able (Oct. 21, 2009) at 26.

[472] FCS (Oct. 29, 2009) at 3 ("We support these disclosures, in principle, but recommend revision to the extent they would require a company to determine in advance the timing and order in which each specific debt will be settled. Creditors

Based on the record, the Commission has determined to require these two disclosures, but is clarifying that providers may make a good faith estimate of the necessary time and money commitments entailed in the service. Providers must have a reasonable basis to support their estimates. With respect to the paragraph (A) disclosure, the provider's estimate of the amount of time necessary to achieve the represented results should be based on the type of program or service offered, the consumer's particular debts, and available historical data regarding similarly-situated consumers' experiences with creditors. With respect to the paragraph (B) disclosure, the provider should base its estimate on its historical experience and other information indicating the threshold amount of money that, if offered to the particular creditor, is reasonably likely to result in a successful settlement that is consistent with results represented by the provider.[473] Providers should keep consumers informed throughout the duration of the program of any changes in creditor policies that may impact the projected time or amount of money needed before completion.

The Final Rule makes two modifications to the language of the proposed rule to accomplish this clarification. Paragraph (A) in the proposed rule would have required disclosure of "the *specific* time by which the debt relief service provider will make a bona fide settlement offer." The Final Rule deletes the word "specific," which could have been read to require a time certain rather than a good faith estimate.[474] Paragraph (B) in the proposed rule required disclosure of "the *specific* amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer." Like the revision of paragraph (A), the Final Rule deletes the word "specific," which could have been read to require a disclosure with certainty of the amount of money or percentage of debt, rather than a good faith estimate. As modified, these provisions will help ensure that consumers are not deceived and have the information they need to make informed decisions, while recognizing that certain information may only be estimated at the time disclosure is required.

(2) Section 310.3(a)(1)(viii)(C)

Section 310.3(a)(1)(viii)(C) of the Final Rule adopts the proposed rule's requirement that debt relief providers whose programs entail consumers not making timely payments to creditors disclose that the program may affect the consumer's creditworthiness; may result in continued collection efforts, including lawsuits; and may increase the amount the consumer owes due to late fees and interest.[475] The adverse consequences of not paying creditors would be highly material to reasonable consumers in deciding whether to purchase the service or, if they do purchase it, whether to stop paying creditors. This disclosure is especially important in the debt settlement context where many consumers must choose between paying their creditors or saving funds for possible settlements.[476]

Debt settlement providers often encourage consumers to stop paying creditors, or consumers stop on their own because they simply cannot afford simultaneously to make monthly payments to their creditors, set aside funds for settlements, and pay fees to the debt settlement company.[477] The record shows, however, that consumers' credit ratings are harmed, often substantially, as a result of not making payments to creditors.[478] Lower credit scores raise the cost of obtaining credit – or make it more difficult to obtain it at all.[479] Another serious and negative consequence that may result from a consumer's decision to enter a debt relief plan in which he or she stops paying creditors is the accrual of late fees or interest on the accounts, which can significantly increase the consumer's ultimate obligation.[480] Finally, if a consumer stops making payments, his likelihood of being sued by creditors will increase. Indeed, even while a consumer is enrolled in a debt relief program, creditors and debt collectors may continue to make collection calls pending resolution of the consumer's debts and may proceed with lawsuits and subsequent enforcement of any judgments, such as through garnishment of wages.[481] Disclosure of these potentially serious negative consequences is necessary to prevent deception and the consumer injury that arises from consumers enrolling in debt relief plans and ceasing to pay creditors.[482]

The Commission received comments both supporting and opposing this proposed disclosure. The American Bankers Association filed a comment in support, arguing that the disclosure will help consumers understand the increased risks to their creditworthiness if they stop communicating with their creditors.[483] TASC also voiced support, but expressed concern that the disclosure was linked primarily to debt settlement programs. TASC therefore recommended that the Commission require bankruptcy providers to make the same disclosure about the effect of

vary in their willingness to make concessions, and their position often changes with time. Debt settlement firms must have the latitude to make the most favorable settlements for a client, and this requires flexibility to determine the order and timing of settlements."); *see* CRN (Oct. 8, 2009) at 6 ("Amounts and terms of settlement fluctuate and are hard to predict, so setting a predetermined time or amount of settlement might prevent debt relief providers from getting consumers the best settlement as quickly as possible. Such a result could occur if a creditor unexpectedly makes a settlement offer to a consumer that, if accepted, would disrupt the previously disclosed schedule of time and amount of settlement for the other enrolled debts."); MD (Oct. 26, 2009) at 29-30.

One provider objected to the money accumulation proposed disclosure (§ 310.3(a)(1)(viii)(B)) because programs that allow for payments over time do not require accumulation of the entire amount needed to settle the debt. Able (Oct. 21, 2009) at 26. The Commission believes that the disclosure is warranted even if the consumer only has to accumulate a lesser amount, since that amount still may be substantial, especially for consumers who are in financial distress.

[473] Thus, if a debt settlement provider expects that a creditor will make an initial settlement offer for 95% of the debt owed, but it knows that consumers historically settle debts with that creditor for 60% after a certain amount of time has passed, compliance with this provision requires disclosure of the estimated time it would take and the amount of money the consumer would have to accumulate before the 60% settlement offer is obtained.

[474] The other disclosures required in subsections (A) and (B) do not use the term "specific."

[475] *TSR Proposed Rule*, 74 FR at 49019. In the proposed rule, this was § 310.3(a)(1)(viii)(E).

[476] *See* CFA at 9.

[477] *TSR Proposed Rule*, 74 FR at 41995. *See* WV AG (Googel), Tr. at 44-45.

[478] *See* AFSA at 2; CFA at 18; CFA (Plunkett), Workshop Tr. at 102 (noting that the length of time it takes to achieve settlement, combined with withheld payments, has a negative effect on consumers); *see also* Fair Isaac Corp., *Understanding Your FICO Score*, at 7 (noting that payment history typically is the most important factor used to determine a consumer's FICO score), *available at* (*http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf*); see also TSR Proposed Rule, 74 FR at 42002.

[479] In addition, as frequently noted by the Commission, a consumer's credit score can impact the availability and/or terms of a wide variety of benefits, including loans, employment, rental property, and insurance. *See, e.g.*, FTC, Need Credit or Insurance? Your Credit Score Helps Determine What You'll Pay, *available at* (*http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre24.shtm*).

[480] The Credit CARD Act of 2009 sets some limits on the fees and penalties that credit card companies can charge delinquent consumers. Pub. L. No. 111-24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009). That Act, however, does not prohibit default fees and thus does not diminish the importance of this disclosure.

[481] Third party collectors are governed by the FDCPA. 15 U.S.C. 1692a(6), 1692c. Creditors collecting their own debts are not subject to the FDCPA, but are subject to Section 5 of the FTC Act.

[482] *TSR Proposed Rule*, 74 FR at 49002; *see* JH (Oct. 24, 2009) at 6.

[483] ABA at 4.

nonpayment on creditworthiness.[484] The Commission notes that bankruptcy providers who are telemarketers of debt relief services would be subject to the TSR. Thus they would be required to make the TSR's disclosures unless they have a face-to-face meeting with the client.[485] Moreover, consumers seeking to file bankruptcy must participate in pre-filing credit counseling with a certified credit counselor.[486] These credit counselors generally inform consumers that bankruptcy negatively impacts their credit rating, remains on their credit report for ten years, and may make obtaining credit in the future more difficult and expensive.

The Final Rule requires these disclosures to be made only "to the extent that any aspect of the debt relief service relies upon or results in the customer failing to make timely payments to creditors or debt collectors." In general, DMPs do not rely upon the customer failing to make timely payments to creditors or debt collectors. Thus, this disclosure typically will not apply to debt relief providers offering DMPs.

One debt relief provider objected to the required disclosures on the basis of a "pilot survey" it conducted of its customers that purported to show that the customers' FICO scores were higher at completion of the program than at enrollment. Thus, it argued, the creditworthiness disclosure would be inaccurate.[487] The survey, however, only included 12 consumers, and the comment provided no information indicating that these consumers were representative of the universe of consumers enrolled in the program.[488] Moreover, the survey only measured FICO scores at enrollment and completion, providing no information regarding whether consumers' scores deteriorated during the time that they were enrolled in the debt settlement program and, in many cases, not paying their creditors. For these reasons, the Commission does not consider the survey to be reliable or probative.

The Commission addressed in the NPRM some of the concerns with this disclosure that were raised by the comments. Specifically, one debt relief provider objected to the disclosure because it relates to actions taken by creditors against consumers that are not directly caused by the consumer's enrollment in the debt relief program.[489] In the NPRM, the Commission acknowledged that some consumers considering debt relief already have stopped making payments and may be subject to late fees or other charges regardless of whether they enroll in the program.[490] The record shows, however, that in a significant number of instances, consumers are induced by the provider's instructions not to make payments that they otherwise would have made.[491] This is particularly true for debt settlement services.[492] Moreover, even as to those consumers who already have ceased paying their creditors, the provider's instruction may persuade them not to resume payments. A disclosure about the adverse consequences of not paying creditors is therefore highly material to many consumers' purchase or use decisions. For these reasons, the Final Rule includes § 310.3(a)(1)(viii)(C) as proposed.

(3) New Section 310.3(a)(1)(viii)(D)

Section 310.3(a)(1)(viii)(D) of the Final Rule imposes an additional disclosure requirement on debt relief providers who request or require the customer to place money for its fee and for payment to customers' creditors or debt collectors, in a dedicated bank account at an insured financial institution. These providers must disclose that the consumer owns the funds held in the account and may withdraw from the debt relief service at any time without penalty and receive all funds currently in the account. This information would be highly material to reasonable consumers in deciding whether to enroll in the service; the right to cancel and receive a refund is a key right for consumers under the rule, but it is only meaningful if consumers know that they have the right.[493]

2. Proposed Disclosures Not Adopted in the Final Rule

After reviewing the record, and as explained below, the Commission has decided not to adopt in the Final Rule three of the disclosures included in the proposed rule, because they are largely duplicative or likely to detract from the efficacy of the required disclosures. The omitted disclosures are: (1) that not all creditors will accept a reduction in the amount of debt owed; (2) that creditors may pursue collection efforts pending the completion of the debt relief services; and (3) that any savings from the debt relief program may be taxable income.

a. Proposed Section 310.3(a)(1)(viii)(C)

Section 310.3(a)(1)(viii)(C) of the proposed rule would have required telemarketers of debt relief services to disclose that "not all creditors or debt collectors will accept a reduction in the balance, interest rate, or fees a customer owes such creditor or debt collector."[494] USOBA supported this disclosure, stating it is one of the disclosures that USOBA encourages its members to make.[495] Some creditors refuse to work with third-party debt relief providers in certain situations, or not all,[496] and many consumers may not realize this is the case. It is difficult to predict with certainty, however, the circumstances under which a particular creditor will or will not be willing to negotiate the debt with a third party.[497] In fact, even those creditors that claim not to work with debt relief providers may do so in certain situations.[498] One commenter explained that, while some creditors

484 TASC (Oct. 26, 2009) at 15.

485 *See* 16 CFR 310.6(b)(3) (exempting "[t]elephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c)").

486 11 U.S.C. 109(h); AICCCA at 1.

487 MD (Oct. 26, 2009) at 30.

488 *Id.*; MD (Mar. 22, 2010) at E-2.

489 *See* Able (Oct. 21, 2009) at 26. The commenter noted, however, that his company currently makes this disclosure to consumers.

490 *TSR Proposed Rule*, 74 FR at 42002.

491 The stop-payment instruction is especially persuasive in those instances when the provider misrepresents or obscures the fact that some or all of the consumer's payments to the provider are going towards its fees, rather than the consumer's debts. *See* SBLS at 4; *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM, Mem. Supp. Mot. T.R.O. at 8-9 (D. Colo. Mar. 20, 2007) ("Defendants lead consumers to conclude that, once enrolled, the Defendants in turn will disburse consumers' monthly payments to the appropriate creditors every month."); *Illinois v. SDS West Corp.*, No. 09CH368 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. 2009); *Illinois v. Debt Relief USA, Inc.*, No. 09CH367 (Cir. Ct. of 7th Jud. Dist., Sangamon Cty. 2009); *North Carolina v. Knight Credit Servs., Inc.* (Sup. Ct. Wake Cty. 2004).

492 *Supra* note 73.

493 *See* Summary of Communications (June 16, 2010) at 2 (meeting with consumer groups).

494 *TSR Proposed Rule*, 74 FR at 42019.

495 USOBA (Oct. 26, 2009) at 14.

496 *TSR Proposed Rule*, 74 FR at 42002; *see, e.g.*, CFA (Plunkett), Workshop Tr. at 101 ("[T]here is no guarantee . . . or reasonable chance of a guarantee of a reduction in the amount of debt owed by consumers who meet required conditions. In fact, some creditors insist that they won't settle."); American Express (Flores), Tr. at 164 ("[O]ur policy is not to . . . accept settlements from debt settlement companies."); *see also, e.g.*, Phil Britt, *Debt Settlement Companies Largely Ignored by Banks*, Inside ARM, Nov. 3, 2008(noting statement by Discover Financial Services spokesman that "[w]e choose not to work with debt settlement companies"), *available at* (*http://www.insidearm.com/go/arm-news/debt-settlement-companies-largely-ignored-by-banks*).

497 MD (Oct. 26, 2009) at 30; FCS (Oct. 29, 2009) at 3; ABA at 2; CRN at 6; CFA (Grant), Tr. at 175.

498 *See* USOBA (Ansbach), Tr. at 75-76 ("[O]ne of our largest members had a financial institution [that allegedly does not work with debt settlement companies] call up and say, we would like to scrub our financial data against yours and offered [settlements of] cents on the dollar.").

might refuse to negotiate a debt balance in the early stages of delinquency, rarely would they continue to do so as the account becomes increasingly delinquent. This is the case because the creditor typically collects more from negotiation with a debt relief program than through other alternatives.[499] One debt relief provider commented that it is very rare that an account cannot be negotiated, especially after the creditor charges off the debt and sells it to a debt buyer who, in turn, initiates its own collection efforts.[500]

In sum, the record indicates that many creditors and debt collectors settle at least some debts for some consumers, and creditor policies and practice may change depending on the length and severity of the delinquency, other features of the debt, or external factors such as the creditor's need for liquidity.[501] Accordingly, the usefulness of a general disclosure about the fact that not all creditors will negotiate debts would vary from case to case. In addition, eliminating this disclosure from the Final Rule reduces the amount of information consumers must absorb, thus making the remaining disclosures more effective, and lessens the burden on industry.[502] Moreover, the Final Rule prohibits any misrepresentation by a debt relief provider relating to whether creditors or debt collectors will modify a debt.[503] For these reasons, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(C)).

b. Proposed Section 310.3(a)(1)(viii)(D)

Proposed § 310.3(a)(1)(viii)(D) would have required debt relief providers to disclose "that pending completion of the represented debt relief services, the customer's creditors or debt collectors may pursue collection efforts, including initiation of lawsuits."[504] This information could be valuable to consumers considering whether to purchase the service and whether to stop paying their creditors.[505] However, another of the proposed disclosures – that, if applicable, the customer may be sued by creditors or debt collectors – essentially makes the same point: enrollment in a debt relief program does not prevent creditors and collectors from continuing to pursue the debtor. Thus, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(D).[506]

c. Proposed Section 310.3(a)(1)(viii)(F)

Proposed § 310.3(a)(1)(viii)(F) would have required that a telemarketer of debt relief services disclose "that savings a customer realizes from use of a debt relief service may be taxable income."[507] It is likely that many consumers do not understand this fact, which would limit the financial benefits of the service.[508] This provision generated only a small number of comments. According to one commenter, several of his clients claimed that they would not have enrolled in the debt relief program if they had been aware of the tax consequences.[509] Consumer advocates also supported this disclosure.[510]

Other commenters objected to this proposed disclosure. One asserted that the information is not relevant to all consumers, such as those who are insolvent before or at the time of the forgiveness of debt.[511] NACCA commented that this disclosure is not accurate for consumers who enroll in a DMP, which generally does not involve debt forgiveness and thus would not result in a tax liability.[512]

After reviewing the record, the Commission has decided not to adopt proposed § 310.3(a)(1)(viii)(F) as part of the Final Rule. As noted by some of the commenters, in many cases this disclosure might not be accurate. Further, as is true with the other two proposed disclosures that are omitted from the Final Rule, this disclosure would add verbiage and complexity to the information consumers receive, and thereby potentially diminish the effectiveness of the more important disclosures.[513]

3. Application of Section 310.3(a)(1) to Debt Relief Services: General Disclosure Obligations

Under the Final Rule, debt relief service providers that promote their services through inbound or outbound telemarketing are subject both to the debt relief-specific disclosure requirements and the existing disclosure and other provisions of the TSR. Consumer advocacy groups noted the importance of applying the TSR's pre-existing disclosure requirements to the telemarketing of debt relief services.[514] Three of those pre-existing disclosures would provide critical information for consumers in the context of debt relief services: the total cost of the services; material restrictions, limitations, or conditions on purchasing, receiving, or using the services; and the seller's refund policy.[515]

Forum participants agreed that a total cost disclosure is important in the sale of debt relief services. This is especially true for debt settlement plans, for which the costs are often substantial and complex.[516] Similarly, in the sale of debt management plans, disclosure of total costs is crucial to ensure that consumers are not misled about the amount of those costs.[517]

[499] Ahle (Oct. 21, 2009) at 26.

[500] CRN at 6.

[501] USOBA (Ansbach), Tr. at 75-76.

[502] Consumer research shows that consumers' ability to process information and make rational choices may be impaired if the quantity of the information is too great. *See generally,* Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment*, 21(3) Psychology & Marketing 159, 177 (Mar. 2004); Yu-Chen Chen et al., *The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment*, 8(1) Electronic Commerce Research and Applications 48 (2009).

[503] 16 CFR 310.3(a)(2)(x).

[504] *Id.* at 42019.

[505] *See* AFSA at 2; ABA at 4; TASC (Oct. 26, 2009) at 15.

[506] *TSR Proposed Rule*, 74 FR at 49019. Some commenters suggested additional disclosures related to lawsuits, *e.g.* that the longer a consumer is enrolled in a debt relief program the more likely the consumer is to be sued and possibly have wages or bank accounts garnished. CRN at 6; MN LA at 1. The Commission believes that the disclosure in Section 310.3(a)(1)(viii)(C) is adequate to inform consumers of the most common risks involved in debt relief, such as the possibility of continuing collection efforts and lawsuits.

[507] *TSR Proposed Rule*, 74 FR at 42019.

[508] IRS, *Publication 525 - Taxable and Nontaxable Income* 19-20 (Feb. 19, 2009) ("Generally, if a debt you owe is canceled or forgiven, other than as a gift or bequest, you must include the canceled amount in your income."), *available at* (*http://www.irs.gov/pub/irs-pdf/p525.pdf*).

[509] RDRI at 5.

[510] CFA at 20. *See* CU (Hillebrand), Tr. at 165-66; *see also* DSUSA (Craven), Workshop Tr. at 91 ("Amounts greater than $600 in savings obtained through a settlement may be reported to the IRS. Again, this has to be disclosed to consumers."); AMCA (Franklin), Workshop Tr. at 223 ("Unless they get that early disclosure that they may have the tax consequence, they may opt for the – what sounds to be the better of the two, which would be the debt settlement, which might not be the best solution for them. So, there has to be some sort of a disclosure that says look, this is it. If you're going to settle a debt for greater than $600, you're going to have an IRS tax consequence this year.").

[511] Able (Oct. 21, 2009) at 26; *see also* Franklin at 22 ("a large portion of debt settlement clients are not actually solvent"); IRS, *Publication 525 - Taxable and Nontaxable Income* 20 (Feb. 19, 2009) ("Do not include a canceled debt in your gross income . . . [if] the debt is cancelled when you are insolvent."), *available at* (*http://www.irs.gov/pub/irs-pdf/p525.pdf*).

[512] NACCA at 3.

[513] The Commission encourages debt relief providers to advise consumers about the tax consequences in those cases where such consequences are likely to exist.

[514] CFA at 20.

[515] *See* 16 CFR 310.3(a)(1)(i)-(iii).

[516] According to TASC, the median fee under the predominant debt settlement model calls for a consumer to pay the equivalent of 14% to 18% of the debt enrolled in the program. Using this formula, a consumer with $20,000 in debt would pay between $2,800 and $3,600 for debt settlement services. *See* USOBA (Keehnen), Tr. at 209.

[517] *See* JH (Jan. 12, 2010) at 2. In the FTC cases brought against sham nonprofit credit counselors, consumers allegedly were misled not only as to the total costs, but also that the fees were "voluntary contributions" used to offset the operating expenses

Continued

Several forum participants stated that at least some debt service providers currently disclose costs to consumers even when they are not required to do so.[518] Often, however, fee disclosures made in the telemarketing call are contradicted by the written contract.[519] Many providers say little, if anything, about fees or misrepresent the amount and/or timing of fee payments.[520] Broadcast advertisements and websites offering debt relief services typically are silent as well about how much a consumer must pay for the advertised service.[521] The complexity of the fee structure used by many debt relief providers exacerbates the potential for consumer confusion or deception.[522] As a result, consumers often enroll in programs under a false impression or are confused about what they have to pay or when they have to pay it. Bringing inbound calls within the coverage of § 310.3(a)(1) will help to diminish this problem. Furthermore, while § 310.3(a)(1) only requires disclosure of the total fee, the failure to clearly and conspicuously disclose material payment terms, such as the fees for individual settlements, may mislead consumers and thus constitutes a deceptive practice prohibited by Section 5 of the FTC Act.

In addition to fees, § 310.3(a)(1)(ii) of the TSR requires providers to disclose "[a]ll material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer."[523] Two common conditions that commenters suggested should be disclosed are (1) the consumer must have a minimum amount of debt to be eligible.[524] and (2) the debt relief services will extend only to unsecured debt, if that is the case.[525] The Commission believes both of these conditions are material and must be disclosed under the TSR.

Section 310.3(a)(1)(iii) of the TSR requires that if the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, it must disclose this policy to consumers.[526] Further, if the seller or telemarketer makes a representation about a refund policy, it must state all material terms and conditions of the policy. Application of this provision to providers of debt relief services is important in light of the record evidence that many consumers either are not apprised that refunds are available or are misled about key limitations and conditions of the refund policy.[527]

4. Timing of Required Disclosures

The TSR specifies the point in the transaction at which disclosures must be made. The pre-existing TSR required all disclosures to be made "[b]efore a customer pays for goods or services offered."[528] The proposed rule would have modified this language by adding the phrase "and before any services are rendered." In the Final Rule, the Commission has determined to modify the TSR language in a different manner from the proposed rule. Specifically, § 310.3(a)(1) of the Final Rule now provides that all required disclosures must be made "[b]efore a customer consents to pay." This formulation more closely comports with the Commission's intent in the original language to trigger the disclosure requirement before any agreement is executed, when the information is most useful, rather than only after the consumer has made a payment on that agreement.[529] Moreover, the phrase "consents to pay" encompasses the conduct that the Commission has previously identified as triggering the disclosure requirement under the pre-existing TSR.[530] Under the Final Rule, the disclosures must be made before any act or communication that signifies the consumer's consent to pay, such as sending full or partial payment; providing credit card, bank account or other billing information, stating agreement to a transaction, or invoking an electronic process used to electronically sign an agreement. This change applies to all disclosures required by the TSR, and not just those

of the allegedly nonprofit service provider. *See, e.g., FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md. filed Nov. 19, 2003) (alleging that, "[i]n response to the question, 'How much will it cost me to be on the Debt Management Program,' AmeriDebt's website . . . stated, 'Due to the fact that AmeriDebt is a nonprofit organization, we do not charge any advance fees for our service. We do request that clients make a monthly contribution to our organization to cover the costs involved in handling the accounts on a monthly basis.'" In fact, the defendants allegedly retained each consumer's first monthly payment as a fee without notice to the consumer.).

[518] *See* USOBA (Keehnen), Tr. at 209.

[519] *See, e.g., FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx), Opp. to FTC Mot. Summ. J. at 12 (C.D. Cal. filed Aug. 3, 2006) (alleging that defendant failed to disclose to consumers that they would have to pay 45% of their total program fees upfront, before any payments would be made to the consumer's creditors; telemarketing claims contradicted by subsequent written disclosures). Even if true, subsequent disclosures generally are not sufficient to correct misrepresentations made in the initial communications. *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975) (citing *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497; *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951)); Deception Policy Statement, *supra* note 453, at 182; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive despite written qualification); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999) (advertisement was deceptive even though a disclaimer in a written contract later signed by consumers contained accurate, non-deceptive information).

[520] *Supra* notes 79, 362; *see also* Loeb (Mallow), Tr. at 206.

[521] As noted above, *supra* note 223, FTC staff found that only 14 of 100 debt settlement websites reviewed disclosed the specific fees that a consumer will have to pay upon enrollment in the service. An additional 34 out of the 100 websites mentioned fees but did not provide specific fee amounts.

[522] The Commission previously has explained compliance obligations when marketing installment contracts, some of which are particularly applicable to debt relief services. Specifically, in an earlier amendment to the TSR, the Commission noted that "it is possible to state the cost of an installment contract in such a way that, although literally true, obfuscates the actual amount that the consumer is being asked to pay." *TSR Proposed Rule*, 67 FR 4492, 4502 (Jan. 30, 2002). The Commission went on to state that "[t]he Commission believes that the best practice to ensure the clear and conspicuous standard is met is to *do the math for the consumer* wherever possible. For example, where the contract entails 24 monthly installments of $8.99 each, the best practice would be to disclose that the consumer will be paying $215.76. In open-ended installment contracts, it may not be possible to do the math for the consumer. In such a case, particular care must be taken to ensure that the cost disclosure is easy for the consumer to understand." *Id.* at n.92. (emphasis supplied, internal quotations omitted).

[523] 16 CFR 310.3(a)(1)(ii).

[524] DMB (Oct. 29, 2009) at 5-6.

[525] *See* MN LA (Elwood), Tr. at 251. Another commenter proposed modifying § 310.3(a)(1)(ii) to require that only "reasonable" material restrictions be disclosed. Able (Oct. 21, 2009) at 25. The definition of materiality – "likely to affect a person's choice of, or conduct regarding, goods or services" – is a well established limiting principle codified in the Commission's Deception Policy Statement, *supra* note 453; *see also TSR Final Rule*, 60 FR at 43845 (citing *In re Thompson Med. Co.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)). The Commission declines to change it in this Rule.

[526] 16 CFR 310.3(a)(1)(iii). This requirement reflects the Commission's determination that a seller's unwillingness to provide refunds is a material term about which a consumer must be informed before paying for goods or services.

[527] *See* WV AG (Googel), Tr. at 84; CFA at 9; *see also, e.g., FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004); *FTC v. Debt Mgmt. Found. Servs.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004).

[528] 16 CFR 310.3(a)(1).

[529] In the SBP to its TSR amendments in 2003, the Commission interpreted the original TSR language to mean that telemarketers must make required disclosures "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment," *i.e.*, before the agreement is executed. *TSR Amended Rule*, 68 FR at 4599 (citing the original Rule's TSR Compliance Guide); *see also* Loeb (Mallow), Tr. at 212-13 ("the FTC law of [when a company must make disclosures under the TSR] is pretty clear, it has to be prior to contracting."); CFA at 20.

[530] *See TSR; Final Amended Rule*, 68 FR at 4599 (disclosures must be made "[b]efore a seller or telemarketer obtains a consumer's consent to purchase, or persuades a consumer to send any full or partial payment").

specific to debt relief services. In the case of debt relief services, a footnote added to the Final Rule clarifies that the provider must make the required disclosures before the consumer enrolls in an offered program. Thus, debt relief providers must make the disclosures at the time the provider is marketing the service and before the consumer signs an enrollment contract or otherwise agrees to enroll, and not at the time the consumer executes a debt relief agreement pursuant to the advance fee ban provision.

5. Recommended Additional Changes to the Disclosure Provisions Not Adopted in the Final Rule

Commenters and forum participants recommended several additional modifications to the proposed disclosures that the Commission has decided not to adopt. First, several consumer advocates proposed that the Final Rule require debt relief providers to disclose their dropout rate, *i.e.*, the percentage of consumers who enroll in a program but drop out before completing it.[531] The Commission agrees that the dropout rate of a particular program is likely to be valuable information for consumers considering enrollment in that program. The Commission has concluded, however, that requiring disclosure of dropout rates is unnecessary and would be difficult to implement. As discussed in detail in Section III.E.b, providers making savings claims must use a calculation that takes into account all of the provider's customers, including those who dropped out, in order for the claim to be truthful and non-deceptive. In addition, there is no single defined way to calculate a dropout rate, and any disclosure requirement would have to be very prescriptive in specifying the formula the provider would have to use to calculate the rate, including all of the different variables that must be factored in.[532]

Second, a commenter recommended that the Rule require that disclosures be in writing to allow consumers additional time to consider their decision, rather than immediately enrolling in a program over the phone.[533] Two forum participants, on the other hand, recommended against requiring written disclosures, asserting that they would come too late in the consumer's decision- making process[534] and noting that consumers often sign documents with written disclosures they do not understand.[535]

The Final Rule does not specify the precise manner or mode in which disclosures must be made.[536] The Commission has determined that it is unnecessary to require that disclosures be in writing, but notes that they must be made in a "clear and conspicuous" manner, prior to the time that the consumer enrolls in the service.[537] The Commission concludes that these requirements, in conjunction with the advance fee ban, will be adequate to protect consumers of debt relief services from deceptive or abusive practices.

Commenters and forum participants recommended that the Commission adopt a variety of additional disclosures, including, among others: (1) identifying contact and other background information about the provider;[538] (2) a list of the consumer's debts to be included in the program;[539] (3) a statement that "other debt relief options may be more appropriate for the consumer;"[540] (4) a statement that consumers will not achieve settlement results until they have accumulated sufficient funds;[541] (5) a notice to consumers when they are collecting funds for debt settlements at a rate more accelerated than a pro rata arrangement;[542] (6) the percentages of clients who complete the program after 39 months and who file for bankruptcy after paying fees to a debt relief provider;[543] (7) the percentage of settlements consummated after charge off;[544] (8) annual retention rates;[545] (9) the length of time the provider has been operating;[546] and (10) the number of complaints and lawsuits filed against the company over the prior three years.[547] The Commission has declined to adopt any of these additional disclosures. The disclosures required in the Final Rule will provide consumers with the most important material information they need to avoid deception and make well-informed choices. Adding more disclosures would risk overshadowing more important information and place a potentially unnecessary burden on providers.

6. Effective Date

This provision will be effective September 27, 2010. The Commission expects prompt compliance with this provision, as it ensures that consumers receive basic information about the advertised services.

E. Sections 310.3(a)(2) & 310.3(a)(4): Misrepresentations

The Final Rule supplements the existing TSR prohibitions against misrepresentations with a provision specifically intended to target deceptive practices by debt relief service providers.[548] As stated above, an act or practice is deceptive if: (1) there is a representation or omission of information that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation or omission is material to consumers.[549]

The new provision prohibits sellers or telemarketers of debt relief services from making misrepresentations regarding any material aspect of any debt relief service and provides several illustrative examples, including misrepresentations of:

- the amount of money or the percentage of the debt amount that a customer may save by using such service;
- the amount of time necessary to achieve the represented results;
- the amount of money or the percentage of each outstanding debt that

[531] *See* NACCA (Keiser), Tr. at 217-18; CU (Hillebrand), Tr. at 218-19; QLS at 5; *see also* CFA (Grant), Tr. at 218 (a dropout rate is very important, especially if success claims are permitted and there is no advance fee ban in place).

[532] Among other things, the rule would have to identify the conditions under which a consumer would be considered to have dropped out, *e.g.*, at what point the consumer would be deemed to have completed, or not completed, the program. This could be a difficult determination in that many debt relief services involve payments – and services – that take place over time. Thus, for example, if a consumer terminates a debt settlement program after 80% of his debts were settled, should he be considered a dropout? The rule also would have to account for new entrants into the market that would lack data on which to calculate a drop out rate. Without standardization of all of these factors, consumers could not compare the dropout rates of different providers.

[533] CRN at 5; *see* NACCA at 2.

[534] *See* CU (Hillebrand), Tr. at 211.

[535] *See* SBLS (Tyler), Tr. at 214.

[536] As stated earlier, after-the-fact written disclosures do not cure deceptive claims made earlier in the transaction. *See supra* note 519.

[537] 16 CFR 310.3(a)(1). If the provider markets to consumers in a language other than English, the disclosures must be provided in the language the provider is using for the marketing, in order to meet the clear and conspicuous requirement. *See* 16 CFR 14.9 (foreign language disclosures in advertising); 16 CFR 308.3(a)(1) (foreign language disclosures under Pay Per Call Rule); 16 CFR 429.1(a) (foreign language disclosure of right to cancel door-to-door sales); 16 CFR 455.5 (Spanish language version of FTC's used car disclosures); 16 CFR 610.4(a)(3)(ii) (foreign language disclosures in marketing free credit reports).

[538] NFCC at 10-11, RDRI at 6.

[539] NFCC at 10-11.

[540] CareOne at 7; *see also* NFCC at 14.

[541] MD (Oct. 26, 2009) at 33, 35.

[542] NACCA at 3-4.

[543] RDRI at 6.

[544] Id.

[545] Id.

[546] Id.

[547] Id.

[548] The Final Rule does not change any of the existing TSR prohibitions on misrepresentations.

[549] Deception Policy Statement, *supra* note 453, at 174-83.

the customer must accumulate before the provider will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt;

• the effect of the service on a customer's creditworthiness;

• the effect of the service on the collection efforts of the customer's creditors or debt collectors;

• the percentage or number of customers who attain the represented results; and

• whether a service is offered or provided by a nonprofit entity.

This provision is largely unchanged from proposed § 310.3(a)(2)(x) of the proposed rule.[550]

In this Section of the SBP, the Commission discusses the amended TSR's prohibitions against misrepresentations and their applicability to debt relief services. Specifically, it provides an analysis of new § 310.3(a)(2)(x) of the Final Rule and the public comments received on the proposed version of this provision. It also provides further detail on the requirements for making truthful and substantiated savings claims under the amended Rule. Finally, this section explains how the existing provisions of §§ 310.3(a)(2) and 310.4(a)(4) of the TSR – those that predate, and were unaltered by, this rulemaking – would apply to inbound telemarketing of debt relief services.

1. Public Comments on Proposed Section 310.3(a)(2)(x)

As described above, § 310.3(a)(2)(x) adds several debt relief-specific examples of misrepresentations that are prohibited by the TSR. The vast majority of commenters who addressed this provision in the proposed rule, including representatives of the debt relief industry, strongly supported it.[551] Additionally, participants in the public forum voiced general support for the proposal.[552] All but two of the comments that recommended changes to § 310.2(a)(2)(x) focused on relatively minor revisions; these comments are discussed, as applicable, in the analysis of the Final Rule below.

Two debt relief service providers opposed this provision, arguing that it is wholly unjustified because material misrepresentations are not widespread in the debt relief industry.[553] As detailed in this SBP and the NPRM, however, the record demonstrates that the misrepresentations banned by § 310.3(a)(2)(x) are common in this industry.[554]

Some commenters recommended that the Commission add additional examples of prohibited misrepresentations to § 310.3(a)(2)(x).[555] The examples included in § 310.3(a)(2)(x) are common misrepresentations observed in FTC and state law enforcement actions. The Commission reiterates that these examples are not intended to be an exhaustive list and that this provision encompasses *any* material misrepresentation made in connection with any debt relief service.

2. Final Section 310.3(a)(2)(x)

a. Claims Other Than Savings Claims

Section 310.3(a)(2)(x), which is added to § 310.3(a)(2) of the TSR as a result of this rulemaking, prohibits material misrepresentations specifically related to the sale of debt relief services.[556] The new provision lists several illustrative examples of prohibited misrepresentations. Although the examples already may be covered by the existing provisions of §§ 310.3(a)(2) and 310.3(a)(4), including them explicitly provides additional guidance to debt relief providers of their obligations to ensure that their claims are true and substantiated.[557]

With respect to the individual examples, § 310.3(a)(2)(x) first prohibits telemarketers of debt relief services from misrepresenting "the amount of time necessary to achieve the promised results" and "the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt." As set forth in detail above in the discussion of § 310.3(a)(1)(viii), consumers often have little understanding of the mechanics of the debt relief process. According to commenters, including those representing the industry, it usually takes many months, if not years, for a provider, if it is even able to do so, to achieve final resolution of all of a consumer's debts.[558] This is information that certainly would influence a reasonable consumer's purchasing decisions. Often, however, telemarketers of these services tell consumers that results can be achieved more quickly.[559] Further, in the context of debt settlement, providers may deceive consumers about how their monthly payments are being used, suggesting that the funds are being accumulated for settlements when, in fact, some or all of them go towards the provider's fees.[560] It is difficult to imagine information

[550] The final provision contains only four minor revisions. First, it corrects two typographical errors by inserting the words "or" and "the" into the prohibition against misrepresenting "the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors to negotiate, settle, or modify the terms of *the* customer's debt." (emphasis added). For consistency purposes, the Final Rule also replaces the word "consumer's" with the word "customer's" in the prohibition against misrepresenting "the effect of the service on collection efforts of the *customer's* creditors or debt collectors." (emphasis added). "Customer" is defined in Section 310.2(l) of the TSR and used throughout the Rule."

Finally, the Commission added the phrase "or make a bona fide offer" to clarify that the misrepresentation provision prohibits misrepresentations about the amount that the customer must accumulate before the provider initiates attempts to settle the debt and/or about the amount that a customer must accumulate before the provider makes a bona fide settlement offer or other offer to renegotiate, settle, or modify the terms of the customer's debt.

[551] *See, e.g.*, TASC (Oct. 26, 2009) at 16; USOBA (Oct. 26, 2009) at 17-18; Orion (Oct. 1, 2009) at 1; CareOne at 4; AICCCA at 5; CFA at 3, 20; NAAG (Oct. 23, 2009) at 11; AFSA at 9 ("Each specified misrepresentation is sufficiently widespread to justify inclusion in the Rule.").

[552] *See, e.g.*, CSA (Witte), Tr. at 65; USOBA (Ansbach), Tr. at 108 ("[The] Commission has got two things down, that I think are widely supported, the disclosures and misrepresentations.").

[553] *See* MD (Oct. 26, 2009) at 37-38; Able (Oct. 21, 2009) at 30.

[554] *See TSR Proposed Rule*, 74 FR at 41991-41997.

[555] *See, e.g.*, NACCA at 4 (recommending that the Commission specifically prohibit misrepresentations concerning whether any savings may be taxable income and the use of lead generators).

[556] *See* Deception Policy Statement, *supra* note 453, at 174-83.

[557] NAAG concurred that the practices prohibited under Section 310(a)(2)(x) are likely already prohibited by the FTC Act and state unfair and deceptive trade practices statutes, but agreed that codifying them under the TSR will clarify the law and debt relief providers' obligations. NAAG (Oct. 23, 2009) at 11; *see also* CFA at 3 (stating that Section 310.3(a)(2)(x) "provides greater clarity to debt relief service providers regarding the types of claims that the FTC will consider to be deceptive").

[558] *See, e.g.*, CRN (Bovee), Tr. at 28; SBLS (Tyler), Tr. at 162; ACCORD (Oct. 9, 2009) at 2; CFA at 4.

[559] *See, e.g.*, *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (alleging that defendant misrepresented that consumers could pay off debt three to five times faster without increasing monthly payments); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (same); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (alleging that defendants misrepresented that consumers could pay off debts three to five times faster); *FTC v. Debt Solutions, Inc.*, No. 06-0298 JLR (W.D. Wash. filed Mar. 6, 2006); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006) (alleging that defendants misrepresented that debt relief would be achieved before consumers' next billing cycle); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004)(alleging defendant told consumers it could shorten period of time to pay off debts).

[560] *See supra* notes 519-20.

more critically material to a consumer in financial distress.

A second provision of § 310.3(a)(2)(x) prohibits misrepresentations regarding "the effect of the service on a customer's creditworthiness." As described earlier in this SBP, representations on this topic are highly material to consumers for whom lower credit scores will impair their ability to get credit, insurance, or other benefits in the future.

Third, § 310.3(a)(2)(x) prohibits a telemarketer from making misrepresentations about the "effect of the service on collection efforts of the consumer's creditors or debt collectors." This provision will ensure that providers do not misrepresent that they can stop creditors or debt collectors from contacting or attempting to collect from consumers, a practice in which a significant number of providers have engaged.[561] Again, this is highly material information that consumers need to make an informed purchaser's decision.

Fourth, § 310.3(a)(2)(x) prohibits misrepresentations relating to "the percentage of customers who attain the represented results." As discussed above, debt relief providers covered by the Rule commonly make success rate claims in their advertising and telemarketing.[562] These claims are highly material to consumers' purchase decisions. Yet a large percentage of customers of these providers do not obtain the results promised.[563] In fact, it appears that well over half of consumers who enroll in these programs drop out before they have completed them.[564]

Fifth, § 310.3(a)(2)(x) prohibits misrepresentations about "whether a service is offered or provided by a nonprofit entity."[565] Such claims are material because they lend credibility and trustworthiness to the entity making them. The Commission has brought several law enforcement actions against entities that masqueraded as nonprofits when, in fact, they operated for the profit of their principals.[566] This problem was particularly common in the credit counseling industry before the IRS took action to scrutinize and, where appropriate, decertify § 501(c)(3) CCAs.

b. Savings Claims

The sixth example of a misrepresentation barred by § 310.3(a)(2)(x) relates to claims about "the amount of money or the percentage of the debt amount that a customer may save by using such service." Below, the Commission explains in some detail the nature of these misrepresentations and how providers can make non-deceptive claims.

A pivotal claim made in most debt relief advertising and telemarketing pitches is that the offered plan can save the consumer money, either by lowering monthly payments or by eliminating debt altogether through substantially reduced, lump sum settlements. Many of these claims are very specific, promising, for example, settlements for 40% to 60% of the debt owed.[567] In many cases, however, these highly material claims are false or misleading.[568] In particular, the record shows that many debt settlement providers have made specific and unqualified claims about the savings enrollees will receive that greatly exaggerate or misrepresent what consumers are likely to experience.[569]

Based on the record, the Commission has identified four fundamental deficiencies in the data that debt relief providers often use to support their savings claims. All of these deficiencies inflate the savings consumers are likely to obtain.

First, as described above, many providers calculate savings without accounting for the additional debt and costs consumers incur as a result of interest, late fees, and other charges imposed by the creditor(s) or debt collector(s) during the course of the program.[570] Second, providers often omit the fees consumers pay to the provider from their calculations of the savings.[571] By ignoring the creditor and provider-associated costs, the claims overstate the amount consumers actually save. Third, providers frequently exclude from their calculation of savings those consumers who dropped out or were otherwise unable to complete the program, and fourth, providers frequently exclude individual accounts that were not settled successfully.[572] Thus, the savings claimed by the provider

[561] A coalition of consumer groups, in their written comments, urged the Commission also to bar debt relief services from: (1) instructing or advising consumers to stop making payments directly to their creditors; (2) instructing or advising consumers to stop communicating directly with their creditors; or (3) re-routing consumers' bills so that creditors send them to the debt relief service. *See* CFA at 2, 18. The Commission believes that the disclosure requirements in § 310.3(a)(1)(viii)(C) of the Final Rule, along with the prohibition against material misrepresentations, are sufficient to protect consumers.

[562] In its review of 100 debt settlement websites, *supra* note 50, FTC staff found that 86% of the 100 debt settlement websites reviewed represented that the provider could achieve a specific level of reduction in the amount of debt owed. Again, such claims are highly material.

[563] Data from the debt settlement industry support this assertion. *See supra* Section III.C.2.a; *see also* FTC Case List, *supra* note 27.

[564] *Supra* Section III.C.2.a.1.

[565] This prohibition applies only to misrepresentations; thus, it does not prevent a bona fide nonprofit entity from claiming that it is a nonprofit. *See, e.g.*, FECA (Oct. 26, 2009) at 10 (requesting that the Commission clarify the scope of § 310.3(a)(2)(x) regarding the prohibition against misrepresenting nonprofit status).

[566] *Supra* Section I.C.1.

[567] *See, e.g.*, *FTC v. Credit Restoration Brokers, LLC*, 2:10-cv-00030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (promising to settle consumers' debts for between 30 cents to 50 cents on the dollar); *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (promising to reduce amount owed to 50% to 60% of amount at time of enrollment); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006) (promising to reduce overall amount owed by up to 40% to 60%); *FTC v. Nat'l Consumer Council, Inc.*, No. SACV04-0474 CJC (JWJX) (C.D. Cal. filed Apr. 23, 2004); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (promising to reduce consumers' debts by up to 50% to 70%); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (representing it could save consumers up to 70% of debt owed); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (promising to reduce debts by up to 60%); *see also, e.g.*, *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (promising to save consumers $2,500 or more); *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla. Am. Compl. filed Jan. 19, 2010) (promising to save consumers $2,500 or more); *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga. filed Nov. 30, 2009) (promising to save consumers $4,000); *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill. filed Nov. 30, 2009) (promising to save consumers $2,500 or more); *FTC v. Express Consolidation*, No. 06-cv-61851-WJZ (S.D. Fla. Am. Compl. filed Mar. 21, 2007); *U.S. v. Credit Found. of Am.*, No. CV 06-3654 ABC(VBKx) (C.D. Cal. filed June 13, 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004); *FTC v. Integrated Credit Solutions*, No. 06-806-SCB-TGW (M.D. Fla. filed May 2, 2006); *see also, e.g.*, *Florida v. CSA - Credit Solutions of Am., Inc.*, No. 09-CA-026438 (Fl. Cir. Ct. - 13th filed Oct. 2009) (alleging that defendant represented that it could reduce consumers debts by 50% or 60% within 12 to 36 months); Press Release, Illinois Attorney General, Attorney General Madigan Sues Two Debt Settlement Firms (May 4, 2009) (alleging that defendant represented to consumers that it could reduce their credit card debt by 40% to 60% and that consumers would be debt free in as little as 36 months), *available at* (*http://www.illinoisattorneygeneral.gov/pressroom/2009_05/20090504.pdf*); *California v. Freedom Debt Relief*, No. CIV477991 (Super. Ct. San Mateo Cty., consent judgment Oct. 30, 2008) (defendant allegedly represented that it could reduce consumers' debt by 40 to 60% and make consumers debt-free).

[568] *See supra* note 567; *see also, e.g.*, NAAG (Oct. 23, 2009) at 2 ("The primary consumer protection problem areas that have given rise to the States' actions include . . . unsubstantiated claims of consumer savings."); CU (Hillebrand), Tr. at 164-65 ("I think when you say consumers get 50 cents on the dollar is I'm going to save 50 cents on the dollar for all of my debt, and that does not account for tax consequences, does not account for the very serious impact of the unsettled debt . . . [and] it does not account for the fact that many of those consumers are going to finish without settling all of their debt."); NFCC at 3; SBLS at 2-5.

[569] *Id.*

[570] *Supra* Section III.C.2.a.(3).

[571] *Id.*

[572] *See id.*

represent only those of the successful cases, and not of consumers generally.[573]

To comply with § 310.3(a)(2)(x), providers' representations, including those promising specific savings or other results, must be truthful, and the provider must have a reasonable basis to substantiate the claims.[574] When a debt relief service provider represents that it will save consumers a certain amount or reduce the debts by a certain percentage, it also represents, by implication, that this savings claim is supported by competent and reliable, methodologically sound evidence showing that consumers generally who enroll in the program will obtain the advertised results.[575] When a debt relief service makes only general savings claims (*e.g.*, "we will help you reduce your debts"), without specifying a percentage or amount of debt reduction, these claims are likely to convey that consumers can expect to achieve a result that will be beneficial to them, and that the benefit will be substantial.[576] Generally, savings claims should reflect the experiences of the provider's past customers[577] and must account for several key pieces of information.[578] Below, the Commission provides additional guidance on the proper methodology for doing this historical experience analysis.[579]

First, savings claims must be calculated based on the amount of debt

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573 An advertiser cannot substantiate a claim based only on supportive data, while ignoring the countervailing data. *See, e.g., In re Kroger Co.*, 98 F.T.C. 639 (1979) (initial decision), *off'd*, 98 F.T.C. at 721 (1981); FTC, *Dietory Supplements: An Advertising Guide for Industry* (1994) ("Advertisers should consider all relevant research relating to the claimed benefit of their supplement and should not focus only on research that supports the effect, while discounting research that does not."), *avoiloble ot* (*http://www.ftc.gov/bcp/edu/pubs/business/adv/bus09.shtm*).

Nonetheless, broadcast advertisements and websites for debt settlement services routinely imply that these services can obtain the represented savings for the typical consumer who enrolls in the program. *See supra* note 567; *see olso, e.g., FTC v. Edge Solutions, Inc.*, No. CV-07-4087, Mem. Supp. Mot. T.R.O. at 7, 11 (E.D.N.Y. Sept. 28, 2007) (alleging that although defendants promised they could settle consumers' debts for 50% to 60% of the amount owed, they often settled just a single debt and "allow[ed] other debts to languish"); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4), Mem. Supp. Mot. T.R.O. at 8 (D. Mass. filed Nov. 2, 2004) (alleging that "defendants' program does not result in a 50% savings on their debt, as promised by defendants . . . [because] [m]any consumers find that defendants settle some of their accounts but not others . . . [and some] consumers see none of their accounts settled").

574 It is an unfair and deceptive practice to make an express or implied objective claim without a reasonable basis supporting it. *See, e.g., FTC v. Pontron I Corp.*, 33 F.2d 1088, 1096 (9th Cir. 1994); *Removatron Int'l Corp.*, 111 F.T.C. 206, 296-99 (1988), *off'd*, 884 F.2d 1489 (1st Cir. 1989); *In re Thompson Med. Co.*, 104 F.T.C. 648, 813 (1984), *off'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); see *olso generolly* 1984 Policy Statement Regarding Advertising Substantiation, appended to *Thompson Med. Co.*, 104 F.T.C. at 813 ("Advertising Substantiation Policy Statement"); *see olso* Amended Franchise Rule, 16 CFR 436.5(s), 436.9(c); *Amended Franchise Rule Stotement of Bosis and Purpose*, 72 FR 15444, 15449 (Mar. 30, 2007).

If the advertisement expressly or impliedly represents that it is based on a particular level of support (*e.g.*, "tests prove"), the advertiser must possess at least that support. *See* 1984 Policy Statement Regarding Advertising Substantiation, *oppended to Thompson Medical Co.*, 104 F.T.C. at 813; *Removatron Int'l*, 111 F.T.C. at 297. If no specific level of support is stated, the necessary level of substantiation is determined by consideration of certain factors, including the type of claim, consequences of a false claim, and the amount of substantiation that experts in the field believe is reasonable. *Id.* Generally speaking, claims must be supported by competent and reliable evidence. The reasonable basis test is an objective standard; an advertiser's good faith belief that its claim is substantiated is insufficient. *See, e.g., FTC v. World Travel Vacotion Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. U.S. Soles Corp.*, 785 F. Supp. 737 (N.D. Ill. 1992). Similarly, the existence of some satisfied customers does not constitute a reasonable basis. *See, e.g., FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999); *In re Brake Guard Products*, 125 F.T.C. 138, 244-45 (1998).

575 It is deceptive to make unqualified performance claims that are only true for some consumers, because consumers are likely to interpret such claims to apply to the typical consumer. *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528-29 (S.D.N.Y. 2000) (holding that, in the face of express earnings claims for multi-level marketing scheme, it was reasonable for consumers to have assumed the promised rewards were achieved by the typical Five Star participant); *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *In re Ford Motor Co.*, 87 F.T.C. 756, 778, *off'd in port ond remonded in port*, 87 F.T.C. 792 (1976); *In re J. B. Williams Co.*, 68 F.T.C. 481, 539 (1965), *off'd as modified*, 381 F.2d 884 (6th Cir. 1967); *FTC v. Feil*, 285 F.2d 879, 885-87 & n.19 (9th Cir. 1960); *cf. Guides Concerning the Use of Endorsements ond Testimonials in Advertising*, 16 CFR 255.2 ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service . . . ."); *In re Cliffdale Assocs.*, 103 F.T.C. 110, 171-73 (1984); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302-03 (7th Cir. 1979).

576 An efficacy claim conveys to consumers that the result or benefit will be meaningful and not *de minimis*. *See P. Lorillord Co. v. FTC*, 186 F.2d 52, 57 (4th Cir. 1950) (challenging advertising that claimed that the cigarette was lowest in nicotine, tar, and resins in part because the difference was insignificant); *In re Sun Co.*, 115 F.T.C. 560 (1992) (consent order) (alleging that advertising for high octane gasoline represented that it would provide superior power "that would be significant to consumers"); *Guides for the Use of Environmentol Morketing Cloims*, 16 CFR 260.6(c) (1998) ("Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible."); *FTC Enforcement Policy Statement on Food Advertising*, 59 FR 28388, 28395 & n.96 (June 1, 1994), *avoiloble ot* (*http://www.ftc.gov/bcp/policystmt/ad-food.shtm*) ("The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.").

577 Although providers may use samples of their historical data to substantiate savings claims, these samples must be representative of the entire relevant population of past customers. Providers using samples must, among other things, employ appropriate sampling techniques, proper statistical analysis, and safeguards for reducing bias and random error. Providers may not cherry-pick specific categories of consumers or exclude others in order to inflate the savings. *See, e.g., Kroger*, 98 F.T.C. at 741-46 (1981) (claims based on sampling were deceptive because certain categories were systematically excluded and because the advertiser failed to ensure that individuals who selected the sample were unbiased); *FTC v. Litton Indus., Inc.*, 97 F.T.C. 1, 70-72 (1981) (claims touting superiority of microwave oven were deceptive because the advertiser based them on a biased survey of "Litton-authorized" service agencies), *enforced os modified*, 676 F.2d 364 (9th Cir. 1982); *Bristol Myers v. FTC*, 185 F.2d 58 (1950) (holding advertisements to be deceptive where they claimed that dentists used one brand of toothpaste "2 to 1 over any other [brand]" when, in fact, the vast majority of dentists surveyed offered no response). Additionally, the relationship between past experience and anticipated future results must be an "apples-to-apples" comparison. If there have been material changes to the program that could affect the applicability of historical experience to future results, any claims must account for the likely effect of those changes. *See* Amended Franchise Rule, 16 CFR 437.5(s)(3)(ii).

578 Providers should maintain historical data about their business activities sufficient to meet the substantiation requirements detailed in this Section. *See, e.g.*, USDR (Johnson), Tr. at 168-170 ("I'll speak specifically to my company, why we make a general claim, is on the 40 to 60 reduction is because historically our numbers for five years reflect that this is the results that we get for the consumers.").

Providers should be cautious in purporting to qualify their savings claims to make sure that the qualifications are effectively communicated to consumers. For example, phrases such as "up to" or "as much as" (*e.g.*, "up to 60% savings") likely convey to consumers that the product or service will consistently produce results in the range of the stated percentage or amount. *See, e.g., In re Automotive Breakthrough Sciences, Inc.*, 126 F.T.C. 229, 301 (1998).

579 In written comments and at the public forum, consumer groups, noting that debt settlement companies often fail to substantiate savings claims properly, urged the Commission to ban outright *any* representations regarding savings amounts or rates, or, alternatively, to require that the provider's historical data demonstrate that it achieved the represented result for 80% of its past customers. *See* CFA at 18-19; CFA (Grant), Tr. at 173 ("[W]e think that any success claims are inherently misleading, and would like to see them prohibited."); *see olso* CRN (Oct. 8, 2009) at 8. Although the record shows that false or unsubstantiated savings claims for debt relief services are common, the Commission does not believe that savings claims are inherently deceptive and thus concludes that they should not be prohibited outright. *See Milovetz, Gallop & Milavetz, P.A. v. US*, 176 L. Ed. 2d 79 (2010) (restrictions on nonmisleading commercial speech require a higher level of scrutiny under the First Amendment than restrictions on misleading speech); *Zauderer v. Office of Disciplinory Counsel*, 471 U.S. 626 (1985) (same); *Cent. Hudson Gos & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The Commission is confident that the prohibition in the Final Rule on misrepresentations will be sufficient to address the problem of false or unsubstantiated savings claims without inadvertently stopping truthful claims that may be valuable to consumers.

owed at the time of enrollment, rather than the amount at the time of settlement, in order to account for (a) increases in debt levels from creditor fees or interest charges that accrue during the period of the program, and (b) fees the consumer pays to the provider. The following example illustrates this principle:

A consumer enrolls a single $10,000 debt with a debt settlement provider. However, between the time the consumer enrolls the debt and the time the debt is settled, the amount owed grows to $13,000 because of accrued interest and late fees. In addition, the consumer must pay the settlement provider a fee of $2,000. The provider settles the debt for $6,000, so that the total amount paid by the consumer is $8,000 ($6,000 paid to settle the debt plus $2,000 in fees). The provider can claim a savings rate of 20%.

Second, in making savings claims, a provider must take into account the experiences of *all* of its past customers, including those who dropped out or otherwise failed to complete the program. The following example illustrates this principle:

A debt settlement provider has ten customers, each of whom has $10,000 in debt enrolled in the program, for a total of $100,000 in unpaid debt. Five of those customers complete the program, each of whom saves $2,000, for a total savings of $10,000. The remaining five customers drop out of the program before making any settlements, and thus save nothing. In total, the customers have saved $10,000 out of the aggregate $100,000 enrolled in the program. The provider can claim a savings rate of 10%.

Third, in making savings claims, a provider must include *all* of the debts enrolled by each consumer in the program. The provider may not exclude debts that it has failed to settle – including those associated with consumers who dropped out of the program – from its calculation of the average savings percentage or amount of its consumers' debt reduction. The following example illustrates this principle:

A debt settlement provider has ten customers, each of whom has two $1,000 debts enrolled in the program, for a total of 20 debts and $20,000 in enrolled debt. The provider settles a single debt for each of the ten customers for $800 per debt. The company fails to settle the remaining debt for each of the ten customers. In total, the customers have saved $2,000 out of the aggregate $20,000 enrolled in the program. The provider can claim a savings rate of 10%.

3. Existing TSR Provisions Prohibiting Deceptive Representations and Misleading Statements

In addition to § 310(a)(2)(x) of the TSR, which has been added as a result of this rulemaking, the existing §§ 310.3(a)(2) and 310.3(a)(4) will now apply to inbound or outbound telemarketing of debt relief services.[580] These provisions prohibit misrepresentations of the following information, much of which providers misrepresent in the telemarketing of debt relief services:

- total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the offer.[581] This provision parallels the required disclosure of total costs contained in TSR § 310.3(a)(1)(i).
- material restrictions, limitations, or conditions to purchase, receive, or use the offered goods or services.[582] This provision, too, has a parallel required disclosure in TSR § 310.3(a)(1)(ii).
- any material aspect of the performance, efficacy, nature, or central characteristics of the offered goods or services.[583]
- any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies.[584] The parallel disclosure requirement is in § 310.3(a)(1)(iii) of the TSR.
- the seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.[585]
- any other statements to induce any person to pay for goods or services.[586]

F. Section 310.6: Exemptions

Section 310.6 sets forth the Rule's exemptions. In determining which exemptions to grant, the Commission considered four factors: (1) whether Congress intended a particular activity to be exempt from the Rule; (2) whether the conduct or business in question is already the subject of extensive federal or state regulation; (3) whether the conduct at issue is suitable for the forms of abuse or deception the Telemarketing Act was intended to address; and (4) whether the risk that fraudulent sellers or telemarketers would avail themselves of the exemption outweighs the burden to legitimate industry of compliance with the Rule.[587]

The TSR generally exempts inbound calls placed by consumers in response

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[580] In fact, all of the TSR provisions will now cover this industry, including, *e.g.*, the provision prohibiting assisting and facilitating another engaged in TSR violations, § 310.3(b), the prohibition on the use of threats or intimidating or profane language, § 310.4(a)(1), and the recordkeeping requirements, § 310.5.

[581] § 310.3(a)(2)(i).Some providers request consumers' billing information during the sales call or pressure consumers to return payment authorization forms and signed contracts as quickly as possible following the call. *See, e.g., FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (alleging "[c]onsumers who agree to enroll . . . are sent an initial set of enrollment documents from Debt Set Colorado. During their telephone pitches, the defendants' telemarketers also exhort consumers to fill out the enrollment documents and return the papers as quickly as possible . . . . Included in these documents are forms for the consumer to authorize direct withdrawals from the consumer's checking account, to identify the amounts owed to various creditors, and a Client Agreement."). The existing TSR prohibits telemarketers from charging consumers' accounts without first obtaining express informed consent in all transactions, and it requires express verifiable authorization in cases where a consumer uses a payment method other than a credit or debit card. *See* §§ 310.3(a)(3), 310.4(a)(6). The amended Rule applies these existing requirements to inbound debt relief telemarketing calls as well.

[582] § 310.3(a)(2)(ii).

[583] § 310.3(a)(2)(iii).

[584] § 310.3(a)(2)(iv).

[585] § 310.3(a)(2)(vii). In several FTC law enforcement actions, debt negotiation companies falsely represented that they were affiliated with consumers' creditors. *See, e.g., FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009); *FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill. Am. Compl. filed Aug. 18, 2007). In other cases, especially with the rise of government economic assistance programs, providers have misrepresented their affiliation with the government or bona fide nonprofits. *See, e.g., FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997 (D.D.C. filed June 15, 2010); *Minnesota v. Priority Direct Marketing*, No. 62-CV-09-10416 (Ramsey Cty., Minn. filed Sept. 21, 2009) (alleging that debt negotiator misrepresented that it was affiliated with the President's stimulus plan); *cf., e.g., FTC v. Washington Data Res., Inc.*, No. 8:08-CV-02309-SDM (M.D. Fla. filed Nov. 12, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); *FTC v. Cantkier*, No. 1:09-cv- 00894 (D.D.C. filed July 10, 2009) (alleging defendants placed advertisements on Internet search engines that refer consumers to websites that deceptively appear to be affiliated with government loan modification programs).

[586] § 310.3(a)(4). The FTC has brought cases against debt relief providers alleging violations of § 310.3(a)(4) for misleading statements made in connection with outbound telemarketing, including statements that the entity (a) will obtain a favorable settlement of the consumer's debt promptly or in a specific period of time (*see, e.g., FTC v. Nat'l Consumer Council*, No. SACV04-0474 CJC (JWJX) (C.D. Cal. filed Apr. 23, 2004)); (b) will stop or lessen creditors' collection efforts against the consumer (*see, e.g., id.*; *FTC v. Group One Networks, Inc.*, No. 8:09-cv-352-T-26-MAP (M.D. Fla. Am. Compl. filed Apr. 14, 2009)); and (c) will secure concessions, such as interest rate reductions, by specific amounts or percentages (*see, e.g., FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674-T-17-MSS (M.D. Fla. filed July 20, 2004)).

[587] *TSR Final Rule*, 60 FR at 43859; *see also TSR Amended Rule 2008*, 73 FR 51188 (discussing the Commission's legal authority to exempt certain calls or callers from the TSR).

to direct mail or general media advertising.[588] The Final Rule in this proceeding, consistent with the proposed rule, carves out inbound calls made to debt relief services from that exemption.[589] As a result, virtually all debt relief telemarketing transactions are now subject to the TSR.[590]

Most commenters supported covering inbound calls made to debt relief providers.[591] On the other hand, one debt relief provider opposed it, arguing that not all debt relief providers harm consumers.[592]

The Commission's decision to include inbound debt relief calls is based on its law enforcement experience and the record in this proceeding and is consistent with the existing TSR provisions covering inbound calls related to investment opportunities, certain business opportunities, credit card loss protection plans, credit repair services, recovery services, and certain advance fee loans.[593] Like debt relief services, each of those services frequently has been marketed through deceptive telemarketing campaigns that capitalize on mass media or general advertising to entice their victims to place an inbound telemarketing call. The modification to the exemptions will ensure that sellers and telemarketers who market debt relief are required to abide by the Rule regardless of the medium used to advertise their services.

This provision will be effective September 27, 2010.[594]

G. Section 310.5: Recordkeeping

Section 310.5 of the TSR describes the types of records sellers or telemarketers must keep and the time period for retention.[595] Although the provisions of this section remain unchanged by these amendments, the operation of the amendments will result in some providers of debt relief services being subject to this provision of the TSR for the first time. Very few comments were received on the recordkeeping requirements. One commenter stated that it did not make sense to limit the recordkeeping requirement to 24 months, when 36 to 60 months is typically required for most debt relief customers to become debt free.[596] This commenter also questioned whether the requirement would reduce abuses and provide sufficiently useful data for law enforcement or regulatory purposes.[597] The FTC's law enforcement experience demonstrates that recordkeeping requirements are critical for enabling the agency to ensure compliance. The TSR has long imposed a 24-month retention period, and the Commission does not see a compelling reason to alter it for debt relief providers. To the extent that providers make claims that rely on historical data for substantiation, however, they must retain all material used to support the claims.

This provision will be effective September 27, 2010.

IV. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act ("PRA"), as amended,[598] the Commission is seeking Office of Management and Budget ("OMB") approval of the Final Rule amendments to the TSR under OMB Control No. 3084-0097. The disclosure and recordkeeping requirements under the amendments to the TSR discussed above constitute "collections of information" for purposes of the PRA.[599]

Upon publication of the NPRM, the FTC submitted the proposed rule and a Supporting Statement to OMB. In response, OMB filed a comment indicating that it was withholding approval pending: (1) discussion in the preamble to the Final Rule of how the Commission has maximized the practical utility of the collection of information and minimized the related burden, and (2) the FTC's examination of the public comments in response to the NPRM. The remainder of this section covers those considerations and provides a revised PRA analysis, factoring in relevant public comments and the Commission's resulting or self-initiated changes to the proposed rule.

A. Practical Utility

According to OMB regulations, practical utility means the usefulness of information to or for an agency.[600] The Commission has maximized the practical utility of the debt relief amendments contained in the Final Rule. The Final Rule requires specific new disclosures in the sale of a "debt relief service," as that term is defined in § 310.2(m). The disclosures will provide consumers critical information before they enroll in a debt relief service. In addition, new respondents will be subject to the existing provisions of the TSR, including its general sales disclosures and recordkeeping provisions.[601] The required disclosures are necessary to inform consumers of important information about the debt relief services being offered. Commenters overwhelmingly supported the disclosures.[602] Moreover, the Commission has removed three of the previously proposed disclosures in order to avoid cluttering the most meaningful material information for consumers and to enhance the comprehensibility of the fewer

[588] *See* § 310.6(b)(5) & (6).

[589] The Commission previously had created certain carve-outs to the general exemption for inbound calls made as part of the sale of products or services that have been the subject of significant fraudulent or deceptive telemarketing activity, such as advertisements relating to investment opportunities and certain business opportunities. *Id.*

[590] Outbound calls to solicit the purchase of debt relief services are already subject to the TSR, including the provisions of § 310.3. The Final Rule continues to exempt telemarketing of debt relief services from compliance with most provisions of the Rule where the sale is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation.

[591] *See* CFA at 20-21;Orion (Oct. 1, 2009) at 1.

[592] Able (Oct. 21, 2009) at 29.

[593] Each of these categories is carved out from the exemptions for inbound calls made in response to both general media and direct mail advertising. Inbound prize promotion calls are carved out only from the direct mail exemption.

[594] In addition, in three subsections of the Exemptions section, the Commission has also made minor, non-substantive amendments to §§ 310.6(b)(2), (5), & (6) to reflect the fact that the Commission has issued *Disclosure Requirements and Prohibitions Concerning Business Opportunities*, 16 CFR 437 (the "Business Opportunity Rule"). Prior to its issuance, this conduct was addressed by 16 CFR 436 (the Franchise Rule) and, therefore, the TSR previously cited only to the latter. Accordingly, §§ 310.6(b)(2), (5), and (6) have been amended to expressly cite both the Franchise Rule and the now-separate Business Opportunity Rule.

[595] 16 CFR 310.5. Specifically, this provision requires that telemarketers must keep for a period of 24 months: all substantially different advertising, brochures, scripts, and promotional materials; information about prize recipients; information about customers, including what they purchased, when they made their purchase, and how much they paid for the goods or services they purchased; information about employees; and all verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

[596] MD (Oct. 26, 2009) at 54.

[597] *Id.*

[598] 44 U.S.C. 3501-3521.

[599] *See* 5 CFR 1320.3(c).

[600] 5 CFR 1320.3(l). In determining whether information will have "practical utility," OMB will consider "whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." *Id.*

[601] *See* 16 CFR 310.3(a)(1); 16 CFR 310.5. (These provisions have previously been reviewed and cleared by the OMB under the above-noted control number.) Accordingly, as a result of the exceptions to the general media and direct mail exemptions, entities that currently engage exclusively in inbound telemarketing of debt relief services, and thus are likely exempt under the current Rule, would be covered by the amended Rule.

[602] *See, e.g.*, NAAG (Oct. 23, 2009) at 11; CFA at 2-3, 20; MN AG at 2; FCS at 3; Able (Oct. 21, 2009) at 30; CareOne at 4; CSA at 1; DS at 18; DMB at 5; DSA/ADE at 1-2; FCS at 3. In fact, many commenters recommended additional disclosures. *Supra* Section III.D.5. The Commission added one additional disclosure that is critical to consumers' understanding of the services.

remaining disclosures. Finally, the recordkeeping requirements are necessary to facilitate law enforcement by ensuring that debt relief service providers retain records demonstrating their compliance with the Rule.[603]

Thus, the Final Rule will have significant practical utility.

B. Explanation of Burden Estimates Under the Final Rule

The PRA burden of the Final Rule's requirements will depend on various factors, including the number of covered firms and the percentage of such firms that conduct inbound or outbound telemarketing. The definition of "debt relief service" in the Rule includes debt settlement companies, for-profit credit counselors, and debt negotiation companies. As before in the NPRM PRA analysis, staff estimates that 2,000 entities will be covered by the Commission's Final Rule.[604] This includes existing entities already subject to the TSR for which there would be new recordkeeping or disclosure requirements ("existing respondents"), as well as existing entities that newly will be subject to the TSR ("new respondents").[605] Staff arrived at this estimate by using available figures obtained through research and from industry sources of information about the number of debt settlement companies[606] and the number of for-profit credit counselors.[607] Although these inputs suggest that an estimate of 2,000 entities might be overstated, staff has used it in its burden calculations in an effort to account for all entities that would be subject to the amended Rule, including debt negotiation companies, for which no reliable external estimates are available. No comments provided specific information about the number of entities.[608] Thus, the FTC retains these estimates without modification.

The Commission received two comments questioning the staff's estimate that the proposed disclosures could be provided in 20 seconds. Specifically, NACCA questioned whether it was realistic that the proposed disclosures could be provided in 20 seconds.[609] Moreover, a debt settlement company stated that it provides consumers with 16 mandatory disclaimers and an additional six disclosures (if applicable), and it estimated that reading those disclaimers and allowing the consumer to respond to the disclosures requires approximately four and a half minutes.[610]

The FTC's revised disclosure estimates, detailed below, consider commenters' input while excluding time estimates for disclosures made independently of the amended Rule. In addition, although the FTC recognizes that certain entities may require more than the projected time regarding the above-noted tasks, the estimates presented below are intended as an approximate average of incremental burden incurred across all businesses.

Burden Statement:

Estimated Additional Annual Hours Burden: 43,375 hours

As explained below, the estimated annual burden for recordkeeping attributable to the Rule amendments, averaged over a prospective three-year PRA clearance, is 29,886 hours for all industry members affected by the Rule. Although the first year of compliance will entail setting up compliant recordkeeping systems, the PRA burden will decline in succeeding years as they will then have in place such systems. The estimated burden for the disclosures that the Rule requires, including the new disclosures relating to debt relief services, is 13,489 hours for all affected industry members, the same estimate used for the proposed rule. Thus, the total PRA burden is 43,375 hours.

1. Number of Respondents

Based on its estimate that 2,000 entities sell debt relief services, and on the assumption that each of these entities engages in telemarketing as defined by the TSR, staff estimates that 879 new respondents will be subject to the Rule as a result of the amendments. The latter figure is derived by a series of calculations, beginning with an estimate of the number of these entities that conduct inbound versus outbound telemarketing of debt relief services. This added estimate is needed to determine how many debt relief service providers are existing respondents and how many are new respondents because their respective PRA burdens will differ.

Staff is not aware of any source that directly states the number of outbound or inbound debt relief telemarketers; instead, estimates of these numbers are extrapolated from external data. According to the Direct Marketing Association ("DMA"), 21% of all direct marketing in 2007 was by inbound telemarketing and 20% was by outbound telemarketing.[611] Using this relative weighting, staff estimates that the number of inbound debt relief telemarketers is 1,024 (2,000 x 21 ÷ (20 + 21)) and the number of outbound telemarketers is 976 (2,000 x 20 ÷ (20 + 21)).

Of the estimated 1,024 entities engaged in inbound telemarketing of debt relief services, an estimated 217 entities conduct inbound debt relief telemarketing through direct mail; the remaining 807 entities do so through general media advertising and have been thus far largely exempt from the

[603] Although the Commission received very few comments addressing the recordkeeping requirements, one debt settlement company stated that the recordkeeping requirements may impose a minor cost but should not substantively affect the business. Able (Oct. 21, 2009) at 32.

[604] To err in favor of over inclusiveness, staff assumes that every entity that sells debt relief services does so using telemarketing.

[605] Inbound telemarketing calls in response to advertisements in any medium other than direct mail solicitation are generally exempt from the Rule's coverage under the "general media exemption." 16 CFR 310.6(b)(5). Outbound telemarketing and non-exempt inbound telemarketing of debt relief services are currently subject to the TSR. Non-exempt inbound telemarketing would include calls to debt relief service providers by consumers in response to direct mail advertising that does not contain disclosures required by § 310.3(a)(1) of the Rule. *See* 16 CFR 310.6(b)(6) (providing an exemption for "[t]elephone calls initiated by a customer . . . in response to a direct mail solicitation . . . that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule . . . .").

[606] *See* David Streitfeld, *Debt Settlers Offer Promises But Little Help*, N.Y. Times, Apr. 19, 2009 (stating, without attribution, that "[a]s many as 2,000 settlement companies operate in the United States, triple the number of a few years ago"); Weinstein (Oct. 26, 2009) at 9 (see attached Weinstein paper at 8) (stating, without attribution, that "some 2,000 firms market themselves as providing 'debt settlement services,'"); Jane Birnbaum, *Debt Relief Can Cause Headaches of Its Own*, N.Y. Times, Feb. 9, 2008 (noting that "[a] thousand such [debt settlement] companies exist nationwide, up from about 300 a couple of years ago, estimated David Leuthold, vice president of the Association of Settlement Companies, which has 70 members and is based in Madison, Wis."); Able Workshop Comment at 5 ("At the time of this FTC Workshop there are nearly a thousand debt settlement companies within the US and a few companies servicing US consumers from outside the US with operations in Canada, Mexico, Argentina, India and Malaysia."). *See also* SIC Code 72991001 ("Debt Counseling or Adjustment Service, Individuals"): 1,598 entities.

[607] According to industry sources consulted by Commission staff, there are believed to be fewer than 200 for-profit credit counseling firms operating in the United States.

[608] One commenter estimated that it manages between 6% to 8% of all debt currently enrolled in debt settlement programs. FDR (Oct. 26, 2009) at 5 n.7. In response to a follow-up question by FTC staff, however, it stated that the statistic was a "good faith estimate based on our awareness of the industry" but did not elaborate further. FDR (Jan. 14, 2010) at 5.

[609] NACCA at 2 ("We find it difficult to believe that the required information can be conveyed in 20 seconds or, if it can be conveyed in 20 seconds, that a consumer who is already distressed can fully understand the information being conveyed.").

[610] MD (Oct. 26, 2009) at 21. This equates to about 12.3 seconds per disclosure.

[611] *See DMA Statistical Fact Book* 1, 17(30th ed. 2008) ("DMA Statistical Fact Book").

Rule's current requirements.[612] Of the 217 entities using direct mail, staff estimates that 72, approximately one-third, make the disclosures necessary to exempt them from the Rule's existing requirements.[613] Thus, an estimated 879 entities (807 + 72) are new respondents that will be newly subject to the TSR and its PRA burden, including burden derived from the new debt relief disclosures.

The remaining 145 entities (217 - 72) conducting inbound telemarketing for debt relief through direct mail would be existing respondents because they receive inbound telemarketing calls in response to direct mail advertisements that do not make the requisite disclosures to qualify for the direct mail exemption.[614] The estimated 976 entities conducting outbound telemarketing of debt relief services are already subject to the TSR and thus, too, would be existing respondents. Accordingly, an estimated 1,121 telemarketers selling debt relief services would be subject only to the additional PRA burden imposed by the newly adopted debt relief disclosures in amended Rule § 310.3(a)(1)(viii).

2. Recordkeeping Hours

Staff estimates that in the first year following promulgation of the Final Rule, it will take 100 hours for each of the 879 new respondents identified above to set up compliant recordkeeping systems. This estimate is consistent with the amount of time allocated in other PRA analyses that have addressed new entrants, i.e., newly formed entities subject to the TSR.[615] The recordkeeping burden for these entities in the first year following the amended Rule's adoption is 87,900 hours (879 new respondents x 100 hours each). In subsequent years, when TSR-compliant recordkeeping systems will, presumably, have already been established, the burden for these entities should parallel the one hour of ongoing recordkeeping burden staff has previously estimated for existing respondents under the Rule.[616] Thus, annualized over a prospective three-year PRA clearance period, cumulative annual recordkeeping burden for the 879 new respondents would be 29,886 hours (87,900 hours in Year 1: 879 hours for each of Years 2 and 3). Burden accruing to new entrants, 100 hours apiece to set up new recordkeeping systems compliant with the Rule, has already been factored into the FTC's existing clearance from OMB for an estimated 75 entrants per year, and is also incorporated within the FTC's current clearance for the TSR under OMB Control No. 3084-0097.[617]

Staff believes that the 1,121 existing respondents identified above will not have recordkeeping burden associated with setting up compliant recordkeeping systems. These entities are already required to comply with the Rule, and thus should already have recordkeeping systems in place. As noted above, these existing respondents will each require approximately one hour per year to file and store records required by the TSR. Here, too, however, this recordkeeping task is already accounted for in the FTC's existing PRA clearance totals and included within the latest request for renewed OMB clearance for the TSR.[618]

3. Disclosure Hours

Industry comments stated that in the ordinary course of business a substantial majority of sellers and telemarketers make the disclosures the Rule requires because doing so constitutes good business practice.[619] To the extent this is so, the time and financial resources needed to comply with disclosure requirements do not constitute "burden."[620] The Commission also streamlined the disclosures required in the final Rule by eliminating three of the disclosures initially proposed. Moreover, some state laws require the same or similar disclosures as the Rule mandates. Thus, the disclosure hours burden attributable to the Rule is far less than the total number of hours associated with the disclosures overall. Staff continues to assume that most of the disclosures the Rule requires would be made in at least 75% of telemarketing calls even absent the Rule.[621]

To determine the number of outbound and inbound calls regarding debt relief services, staff has combined external data with internal assumptions. Staff assumes that outbound calls to sell and inbound calls to buy debt relief services are made only to and by consumers who are delinquent on one or more credit cards.[622] For simplicity, and lacking specific information to the contrary, staff further assumes that each such consumer or household will receive one outbound call and place one inbound call for these services.

The PRA analysis in the NPRM focused on the number of U.S. households having credit cards (91.1 million) as a base for further calculations. One commenter noted that both individuals and couples within a household may file for bankruptcy relief, and a large proportion of households include more than two adults.[623] In response, FTC staff has refocused its analysis on an estimated number of adult (ages 18 and over) decision makers within each household. With that as the revised base, staff then applies the additional calculations and assumptions presented below to project an estimated number of consumers who will receive and place a call for debt relief services in a given year.

Based on U.S. Census Bureau data,[624] FTC staff estimates that there are 162,769,000 decision making units. This estimate is based on the assumptions that couples constitute a single decision making unit, as are single (widowed, divorced, separated, never married) adults within each household. Using households as a proxy for individual decision makers in applying again the previously stated percentage of households (78%) that had one or more credit cards at the end of 2008,[625] staff

[612] According to the DMA, 21.2% of annual U.S. advertising expenditures for direct marketing is through direct mail; the remaining 78.8% is through all other forms of general media (e.g., newspapers, television, Internet, Yellow Pages). *See id.* at 11. Thus, applying these percentages to the above estimate of 1,024 inbound telemarketers, 217 entities (21.2%) advertise by direct mail, and 807 (78.8%) use general media.

[613] The apportionment of one-third is a longstanding assumption stated in past FTC analyses of PRA burden for the TSR. *See, e.g., Agency Information Collection Activities*, 74 FR 25540, 25543 (May 28, 2009); *Agency Information Collection Activities*, 71 FR 28698, 28700 (May 17, 2006). No comments have been received to date with an alternative apportionment or reasons to modify it.

[614] 16 CFR 310.6(b)(6).

[615] See, e.g., *Agency Information Collection Activities*, 74 FR at 25542; *Agency Information Collection Activities*, 71 FR at 28699.

[616] *Id.*

[617] *Agency Information Collection Activities*, 74 FR at 25542 ("The Commission staff also estimates that 75 new entrants per year would need to spend 100 hours each developing a recordkeeping system that complies with the TSR for an annual total of 7,500 burden hours."). The term "new entrant" denotes an entity that has not yet, but may in the future come into being.

[618] *Id.*

[619] *See, e.g.*, MD (Oct. 26, 2009) at 21 & 35-37; TASC (Oct. 26, 2009) at 5, 14-15; Franklin at 19-20; *see also Agency Information Collection Activities*, 74 FR at 25542.

[620] 16 CFR 1320.3(b)(2).

[621] *See, e.g., Agency Information Collection Activities*, 74 FR at 25543; *Agency Information Collection Activities*, 71 FR at 28699. Accordingly, staff has continued to estimate that the hours burden for most of the Rule's disclosure requirements is 25% of the total hours associated with disclosures of the type the TSR requires.

[622] By extension upsells on these initial calls would not be applicable. Moreover, staff believes that few, if any, upsells on initial outbound and inbound calls would be for debt relief.

[623] RDRI at 2.

[624] U.S. Census Bureau, Current Population Survey, 2008 Annual Social and Economic Supplement, Internet Release Date: January 2009.

[625] See Ben Woolsey and Matt Schulz, *Credit card statistics, industry facts, debt statistics, available at* (*http://www.creditcards.com/credit-card-news/*

further estimates that 126,959,820 consumers have one or more credit cards. This figure, in turn, is then multiplied by the most recently available Federal Reserve Board data regarding the delinquency rate for credit cards. The Federal Reserve Board reported that the delinquency rate for credit cards was 6.58% in the third quarter of 2009.[626] Multiplying this delinquency rate by the estimated number of consumers having one or more credit cards – 126,959,820 – results in an estimate of 8,353,956 consumers with delinquent accounts. As before, staff assumes that each of these consumers will receive and place a call for debt relief services in a given year.

Because outbound calls are already subject to the existing provisions of the TSR, each such call will entail only the incremental PRA burden resulting from the new debt relief disclosures. For inbound calls, however, there will be new respondents, and associated underlying distinctions between current exemptions applicable to direct marketing via direct mail and those for general media (discussed further below). Accordingly, separate estimates are necessary for inbound debt relief calls attributable to each.

To determine the number of inbound debt relief calls attributable to general media advertising versus direct mail advertising, staff relied upon the DMA estimate that 78.8% of direct marketing is done by general media methods[627] and that 21.2% of direct marketing is done by direct mail.[628] Applying these percentages to the above-noted estimate of 8,353,956 inbound debt relief calls translates to 6,582,917 calls resulting from general media advertising and 1,771,039 calls arising from direct mail. Staff then estimated that 1/3 of inbound direct mail debt relief calls, or 590,346 such calls, are currently exempt from the TSR because they are in response to direct mail advertising that makes the requisite § 310.3(a)(1) disclosures. The remaining 2/3, or 1,180,692 inbound direct mail calls, are non-exempt.

a. Existing Respondents' Disclosure Burden

As discussed above, the amended Rule includes a new provision, § 310.3(a)(1)(viii), which includes four disclosures specific to providers of debt relief services; moreover, the Commission eliminated three disclosures set forth in the proposed rule. Staff estimates that reciting these disclosures in each sales call pertaining to debt relief services will take 10 seconds.[629]

For outbound calls, the disclosure burden for existing entities from the new debt relief disclosures is 4,112 hours (5,921,500 outbound calls involving debt relief x 10 seconds each (for new debt relief disclosures) x 25% TSR burden).

Similarly, currently non-exempt inbound calls – inbound calls placed as a result of direct mail solicitations that do not include the § 310.3(a)(1) disclosures – will only entail the incremental PRA burden resulting from the new debt relief disclosures. As noted above, this totals 1,180,692 such calls each year. The associated disclosure burden for these calls would be 820 hours (1,180,692 non-exempt direct mail inbound calls x 10 seconds for debt relief disclosures x 25% burden from TSR).

Thus, the total disclosure burden under the amended Rule for all existing respondents is 4,932 hours (4,112 hours for entities conducting outbound calls + 820 hours for entities conducting inbound, non-exempt telemarketing).

b. New Respondents' Disclosure Burden

New respondents – those currently exempt from the Rule's coverage as a result of the direct mail or general media exemptions for inbound calls – will incur disclosure burden not only for the debt relief disclosures in § 310.3(a)(1)(viii), but also for the existing general disclosures for which such entities will newly be responsible.[630]

As noted above, inbound calls responding to debt relief services advertised in general media are currently exempt from the Rule.[631] The disclosure burden for these calls would be 18 seconds each (8 seconds for existing § 310.3(a)(1) disclosures + 10 seconds for debt relief disclosures). Applying this unit measure to the estimated 6,582,917 inbound debt relief calls arising from general media advertising, the cumulative disclosure burden is 8,229 hours per year (6,582,917 inbound debt relief calls in response to general media advertising x 18 seconds x 25% burden from TSR).

Applying the previously stated estimates and assumptions, the disclosure burden for new respondents attributable to currently exempt inbound calls tied to direct mail (i.e., currently exempt when the requisite § 310.3(a)(1) disclosures are made), is 328 hours per year (590,346 exempt inbound direct mail calls x 8 seconds x 25% burden from TSR).

Thus, the total disclosure burden attributable to the Final Rule is 13,489 hours (4,932 + 8,229 + 328).

Estimated Annual Labor Cost: $945,361

Estimated Annual Non-Labor Cost: $58,753

4. Recordkeeping Labor and Non-Labor Costs

a. Labor Costs

Assuming a cumulative burden of 100 hours in Year 1 (of a prospective three-year PRA clearance for the TSR) to set up compliant recordkeeping systems for existing debt relief service providers newly subject to the Rule (879 new respondents x 100 hours each in Year 1 only), and applying to that a skilled labor rate of $26/hour,[632] labor costs would approximate $2,285,400 in the first year of compliance for new respondents.[633] As discussed above, however, in succeeding years, recordkeeping associated with the Rule will only require 879 hours, cumulatively, per year. Applied to a clerical wage rate of $14/hour, this would amount to $12,306 in each of those years. Thus, the estimated labor costs for recordkeeping associated with the Final Rule, averaged over a prospective three-year clearance period, is $770,004.

b. Non-Labor Costs

Staff believes that the capital and start-up costs associated with the TSR's information collection requirements are *de minimis*. The Rule's recordkeeping

credit-card-industry-facts-personal-debt-statistics-1276.php.)

[626] FRB, *Federal Reserve Statistical Release: Charge Offs and Delinquency Rates on Loans and Leases at Commercial Banks, available at* (*http://www.federalreserve.gov/releases/chargeoff/delallsa.htm*) (reporting a 6.58% delinquency rate for credit cards for the third quarter of 2009).

[627] *Id.*

[628] *DMA Statistical Fact Book* at 17.

[629] This estimate considers commenters' input while excluding the time pertaining to disclosures that are not invoked by the amended Rule.

[630] *See Agency Information Collection Activities*, 74 FR at 25542.

[631] This is so because, at present, no limitation or exemption would limit use of the general media exemption by those selling debt relief services via inbound telemarketing. *See* 16 CFR 310.6(b)(5) (the general media exemption, unlike the direct mail exemption, is not conditional and does not presently except from its coverage debt relief services).

[632] This rounded figure is derived from the mean hourly earnings shown for computer support specialists found in the National Compensation Survey: Occupational Earnings in the United States 2008, U.S. Department of Labor released August 2009, Bulletin 2720, Table 3 ("Full-time civilian workers," mean and median hourly wages), *available at* (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*).

[633] As discussed above, existing respondents should already have compliant recordkeeping systems and thus are not included in this calculation.

requirements mandate that companies maintain records, but not in any particular form. While those requirements necessitate that affected entities have a means of storage, industry members should have that already regardless of the Rule. Even if an entity finds it necessary to purchase a storage device, the cost is likely to be minimal, especially when annualized over the item's useful life.

Affected entities need some storage media such as file folders, electronic storage media or paper in order to comply with the Rule's recordkeeping requirements. Although staff believes that most affected entities would maintain the required records in the ordinary course of business, staff estimates that the previously determined 879 new respondents newly subject to the Final Rule will spend an annual amount of $50 each on office supplies as a result of the Rule's recordkeeping requirements, for a total recordkeeping cost burden of $43,950.

5. Disclosure Labor and Non-Labor Costs

a. Labor Costs

The estimated annual labor cost for disclosures under the Final Rule is $175,357. This total is the product of applying an assumed hourly wage rate of $13.00[634] to the earlier stated estimate of 13,489 hours pertaining to general and specific disclosures in initial outbound and inbound calls.

b. Non-Labor Costs

Estimated outbound disclosure hours (4,112) per above multiplied by an estimated commercial calling rate of 6 cents per minute ($3.60 per hour) equals $14,803 in telephone-related costs.[635]

V. Regulatory Analysis and Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act of 1980 ("RFA") [636] requires a description and analysis of proposed and final Rules that will have a significant economic impact on a substantial number of small entities.[637] The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") [638] with the proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") [639] with the Final Rule, if any. The Commission is not required to make such analyses if a Rule would not have such an economic effect.[640]

As of the date of the NPRM, the Commission did not have sufficient empirical data regarding the debt relief industry to determine whether the proposed amendments to the Rule would impact a substantial number of small entities as defined in the RFA.[641] It was also unclear whether the proposed amended Rule would have a significant economic impact on small entities. Thus, to obtain more information about the impact of the proposed rule on small entities, the Commission decided to publish an IRFA pursuant to the RFA and to request public comment on the impact on small businesses of its proposed amended Rule.

In response to questions in the NPRM, the Commission did not receive any comprehensive empirical data regarding the revenues of debt relief companies or the impact on small businesses of the amended Rule. A trade association stated that a significant number of companies that would be harmed by the advance fee ban were small businesses.[642] One commenter asserted that there are tens of thousands of sole practitioners engaged in financial consulting services that may fall under the Rule's definition of debt relief services.[643] It does not appear, though, that the commenter considered that many sole practitioners would not fall within the Rule's ambit because they meet face-to-face with their customers.[644] The commenter also opined that the rule would subject small businesses to frivolous lawsuits that could jeopardize their businesses.[645] However, the commenter neither provided support for the statement nor asserted that the impact would be more significant on small businesses than large businesses.[646]

A. Need for and Objectives of the Rule

The objective of the amended Rule is to curb deceptive and abusive practices occurring in the telemarketing of debt relief services. As described in Sections II and III, above, the amendments are intended to address consumer protection concerns regarding telemarketing of debt relief services and are based on evidence in the record that deceptive and abusive acts are common in telemarketing of debt relief services to consumers.

B. Significant Issues Raised by Public Comment, Summary of the Agency's Assessment of These Issues, and Changes, If Any, Made in Response to Such Comments

As discussed in Section III above, commenters raised limited concerns about the burden of the proposed disclosures.[647] However, commenters raised more significant concerns about the potential costs and burdens of the advance fee ban, as discussed in Sections III.C.2.c-e. Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms.[648] Rather, they argued that the costs to be borne by all firms – including small firms – would be

[634] This rounded figure is derived from the mean hourly earnings shown for telemarketers found in the National Compensation Survey: Occupational Earnings in the United States 2008, U.S. Department of Labor released August 2009, Bulletin 2720, Table 3 ("Full-time civilian workers," mean and median hourly wages), *available at* (*http://www.bls.gov/ncs/ncswage2008.htm#Wage_Tables*).

[635] Staff believes that remaining non-labor costs would largely be incurred by affected entities, regardless, in the ordinary course of business and/ or marginally exceed such costs.

[636] 5 U.S.C. 601-612.

[637] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small-business concern" as a business that is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a)(1).

[638] 5 U.S.C. 603.

[639] 5 U.S.C. 604.

[640] 5 U.S.C. 605.

[641] In response to a request for comments issued in conjunction with the Workshop, the Commission received no empirical data regarding the revenues of debt relief companies generally, or debt settlement companies specifically. One Workshop commenter opined, without attribution, that the vast majority of debt settlement companies have fewer than 100 employees. *See* Able Workshop Comment at 6 ("[o]f the thousand plus or minus companies whose business activities are related to debt settlement, the estimates for the numbers of companies and the numbers of individuals either working for or affiliated with them are as follows: Two percent consist of more than 100 individuals; eight percent consist of 25 to 100 individuals; and the remaining ninety percent consist of less than 25 individuals.").

[642] USOBA (Oct. 26, 2009) at 20 ("95% of USOBA members would 'certainly' or 'likely' be forced to lay off employees if the advance fee ban were adopted [note that 72% of these USOBA members were 'small businesses' (firms of 25 people or less)]").

[643] Able (Oct. 21, 2009) at 28.

[644] *See* 16 CFR 310.6(b)(3).

[645] Able (Oct. 21, 2009) at 28.

[646] Two other debt settlement companies stated that many small business entities would not be able to enter the market due to significant investment and overhead costs and extended break-even time. SDS (Oct. 7, 2009) at 3; CRN (Oct. 8, 2009) at 5. Again, the commenters did not provide support for the assertions and did not explain why small businesses would fare differently than large businesses in this regard.

[647] With respect to the disclosures, NACCA questioned whether it was realistic that the proposed disclosures could be provided in 20 seconds. NACCA at 2. Moreover, a debt settlement company stated that it provides consumers with 16 mandatory disclaimers, and an additional 6 disclosures if applicable – it estimates that reading the disclaimers, and allowing the consumer to assent to the disclosures, requires approximately four and a half minutes. MD (Oct. 26, 2009) at 21.

[648] One commenter stated that, as a "smaller operation," it would not be able to front employees salaries, as well as account set-up and maintenance costs, but did not provide any data to support these assertions or support the assertion that small companies would have a harder time than large companies in capitalizing expenses. *See* RADR at 1.

excessive. As discussed in detail above, two debt settlement trade associations and many debt settlement companies argued that numerous companies would go out of business if the FTC imposes an advance fee ban.[649] A trade association submitted a survey of its members reporting: (1) 84% would "almost certainly" or "likely" have to shut down if an advance fee ban were enacted; (2) 95% would "certainly" or "likely" lay off employees under an advance fee ban; and (3) 85% would stop offering debt settlement services to new and existing consumers.[650] These survey results, however, are not persuasive, as the commenter did not provide basic information about survey respondents and methodology. Moreover, the survey elicited self-reported statements but did not verify the responses' accuracy in any way. Individual debt settlement company commenters similarly asserted that they would go out of business if the Commission imposed an advance fee ban.[651] These statements, however, did not have adequate support. Moreover, the Final Rule permits debt relief providers to require consumers to place funds for provider fees and payments to creditors or debt collectors in a dedicated bank account, provided certain conditions are met. This provision will assure providers that, once they settle a consumer's debt, they will receive the appropriate fee.

C. Description and Estimate of the Number of Small Entities Subject to the Final Rule or Explanation Why No Estimate Is Available

The amendments to the Rule will affect providers of debt relief services engaged in "telemarketing," as defined by the Rule to mean "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call."[652] Staff estimates that the amended Rule will apply to approximately 2,000 entities. Determining a precise estimate of how many of these are small entities, or describing those entities further, is not readily feasible because the staff is not aware of published data that reports annual revenue figures for debt relief service providers.[653] Further, the Commission's requests for information about the number and size of debt settlement companies yielded virtually no information.[654] Based on the absence of available data, the Commission believes that a precise estimate of the number of small entities that fall under the amendment is not currently feasible.

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Rule and the Type of Professional Skills That Will Be Necessary to Comply

The Final Rule imposes disclosure and recordkeeping burden within the meaning of the PRA. The Commission is seeking clearance from the OMB for these requirements, and the Commission's Supporting Statement submitted as part of that process is being made available on the public record of this rulemaking. Specifically, the Final Rule requires specific disclosures in telemarketing of debt relief services, and it would subject inbound debt relief service telemarketing to the Rule's requirements, including the existing disclosure and recordkeeping provisions.[655] In addition, the Final Rule prohibits a seller or telemarketer of debt relief services from requesting or receiving a fee in advance of providing the offered services.[656]

The classes of small entities affected by the amendments include telemarketers or sellers engaged in acts or practices covered by the Rule. The types of professional skills required to comply with the Rule's recordkeeping, disclosure, or other requirements would include attorneys or other skilled labor needed to ensure compliance.

E. Steps the Agency Has Taken to Minimize any Significant Economic Impact on Small Entities, Consistent with the Stated Objectives of the Applicable Statutes

In drafting the amended Rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. The Commission believes that the amendments – including the new disclosures for debt relief services, prohibited misrepresentations, and the advance fee ban – are necessary in order to protect consumers considering the purchase of debt relief services. Similarly, the Commission is extending the coverage of the existing provisions of the Rule to inbound telemarketing of debt relief services. This amendment is designed to ensure that in telemarketing transactions to sell debt relief services, consumers receive the benefit of the Rule's protections. For each of these amendments, the Commission has attempted to tailor the provision to the concerns evidenced by the record to date. In fact, in determining the Final Rule's requirements, the FTC reduced the number of debt relief-specific disclosures from six initially proposed in the NPRM to four in order to reduce the burden on business, including small entities. On balance, the Commission believes that the benefits to consumers of each of the Rule's requirements outweigh the costs to industry of implementation.

The Commission considered, but decided against, providing an exemption for small entities in the amended Rule. The protections afforded to consumers from the amendments are equally important regardless of the size of the debt relief service provider with whom they transact. Indeed, small debt relief service providers have no unique attributes that would warrant exempting them from provisions, such as the required debt relief disclosures. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services. Similarly, the protections afforded to consumers by the advance fee ban are equally necessary regardless of the size of the entity providing the services. Thus, the Commission believes that creating an exemption for small businesses from compliance with the amendments would be contrary to the goals of the amendments because it would arbitrarily limit their reach to the detriment of consumers.

Nonetheless, the Commission has taken care in developing the amendments to set performance standards, which establish the objective results that must be achieved by

[649] *Supra* Section III.C.2.c.

[650] USOBA (Oct. 26, 2009) at 20.

[651] SDS at 2; MD (Oct. 26, 2009) at 25; RADR at 1; Orion (Oct. 1, 2009) at 2; CDS at 1; D&A at 2; *see also* ULC at 6; CSA at 10 (stating generally that the advance fee ban "could put a legitimate company out of business"); FDR (Oct. 26, 2009) at 16-17; CCC at 1 (a for-profit credit counseling company stated that it would go out of business if the Commission promulgates the advance fee ban).

[652] 16 CFR 310.2(cc) (in the proposed amended Rule, this definition is renumbered as § 310.2(dd)).

[653] Directly covered entities under the proposed amended Rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System ("NAICS") as follows: All Other Professional, Scientific and TechnicalServices (NAICS code 541990) with no more than $7.0 million dollars in average annual receipts (no employee size limit is listed). *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System codes (Aug. 22, 2008), *available at* (*http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf/*).

[654] *See* Able Workshop Comment at 6 (there are a "thousand plus or minus companies whose business activities are related to debt settlement").

[655] *See* Rule § 310.3(a)(1)(viii).

[656] *See* Rule § 310.4(a)(5).

regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the TSR must be kept. Moreover, the Rule's disclosure requirements are format-neutral; sellers and telemarketers may make the disclosures in writing or orally, as long as they are clear and conspicuous.[657] In sum, the agency has worked to minimize any significant economic impact on small entities.

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS CITED IN THE SBP

TSR Debt Relief Final Rule

Short-name/Acronyms	Commenter
Allen	Charles Allen
Arnold & Porter	Arnold & Porter on behalf of National Consumer Council
ART	A.R. Trust Services, Inc.
Able	Able Debt Settlement, Inc.
ACA	ACA International
ACCORD	American Coalition of Companies Organized to Reduce Debt
AFSA	American Financial Services Association
AICCCA	Association of Independent Consumer Credit Counseling Agencies
AADMO	American Association of Debt Management Organizations
ABA	American Bankers Association
AMCA	American Credit Alliance
Atkins	Anthony Atkins
BBB	Better Business Bureau of the Southland
Briesch	Richard Briesch
Brodie	Jessica Brodie
CDS	Tim Harris, on behalf of CDS
CCC	Edward McTaggart, on behalf of CCC
Cambridge	Cambridge Credit Counseling Corp.
Clement	Bryan Scott Clement
CRN	Consumer Recovery Network
CareOne	Care One Services
Centricity	Centricity, Inc.
Cheney	Gabriel Cheney
CO AG	Office of the Colorado Attorney General
CCCS CNY	Consumer Credit Counseling Service of Central New York
CFA	Consumer Federation of America, Consumers Union, Consumer Action, National Consumer Law Center, Center for Responsible Lending, National Association of Consumer Advocates, National Consumers League, US Public Interest Research Group, Privacy Rights Clearinghouse, Arizona Consumers Council, Chicago Consumer Coalition, Consumer Assistance Council, Community Reinvestment Association of North Carolina, Consumer Federation of the Southeast, Grass Roots Organizing, Jacksonville Area Legal Aid, Inc., Maryland Consumer Rights Coalition, Mid-Minnesota Legal Assistance, and Virginia Citizens Consumer Council
CU	Consumer's Union
CSA	Morrison & Foerster, LLP on behalf of Credit Solutions of America
D&A	Davis & Associates
Davis	Robert Davis, engaged by AADMO
Debthelper	Debthelper
DRS	Debt Remedy Solutions
DS	Debt Shield, Inc.
DSUSA	Debt Settlement USA
DMB	DMB Financial, LLC
DSA/ADE	Debt Settlement America, Inc. and American Debt Exchange, Inc.
FCS	Financial Consulting Services, LLC
FECA	Financial Education and Counseling Alliance
Figliuolo	Michael Figliuolo
FSR	Financial Services Roundtable
FDR	Freedom Debt Relief, LLC
Franklin	Franklin Debt Relief
Garner	Garner
GCS	Global Client Solutions, LLC
Gecha	Gecha
Greenfield	Professor Michael Greenfield
GP	GreenPath, Inc.
Hargrove	Jason Hargrove
Hinksor	Eric Hinksor
Ho	Andy Ho
Houghton	Rebecca Houghton
Hunter	Hunter Business Solutions
JH	J. Haas Group
Kaiser	Karen Kaiser

[657] If the disclosures are made in writing, they are considered clear and conspicuous "only if they are sent close enough in time to the call so that the consumer associates the call with the written disclosures." FTC, *Complying With the Telemarketing Sales Rule* (May 2009), *available at* (*http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm*).

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS CITED IN THE SBP—Continued
TSR Debt Relief Final Rule

Short-name/Acronyms	Commenter
Loeb	Loeb & Loeb, LLC
MP	Manchester Publishing Company, Inc.
McInnis	Saundra McInnis
MD	Morgan Drexen, Inc.
MD AG	Office of the Maryland Attorney General
MN AG	Office of the Minnesota Attorney General
MN LA	Mid-Minnesota Legal Assistance
NACCA	National Association of Consumer Credit Administrators
NAAG	National Association of Attorneys General
Neal	Erin Neal
NYC DCA	N.Y.C. Dept. of Consumer Affairs
NFCC	National Foundation for Credit Counseling
NWS	Nationwide Support Services, Inc.
Orion	Orion Processing, LLC.
Palmiero	Diane Palmiero, on behalf of Century Negotiations, Inc.
Paquette	Barbara Paquette
Patel	David Patel
Pratt	Vincent Pratt
QSS	Quality Survey Services
QLS	Queens Legal Services
RDRI	Responsible Debt Relief Institute
RADR	Rise Above Debt Relief
SBLS	South Brooklyn Legal Services
Seigle	John Seigle
Silverman	Jeffrey Silverman
SOLS	Southeastern Ohio Legal Services
SDS	Superior Debt Services
Smith	Andrew Smith
Taillie	Alex Taillie
TASC	The Association of Settlement Companies
TBDR	Two Bridge Debt Resolutions
ULC	Uniform Law Commission/National Conference of Commissioners on Uniform State Laws
USOBA	United States Organizations for Bankruptcy Alternatives
USDR	US Debt Resolve, Inc.
Weinstein	Bernard Weinstein
Wheat	Sharon Wheat
WV AG	Office of the West Virginia Attorney General

List of FTC Law Enforcement Actions Against Debt Relief Companies

1. *FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997 (D.D.C. filed June 15, 2010) (debt settlement)
2. *FTC v. Asia Pacific Telecom, Inc.*, No. 10 C 3168 (N.D. Ill. filed May 24, 2010) (debt negotiation)
3. *FTC v. Advanced Mgmt. Servs. NW, LLC*, No. 10-148-LRS (E.D. Wash. filed May 10, 2010) (debt negotiation)
4. *FTC v. Credit Restoration Brokers, LLC*, No. 2:10-cv-0030-CEH-SPC (M.D. Fla. filed Jan. 19, 2010) (debt settlement and credit repair)
5. *FTC v. 2145183 Ontario, Inc.*, No. 09-CV-7423 (N.D. Ill., preliminary injunction issued Dec. 17, 2009) (debt negotiation)
6. *FTC v. Econ. Relief Techs., LLC*, No. 09-CV-3347 (N.D. Ga., preliminary injunction issued Dec. 14, 2009) (debt negotiation)
7. *FTC v. JPM Accelerated Servs., Inc.*, No. 09-CV-2021 (M.D. Fla., preliminary injunction issued Dec. 31, 2009) (debt negotiation)
8. *FTC v. MCS Programs, LLC*, No. 09-CV-5380 (W.D. Wash., final order July 19, 2010) (debt negotiation)
9. *FTC v. Group One Networks, Inc.*, No. 09-CV-00352 (M.D. Fla., preliminary injunction issued March 25, 2009) (debt negotiation)
10. *FTC v. Edge Solutions, Inc.*, No. CV 07-4087-JG-AKT (E.D.N.Y., final order Aug. 29, 2008) (debt settlement)
11. *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo., final order Apr. 11, 2008) (debt settlement)
12. *FTC v. Select Pers. Mgmt., Inc.*, No. 07-CV-0529 (N.D. Ill., final order May 15, 2009) (debt negotiation)
13. *FTC v. Express Consolidation*, No. 0:06-CV-61851-WJZ (S.D. Fla., final order May 5, 2007) (credit counseling)
14. *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal., final order Oct. 2, 2008) (debt settlement)
15. *United States v. Credit Found. of Am.*, No. CV06-3654 ABC (VBKx) (C.D. Cal., final order June 16, 2006) (credit counseling)
16. *FTC v. Integrated Credit Solutions, Inc.*, No. 8:06-CV-00806-SCB-TGW (M.D. Fla., final order Oct. 16, 2006) (credit counseling)
17. *FTC v. Debt Solutions, Inc.*, No. CV06-0298 (W.D. Wash., final order June 18, 2007) (debt negotiation)
18. *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC(Ex) (C.D. Cal., final order Dec. 12, 2004) (debt settlement)
19. *FTC v. Nat'l Consumer Council, Inc.*, No. ACV04-0474CJC (JWJX) (C.D. Cal., final order Apr. 1, 2005) (credit counseling and debt settlement)
20. *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass., final order Mar. 28, 2005) (debt settlement)
21. *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 8:04-CV-1674-T-17MSS (M.D. Fla., final order Mar. 30, 2005) (credit counseling)
22. *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 (C.D. Cal., final order July 13, 2005) (debt settlement)
23. *FTC v. AmeriDebt, Inc.*, No. PJM 03-3317 (D. Md., final order May 17, 2006) (credit counseling)

List of State Law Enforcement Actions Against Debt Relief Companies

Debt Settlement

Attorney General Actions

1. *Alabama v. Allegro Law LLC*, No. 2:09cv729 (M.D. Ala. 2009). Press Release, Alabama Attorney General, *A.G. King and Securities Commission Sue Prattville Companies Operating Alleged National Debt Settlement Scheme* (July 10, 2009), *available at* (http://www.ago.state.al.us/news_template.cfm?Newsfile=www.ago.alabama.gov/news/07102009.htm)
2. *California v. Freedom Debt Relief*, No. CIV477991 (Cal. Super. Ct. San Mateo County 2008). Consent Judgment, Stipulation for Entry of Consent Judgment, and Complaint, *available at* (http://www.corp.ca.gov/ENF/pdf/f/FDR.pdf)
3. *In re Clearone Advantage, LLC* (Colo. 2009). Press Release, Colorado Attorney General, *Eleven Companies Settle with the State Under New Debt-Management and Credit Counseling Regulations* (Mar. 12, 2009), *available at* (http://www.coloradoattorneygeneral.gov/press/news/2009/03/12/eleven_companies_settle_state_under_new_debt_management_and_credit_counseling_)
4. *In re Credit Answers, LLC* (Colo. 2009). Press Release, *supra* item 3.
5. *In re Debt Relief of Am.* (Colo. 2009). Press Release, *supra* item 3.
6. *In re Fin. Freedom Res., Inc.* (Colo. 2009). Press Release, *supra* item 3.
7. *In re Freedom Debt Relief* (Colo. 2009). Press Release, *supra* item 3.
8. *In re New Beginnings Debt Settlement, LLC* (Colo. 2009). Press Release, *supra* item3.
9. *In re New Life Debt Relief Corp.* (Colo. 2009). Press Release, *supra* item 3.
10. *In re PDL Assistance, Inc.* (Colo. 2009). Press Release, *supra* item 3.
11. *In re Pemper Cos., Inc.* (Colo. 2009). Press Release, *supra* item3.
12. *Colorado v. ADA Tampa Bay, Inc. dba Am. Debt Arbitration, FGL Clearwater, Inc. dba Am. Debt Arbitration, and Glenn P. Stewart* (Colo. 2010).
13. *Florida v. Hess Kennedy Chartered LLC*, No. 08007686 (Fla. Cir. Ct. - 17th 2008). Complaint, *available at* (http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7C2GSH/$file/HessComplaint.pdf)
14. *Florida v. New Leaf Assocs., LLC*, No. 05-4612-CI-20 (Fla. Cir. Ct. - 6th 2008). Complaint, *available at* (http://myfloridalegal.com/webfiles.nsf/wf/mray-6e3juf/$file/newleafcomplaint.pdf)
15. *Florida v. Hacker*, (Fla. Cir. Ct. - 4th 2008). Complaint, *available at* (http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7C2GRC/$file/HackerandCaparellaComplaint.pdf)
16. *Florida v. Ryan Boyd*, No. 16-2008-CA-002909 (Fla. Cir. Ct. - 4th 2008). Press Release, Florida Attorney General, *Two Duval County Debt Negotiation Companies Sued for Alleged Deceptions* (Mar. 5, 2008), *available at* (http://myfloridalegal.com/__852562220065EE67.nsf/0/1E9B7637235FE16C85257403005C595F?Open&Highlight=0,ryan,boyd)
17. *Florida v. Credit Solutions of Am., Inc.*, No. 09-CA-026438 (Fla. Cir. Ct. - 13th 2009). Complaint, *available at* (http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7WYJAU/$file/CSAcomplaint.pdf)
18. *Florida v. Nationwide Asset Servs., Inc., et al.* (Fla. Cir. Ct. - 6th 2009). Complaint, *available at* (http://myfloridalegal.com/webfiles.nsf/WF/KGRG-7WYJCD/$file/ADAcomplaint.pdf)
19. *In re Christian Crossroads.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (http://myfloridalegal.com/85256309005085AB.nsf/0/3BEE2927780BC9468525765D0044C534?Open&Highlight=0,christian,crossroads)
20. *In re Clear Fin. Solutions.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (http://myfloridalegal.com/__85256309005085AB.nsf/0/C0634690070A696285257585005670EB?Open&Highlight=0,clear,financial)
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22. *In re Debt Settlement USA.* Notice of Active Public Consumer-Related Investigation, Florida Attorney General, *available at* (http://myfloridalegal.com/__85256309005085AB.nsf/0/21B6A5099EFC61FE852576A500751189?Open&Highlight=0,debt,services)
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2. *Georgia. Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Debt Freedom, Inc. and Joshua Autenreith*, No. 2008CV158957 (Ga. Super. Ct. Fulton County 2008).

3. *Georgia, Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Smart Credit Mgmt. Group, Inc.*, No. 2007CV134220 (Ga. Super. Ct. Fulton County 2007).

4. *Georgia, Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Consumer Credit Counseling Found.*, No. 2006CV120087 (Ga. Super. Ct. Fulton County 2006).

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3. *Illinois v. AmeriDebt, Inc.* (Ill. 2005). Press Release, *supra* item 2.

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9. *Minnesota v. AmeriDebt, Inc.* (Minn. 2003).

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13. *Texas v. AmeriDebt, Inc.* (Tex. 2003). Press Release, Texas Attorney General, *Attorney General Abbot Files Suit Against Non-Profit Credit Counseling Service* (Nov. 19, 2003), *available at* (*http://www.oag.state.tx.us/oagNews/release.php?id=284*)

14. *State ex rel. McGraw v. Cambridge Credit Counseling Corp.* (W. Va. 2006). Press Release, West Virginia Attorney General, *Attorney General Secures Settlement Agreement with Cambridge* (May 25, 2006), *available at* (*http://www.wvago.gov/press.cfm?ID=35&fx=more*)

15. *State ex rel. McGraw v. Family Credit Counseling Corp.* (W. Va. 2009). Press Release, West Virginia Attorney General, *Attorney General McGraw Sues James R. Armstrong, Jr. And His Web of Florida Shell Companies over Fraudulent Credit Counseling Scheme* (May 8, 2009), *available at* (*http://www.wvago.gov/press.cfm?fx=more&ID=475*)

16. *State ex rel. McGraw v. Help Ministries dba Debt Free* (W. Va. 2006). Press Release, West Virginia Attorney General, *Attorney General McGraw Secures Settlement With Debt Free* (Sept. 13, 2006), *available at* (*http://www.wvago.gov/press.cfm?ID=83&fx=more*)

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2. *In re Money Mgmt. by Mail, Inc.* (California Dep't of Corps. 2005). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2005/MoneyManagement.pdf*)

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4. *Georgia, Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Fin. Freedom Resources, Inc.*, No. 2007-RCCV-781 (Ga. Super. Ct. Richmond County 2008).

5. *South Carolina Dep't of Consumer Affairs v. Vision Fin. Mgmt., LLC and Nelzarie Wynn*, No. 08-ALJ-30-0043-IJ (S.C. Admin. Law Ct. 2008). Administrative Law Court Decision, *available at* (*http://www.scalc.net/decisions.aspx?q=4&id=11007*)

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2. *Delaware v. Freedom Debt Relief, LLC* (Del. 2009). Press Release, Delaware Attorney General, *Consumer Protection Unit Acts to Safeguard Delawareans in Debt* (Sept. 28, 2009), *available at* (*http://attorneygeneral.delaware.gov/media/releases/2009/Consumer%20Protection%20Unit%20acts%20to%20safeguard%20*

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3. *Idaho v. Debt Relief USA, Inc.* (Idaho 2008). Press Release, Idaho Department of Finance, *Department of Finance Reaches Agreements with Out-of-State Debt Settlement Companies* (Sept. 19, 2008), available at (*http://finance.idaho.gov/PR/2008/GSpressRelDebtStlmntCoSettlements9-08.pdf*)

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6. *Idaho v. Credit Solutions of Am., Inc.* (Idaho 2008). Press Release, Idaho Department of Finance, *Idaho Department of Finance Settles with Credit Solutions of America* (Jan. 15, 2008), *available at* (*http://spokane.bbb.org/article/idaho-department-of-finance-settles-with-credit-solutions-ofamerica-inc-3086*)

7. *New Hampshire v. Debt Relief USA, et al.*, Banking Department No. 08-361 (N.H. 2008). Order of License Denial, *available at* (*http://www.nh.gov/banking/Order08_361Debt ReliefUSA_DO.pdf*)

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10. *In re Consumer Law Ctr.* (Utah Dep't of Commerce, 2008).

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17. *State ex rel. McGraw v. New Horizons Debt Relief* (W. Va. 2007) . Press Release, *supra* item 14.

18. *State ex rel. McGraw v. Consumer Credit Counseling of Am., Inc.* (W. Va. 2008). Press Release, West Virginia Attorney General, *Attorney General McGraw Reaches Agreement with Three More "Debt Settlement" Companies; Refunds of $375K to 141 WV Consumers* (Sept. 3, 2008), *available at* (*http://www.wvago.gov/press.cfm?fx=more&ID=446*)

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3. *In re AAA Fin. Servs., Neo Fin. Servs.* (Cal. Dep't of Corps. 2003). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2003/neo.pdf*)

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9. *In re Harbour Credit Counseling Servs., Inc.* (California Dep't of Corps. 2002). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2002/harbour.pdf*)

10. *In re InCharge Inst. of Am., Inc.* (Cal. Dep't of Corps. 2002). Consent Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2002/inchargeconsentorder.pdf*)

11. *In re MyVesta.org, Inc.* (Cal. Dep't of Corps. 2002). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2002/myvesta.pdf*)

12. *In re Innovative Sys. Tech., Inc.* (Cal. Dep't of Corps. 2002). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2002/briggs.pdf*)

13. *In re Nat'l Consumer Council, Inc.* (Cal. Dep't of Corps. 2004). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2004/NationalConsumerCouncilInc.pdf*)

14. *In re Positive Return, Inc.* (Cal. Dep't of Corps. 2004). Desist and Refrain Order, *available at* (*http://www.corp.ca.gov/ENF/pdf/2004/Positive.pdf*)

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19. *In re Am. Debt Mgmt. Servs., Inc.*, No. DFP EU 2007-120 (Md. Comm'r of Fin. Regulation 2007). Final Order to Cease and Desist, *available at* (*http://www.dllr.state.md.us/finance/consumers/pdf/eandamdebtmgmt.pdf*)

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43. *Wisconsin, Dep't of Fin. Insts., Dep't of Banking v. Worldwide Fin. Servs., Inc.* (Wisc. 2007). Order, *available at* (*http://www.wdfi.org/_resources/indexed/site/newsroom/admin_orders/mb_2007/WorldwideFinancialServicesInc.pdf*)

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VI. Final Amendments

List of Subjects in 16 CFR part 310

Telemarketing, Trade practices.

■ For the reasons discussed in the preamble, the Federal Trade Commission revises 16 CFR part 310 to read as follows:

TELEMARKETING SALES RULE 16 CFR PART 310

Authority: 15 U.S.C. 6101–6108.

Source: 68 FR 4669, Jan. 29, 2003, unless otherwise noted.

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Debt relief service* means any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the

[658] In addition to the state cases provided in this List, the Commission is aware of 10 additional matters submitted by NAAG in a supplemental comment dated July 6, 2010: *In re United Debt Svcs., LLC* (W. Va. 2010); *West Virginia v. Nat'l Credit Solutions* (W. Va. 2010); *West Virginia v. Shermon Enters., LC dba Nationwide Credit Solutions, GSV Ltd.*, and Glen S. Vondielingen (W. Va. 2009); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Solve Debts, Inc.*, No. 2009-CV-1777490 (Ga. 2009); *Joseph B. Doyle, Adm'r, Foir Bus. Proctices Act v. The Credit Exch. Corp.*, No. 2009-CV-179467 (Ga. 2009); *Joseph B. Doyle, Adm'r, Foir Bus. Practices Act v. Beocon Debt Settlement, Inc.*, No. 2010-CV-185216 (Ga. 2010); *Joseph B. Doyle, Adm'r, Fair Bus. Practices Act v. Johnson Law Group* (Ga. 2010).

balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.

(n) *Donor* means any person solicited to make a charitable contribution.

(o) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(p) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(q) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(r) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(s) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(u) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(v) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(w) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(x) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(y) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(z) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(aa) *Seller* means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(bb) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(cc) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(dd) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(ee) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices.* It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer consents to pay[659] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[660]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and,

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659 When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment. In the case of debt relief services, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before the consumer enrolls in an offered program.

660 For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643;

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); and

(viii) In the sale of any debt relief service:

(A) the amount of time necessary to achieve the represented results, and to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the time by which the debt relief service provider will make a bona fide settlement offer to each of them;

(B) to the extent that the service may include a settlement offer to any of the customer's creditors or debt collectors, the amount of money or the percentage of each outstanding debt that the customer must accumulate before the debt relief service provider will make a bona fide settlement offer to each of them;

(C) to the extent that any aspect of the debt relief service relies upon or results in the customer's failure to make timely payments to creditors or debt collectors, that the use of the debt relief service will likely adversely affect the customer's creditworthiness, may result in the customer being subject to collections or sued by creditors or debt collectors, and may increase the amount of money the customer owes due to the accrual of fees and interest; and

(D) to the extent that the debt relief service requests or requires the customer to place funds in an account at an insured financial institution, that the customer owns the funds held in the account, the customer may withdraw from the debt relief service at any time without penalty, and, if the customer withdraws, the customer must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643;

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s); or

(x) Any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt relief service will initiate attempts with the customer's creditors or debt collectors or make a bona fide offer to negotiate, settle, or modify the terms of the customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the customer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a debt relief service is offered or provided by a non-profit entity.

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[661] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[662] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[663]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

[661] Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR part 226.

[662] Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq., and Regulation E, 12 CFR part 205.

[663] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating.* It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) *Credit card laundering.* Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) (i) Requesting or receiving payment of any fee or consideration for any debt relief service until and unless:

(A) the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of at least one debt pursuant to a settlement agreement, debt management plan, or other such valid contractual agreement executed by the customer;

(B) the customer has made at least one payment pursuant to that settlement agreement, debt management plan, or other valid contractual agreement between the customer and the creditor or debt collector; and

(C) to the extent that debts enrolled in a service are renegotiated, settled, reduced, or otherwise altered individually, the fee or consideration either:

(1) bears the same proportional relationship to the total fee for renegotiating, settling, reducing, or altering the terms of the entire debt balance as the individual debt amount bears to the entire debt amount. The individual debt amount and the entire debt amount are those owed at the time the debt was enrolled in the service; or

(2) is a percentage of the amount saved as a result of the renegotiation, settlement, reduction, or alteration. The percentage charged cannot change from one individual debt to another. The amount saved is the difference between the amount owed at the time the debt was enrolled in the service and the amount actually paid to satisfy the debt.

(ii) Nothing in § 310.4(a)(5)(i) prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:

(A) the funds are held in an account at an insured financial institution;

(B) the customer owns the funds held in the account and is paid accrued interest on the account, if any;

(C) the entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;

(D) the entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and

(E) the customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

(6) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(7) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(8) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.*

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[664] of that person; or

(ii) as an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(v) Initiating any outbound telephone call that delivers a prerecorded message, other than a prerecorded message permitted for compliance with the call abandonment safe harbor in § 310.4(b)(4)(iii), unless:

(A) in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

(i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;

(ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;

(iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and

(iv) Includes such person's telephone number and signature;[665] and

(B) In any such call to induce the purchase of any good or service, or to induce a charitable contribution from a member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made, the seller or telemarketer:

(i) Allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call; and

(ii) Within two (2) seconds after the completed greeting of the person called, plays a prerecorded message that promptly provides the disclosures required by § 310.4(d) or (e), followed immediately by a disclosure of one or both of the following:

[664] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

[665] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(A) In the case of a call that could be answered in person by a consumer, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A) at any time during the message. The mechanism must:

(1) Automatically add the number called to the seller's entity-specific Do Not Call list;

(2) Once invoked, immediately disconnect the call; and

(3) Be available for use at any time during the message; and

(B) In the case of a call that could be answered by an answering machine or voicemail service, that the person called can use a toll-free telephone number to assert a Do Not Call request pursuant to § 310.4(b)(1)(iii)(A). The number provided must connect directly to an automated interactive voice or keypress-activated opt-out mechanism that:

(1) Automatically adds the number called to the seller's entity-specific Do Not Call list;

(2) Immediately thereafter disconnects the call; and

(3) Is accessible at any time throughout the duration of the telemarketing campaign; and

(iii) Complies with all other requirements of this part and other applicable federal and state laws.

(C) Any call that complies with all applicable requirements of this paragraph (v) shall not be deemed to violate § 310.4(b)(1)(iv) of this part.

(D) This paragraph (v) shall not apply to any outbound telephone call that delivers a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[666]; and

(iv) The seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions.* Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

[666] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(d) *Required oral disclosures in the sale of goods or services.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations.* It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or

services were shipped or provided, and the amount paid by the customer for the goods or services;[667]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising," ("Franchise Rule") 16 CFR Part 436, and the sale of business opportunities subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Business Opportunities," ("Business Opportunity Rule") 16 CFR Part 437, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided,* however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided,* however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided,* however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided,* however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, debt relief services, business opportunities other than business arrangements covered by the Franchise Rule or Business Opportunity Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided,* however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry

[667] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $54 for each area code of data accessed, up to a maximum of $14,850; provided, however, that there shall be no charge to any person for accessing the first five area codes of data, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing area codes of data in the National Do Not Call Registry if the person is permitted to access, but is not required to access, the National Do Not Call Registry under this Rule, 47 CFR 64.1200, or any other Federal regulation or law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) Each person who pays, either directly or through another person, the annual fee set forth in § 310.8(c), each person excepted under § 310.8(c) from paying the annual fee, and each person excepted from paying an annual fee under § 310.4(b)(1)(iii)(B), will be provided a unique account number that will allow that person to access the registry data for the selected area codes at any time for the twelve month period beginning on the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, each person required to pay the fee under § 310.8(c) must first pay $54 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, each person required to pay the fee under § 310.8(c) must first pay $27 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

[FR Doc. 2010–19412 Filed 8–9–10; 8:45 am]

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Federal Register

Tuesday,
August 10, 2010

Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938
Pennsylvania Regulatory Program; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-153; Docket ID OSM-2008-0021]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule; partial approval of amendment.

SUMMARY: OSM is announcing its partial approval of a program amendment submitted by the Commonwealth of Pennsylvania for the purpose of addressing the need for financial guarantees to cover the costs of treatment of post-mining pollutional discharges and land reclamation for those surface coal mining sites that were originally bonded under the Commonwealth's now defunct alternative bonding system (ABS). OSM is requiring that Pennsylvania ensure that its program provides suitable, enforceable funding mechanisms sufficient to guarantee coverage of land reclamation at all original ABS sites.

DATES: *Effective Date:* August 10, 2010.

FOR FURTHER INFORMATION CONTACT: George Rieger, Director, Pittsburgh Field Division, *Telephone:* (717) 782-4036, *e-mail: grieger@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program
II. Description of the Amendment
III. OSM Findings
IV. Summary and Disposition of Comments
V. OSM's Decision
VI. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, "* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act "* * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." *See* 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982.

You can find additional background information on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval in the July 30, 1982, **Federal Register**, 47 FR 33050. You can also find later actions concerning Pennsylvania's program and program amendments at 30 CFR 938.11, 938.12, 938.13, 938.15 and 938.16.

General Discussion—Bonding Regulations

SMCRA's implementing regulations at 30 CFR Part 800 specify the minimum requirements for filing and maintaining bonds and insurance for surface coal mining and reclamation operations under regulatory programs. This Part includes (but is not limited to) a description of the regulatory authority's responsibilities and definitions, the requirement to file a bond, the form of the performance bond, the period of liability, the determination of bond amount and adjustment of the amount, and the general terms and conditions of a bond.

Coal operators are required to file a bond for reclamation of disturbed land in accordance with permit requirements. The bond should cover the entire permit area and the amount may be determined incrementally as reclamation phases are completed. Independent increments should be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the regulatory authority become necessary. The applicant can file a bond or another financial instrument to cover the bond amount.

These bonding methods include a bond for the entire permit area, a cumulative bond schedule and bond for the initial area, an incremental bond schedule and bond for the first increment, or an alternative bonding system if it achieves the objectives and purposes of the bonding program. As set forth at 30 CFR 800.11(e), the objectives of the bonding program are: (1) To assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time; and, (2) to provide a substantial economic incentive for the permittee to comply with all reclamation provisions.

In addition to prescribing, by regulation, the terms and conditions for performance bonds, the regulatory authority is also responsible for determining the amount of the bond, including any adjustments to such amount. The determination of the bond amount should depend upon the requirements of the approved permit and reclamation plan and reflect the probable difficulty of reclamation. The amount of the bond should be sufficient to assure the completion of the reclamation plan if the work has to be completed by the regulatory authority.

The amount of the bond shall be adjusted by the regulatory authority from time to time as the area requiring bond coverage is increased or decreased or where the cost of future reclamation changes. The regulatory authority may require periodic times or set a schedule for reevaluating and adjusting the bond amount to fulfill this requirement.

The regulatory authority may release liability under a bond when reclamation activities are completed and may require forfeiture of such bonds if the terms of the permit or bond are not met. The liability period shall extend until all reclamation, restoration, and abatement work under the permit has been completed.

Throughout the U.S., State regulatory programs have employed a variety of bonding programs, some electing to employ a conventional bonding program (full-cost bonding program that requires site-specific bonds as the only means of assuring reclamation following completion of mining) and others electing to employ an ABS as provided for in § 800.11(e).

Background on Pennsylvania's Bonding Program

For almost 60 years Pennsylvania law has regulated surface mining and has required some degree of land reclamation. For most of the same period it has also required bonds, in changing amounts and formats, to ensure the required land reclamation. The current requirements for both land reclamation and bonding are found in the Surface Mining Conservation and Reclamation Act (PASMCRA) (52 p.s. SS 1396.1-1396.31), the Coal Refuse Disposal Control Act (CRDCA) (52, P.S. SS 30.51-30.66) and the Clean Streams Law (CSL) (35 p.s. SS 691.1-691.1001). These provisions require a bond to be filed prior to commencement of mining, and to be conditioned "that the permittee shall faithfully perform all of the requirements" of PASMCRA, the CSL, and other applicable statutes.

The conventional bonding system is based on the mine operator's description of the maximum amount of reclamation needed during the term of the permit. The proposed dimensions of the mining activity are combined with bond rate guidelines to calculate the total bond. The PADEP developed bond rate guidelines using actual bid costs submitted for abandoned mine lands and forfeited mine sites reclamation contracts and other appropriate sources. Revised guidelines are published in the Pennsylvania Bulletin annually.

Pennsylvania's mining laws provide the basis for conventional bonding. The conventional bonding system incorporates the bonding obligations of those acts and the regulations and considers the following criteria.

The bond amount is the cost to the Commonwealth for hiring a contractor to complete the permitted reclamation plan to regulatory standards. It reflects the Commonwealth's maximum responsibilities under the approved operation and reclamation plan for land reclamation.

The operation and reclamation plans in the coal mining permit application describe how the operator will mine and reclaim the site. The PADEP relies upon the operator's plan, plus site-specific special conditions, when calculating the total bond.

Permit approval requires a finding that there is no presumptive evidence of pollution to the waters of the Commonwealth. Consequently, post-mining pollutional discharges of mine drainage are not anticipated in the reclamation plan. The calculation of the initial bond amount for a coal mining permit does not include costs for the treatment of mine drainage or anything not anticipated in the approved permit and reclamation plan.

Many factors contribute to the design of a mine site, and therefore effect the rate of bond required for full reclamation. If the methods of mining or operation change, standards of reclamation change, or the cost of reclamation, restoration or abatement work increases, the PADEP will require the permittee to recalculate the bond.

From 1982 until 2001, Pennsylvania's approved program included operation of an ABS for surface coal mines, coal refuse reprocessing operations and coal preparation plants. Under the ABS, in the event of bond forfeiture, the amount of bond posted by the operator for the forfeited site was supplemented by other funds (the Surface Mining Conservation and Reclamation Fund, or SMCR Fund). This fund (referred to as a bond pool) was funded in part by a per-acre reclamation fee paid by operators of permitted sites and was used to supplement site-specific bonds posted by those operators for each mine site, in the event of bond forfeiture.

In 1991, OSM's oversight activities determined that Pennsylvania's ABS included unfunded reclamation liabilities for backfilling, grading, and revegetating mined land and OSM determined that the ABS was financially incapable of abating or treating unanticipated pollutional discharges from bond forfeiture sites under its jurisdiction.

In May 1991, OSM codified a required regulatory program amendment at 30 CFR 938.16(h), directing Pennsylvania to submit information by November 1991 which demonstrated that Pennsylvania's ABS was solvent. The program amendment required Pennsylvania to submit information demonstrating that the revenues generated by the collection of the reclamation fee, as amended in 25 Pa. Code 86.17(e) will assure that Pennsylvania's ABS can be operated in a manner that will meet the requirements of 30 CFR Part 800.11(e). *See* 56 FR 24687 (May 31, 1991).

Additionally, in October 1991, OSM notified Pennsylvania that in order for Pennsylvania to maintain jurisdiction of the regulatory program under the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* Pennsylvania had to address program deficiencies related to administration of the ABS. This document is commonly referred to as a "732 letter," because it was issued pursuant to the Federal regulations, at 30 CFR 732.17.

These OSM actions identified a deficiency in the ABS concerning the system's ability to generate sufficient funds to complete the reclamation of all primacy ABS bond forfeiture sites, including the costs to treat pollutional discharges on these sites. Since 1991, Pennsylvania had undertaken actions and made changes to its bonding program in an effort to address the deficiencies identified. In the late 1990s, Pennsylvania concluded the ABS could not be amended to meet the Federal requirements, and in 2001, Pennsylvania terminated the ABS and converted the active permits covered by the ABS to a "full-cost" bonding program (conventional bonding program). This program requires a permittee to post a site-specific bond in an amount sufficient to cover the estimated costs to complete reclamation in the event of bond forfeiture.

Following termination of the ABS, Pennsylvania and OSM developed a programmatic solution for addressing all of the discharges on the forfeited ABS sites, which was memorialized in a document titled "Pennsylvania Bonding System Enhancements." By letter dated June 12, 2003, OSM notified the PADEP that the conversion to a full-cost bonding program, as well as other additional measures taken by the State, were sufficient to remedy the deficiencies cited in the 732 letter, which it declared to be terminated, and agreed with Pennsylvania that the only ABS obligation remaining was to expend remaining ABS monies for reclamation of forfeited sites.

On October 7, 2003, OSM published a final rule removing the required amendment at 30 CFR 938.16(h) on the basis that the conversion from an ABS to a full-cost bonding program rendered the requirement to comply with 30 CFR 800.11(e) moot. *See* 68 FR 57805. Subsequent to these OSM actions, a lawsuit was filed in the U.S. District Court for the Middle District Court of Pennsylvania by several citizens groups in December 2003 challenging OSM's termination of the 1991 Part 732 Notice and its removal of the required program amendment in 30 CFR 938.16(h). (*Pennsylvania Federation of Sportsmen's Clubs Inc. et al.* v. *Norton*, No. 1:03–CV–2220). In 2006, the U.S. District Court granted a motion requesting dismissal of the case. The district court affirmed OSM's decision in a Memorandum Opinion and Order dated February 1, 2006. *Id.* The plaintiffs appealed the District Court's decision to the U.S. Court of Appeals for the Third Circuit.

Court Decision

On August 2, 2007, the United States Court of Appeals for the Third Circuit reversed the district court's decision and set aside OSM's decision to remove the required amendment and the 732 letter. *Pennsylvania Federation of Sportsmen's Clubs* v. *Kempthorne*, 497 F.3d 337 (3rd Cir. 2007) (*Kempthorne*). At issue, relevant to this notice, was whether OSM properly terminated the requirement that Pennsylvania demonstrate that its SMCR Fund was in compliance with 30 CFR 800.11(e). The ruling by the Third Circuit reinstated 938.16(h) and the 1991 Part 732 Notice and remanded the decision to OSM.

The court ruled that the primacy ABS forfeited sites, plus any additional sites permitted under the ABS whose reclamation costs are not fully covered by a conventional bond, remain subject to the requirements of 30 CFR Part 800.11(e)(1). The Third Circuit concluded: "While it is true that the 'ABS Fund' continues to exist in name, it no longer operates as an ABS, that is, as a bond pool, to provide liability coverage for new and existing mining sites." 497 F.3d at 349. However, the Court went on to "conclude that 800.11(e) continues to apply to sites forfeited prior to the CBS [conventional bonding system] conversion." *Id.* at 353. In commenting further on 30 CFR 800.11(e), the Court stated that "[t]he plain language of this provision requires that Pennsylvania demonstrate adequate funding for mine discharge abatement and treatment at all ABS forfeiture sites." *Id.* at 354.

Finally, the court also concluded that "a plain reading of the words 'any areas which may be in default at any time' indicates that the obligations prescribed by § 800.11(e) are not restricted to the immediate circumstances surrounding the approval of an ABS, but are instead ongoing in nature and apply at any time, so long as those mining areas originally bonded under the ABS, and not yet converted to CBS bonds, still exist." *Id.* at 352. As such, Pennsylvania shall provide for the complete reclamation and treatment of these sites and their pollutional discharges by assuring Pennsylvania has available sufficient money to complete reclamation for these sites at any time.

State Response

Pennsylvania submitted the program amendment in an attempt to satisfy two mandates placed on the State's approved surface coal mining operations regulatory program in 1991. The mandates, in the form of a required amendment published in the Code of Federal Regulations, and a letter from OSM, required Pennsylvania to eliminate funding deficiencies in its bonding program.

Two categories of surface coal mining sites requiring treatment of post-mining pollutional discharges and land reclamation are the subject of this notice: (1) Those sites that already had their bonds forfeited at the time of the dissolution of ABS; and (2) those that were permitted and had bonds that were not forfeited at the time of the dissolution of the ABS, but had existing reclamation liabilities, for which available financial guarantees were not sufficient to cover the entire cost of treatment or reclamation during the conversion to the Commonwealth's conventional bonding system. These sites, if forfeited, would be considered liabilities of the ABS.

II. Submission of the Amendment

By letter dated August 1, 2008 (Administrative Record Number PA 802.43), Pennsylvania sent OSM a proposed program amendment that is intended to satisfy a required amendment that was imposed by OSM in a final rule published in the **Federal Register** on May 31, 1991, 56 FR 24687, and codified in the Federal Regulations at 30 CFR 938.16(h). This proposed program amendment is also intended to satisfy the 732 letter dated October 1, 1991. Both the required amendment and the 732 letter are discussed in more detail in Section I.

OSM announced receipt of the proposed amendment in the January 14, 2009, **Federal Register** (74 FR 2005–2015) (Administrative Record No. PA 802.49) and in the same document invited public comment and provided an opportunity for a public meeting on the adequacy of the proposed amendment. The public comment period closed on February 13, 2009. We received comments from four entities; The Pennsylvania Coal Association comment dated February 11, 2009 (Administrative Record No. PA 802.59); PennFuture letter dated February 27, 2009, representing Pennsylvania Federation of Sportsmen's Clubs, Inc., the Sierra Club, Pennsylvania Council of Trout Unlimited, Citizens for Coal Field Justice, Mountain Watershed Association, Inc., and Citizen's for Pennsylvania's Future (Administrative Record No. PA 802.60); the United States Environmental Protection Agency memorandum dated February 13, 2009 (Administrative Record No. PA 802.58); and the Mining and Reclamation Advisory Board letter dated February 12, 2009 (Administrative Record No. PA 802.56). Two other Federal agencies responded with no comment (U.S. Fish and Wildlife Services' note dated January 22, 2009 (Administrative Record No. PA 802.52), and the U.S. Department of Labor memorandum received February 5, 2009 (Administrative Record No. PA 802.54).

Treatment of Post-Mining Discharges (Parts A, C & E of the Amendment Submission): To address the treatment of post-mining discharges, Pennsylvania proposed regulatory provisions; provided a demonstration of sufficient funding; and proposed the use of treatment trusts.

Land Reclamation (Parts B & D of the Amendment Submission): To address land reclamation liabilities for sites originally permitted under the ABS, Pennsylvania submitted a statutory provision and demonstration of sufficient funding.

This program amendment consists of five parts: (A) Regulatory Changes to Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites; (B) The Conversion Assistance Program; (C) Trust Funds as an Alternative System and Other Equivalent Guarantee: Rationale for Approval; (D) Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites; and, (E) Demonstration of Sufficient Funding for Construction of all Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites.

Regulatory Changes (Part A): Pennsylvania explains that the regulatory changes submitted with this amendment provide a "legally enforceable mechanism" for paying the costs of treating the discharges at the ABS legacy sites in perpetuity. In summary, these changes restructure the reclamation fee and dedicate other sources of funding for performing reclamation of the ABS sites. The PADEP recognizes the reclamation fee as a flexible source of funding for the operation and maintenance costs associated with treating discharges at the ABS legacy sites.

Conversion Assistance Program and Treatment Trusts (Parts B and C): The conversion process included several changes to the active bonding program. Section 4(d.2) of the PASMCRA, 52 P.S. 1396.4(d.2), authorized PADEP to establish alternative financial assurance mechanisms that meet the purposes and objectives of the bonding program (*i.e.*, Conversion Assistance Program and Treatment Trusts).

Demonstrations of Sufficient Funding (Parts D and E): Pennsylvania submitted documentation to demonstrate that it has available sufficient funds to complete the outstanding land reclamation and sufficient funds to construct the necessary discharge-treatment facilities for all the ABS legacy sites at any time, as required by the Third Circuit's decision.

Pennsylvania explains that the regulatory changes described in Part A, along with the remaining portions of this State program amendment, described in Parts B through E below, while they do not consist of changes to Pennsylvania regulations, are financial mechanisms PADEP has established that will work in concert with the regulatory changes described above to bring Pennsylvania into compliance with the required amendment at 30 CFR 938.16(h), the 1991 732 letter, and, consequently, with the ABS standard of sufficiency set forth in 30 CFR 800.11(e). Pennsylvania is seeking approval of this program amendment submission in its entirety in accordance with 30 CFR 732.17(h) and the Part 732 Notices.

III. OSM Findings

Part A. Regulatory Changes To Establish Legally Enforceable Means of Funding the O&M and Recapitalization Costs for the ABS Legacy Sites

The following is a description of the changes to Pennsylvania's Code that are being proposed:

Summary of Regulatory Changes—Section 86.1, Definitions

1. Subchapter A. General Provisions, Section 86.1: Definitions

The terms, ABS legacy sites, operational area, operation and maintenance costs, primacy alternate bonding system, and recapitalization costs were added to Pennsylvania's list of definitions to clarify and define these terms when discussing and addressing sites that were permitted under the alternative bonding system.

Finding: We are approving Pennsylvania's changes to its definitions that define the following terms: ABS legacy sites, operational area, operation and maintenance costs, primacy alternate bonding system, and recapitalization costs. There are no Federal counterparts to these definitions; however, they are not inconsistent with SMCRA and its implementing regulations.

Summary of Regulatory Changes—Section 86.17, Permit and Reclamation Fees

2. Subchapter B. Permits, General Requirements for Permits and Permit Applications, Section 86.17 Permit and Reclamation Fees

a. Section 86.17(e) Reclamation Fees:

This provision revises the text of Section 86.17(e) to clarify the application of this subsection in the context of the CBS. The revisions provide that the reclamation fee is assessed for each acre of the approved operational area of the permit. The proposed revisions also clarify the manner in which the reclamation fee is assessed. Finally, minor editorial changes were made by adding references to Section 86.143 (relating to the requirement to file a bond) and to the exception for remining areas provided in Section 86.283(c).

b. Section 86.17(e)(1) (deposit and use of reclamation fees)

This provision, in conjunction with Section 86.187(a)(1), establishes a separate subaccount within the SMCR Fund called the Reclamation Fee O&M (operation and maintenance) Trust Account (RFO&M Account), and requires the PADEP to deposit all reclamation fees it collects into the RFO&M Account. The funds included in the account are held in trust by the Commonwealth to treat post-mining pollutional discharges at ABS legacy sites. This subsection also requires that the PADEP use the reclamation fees only for the purpose of paying the costs associated with treating such discharges. The reclamation fee is an adjustable source of revenue that PADEP will review annually to determine if adjustment of the fee is needed. In addition, this provision requires that all interest earned on the monies in the RFO&M Account be deposited into the account and be used only to pay the costs associated with treating post-mining pollutional discharges at ABS legacy sites.

c. Section 86.17(e)(2) (preparation of fiscal-year report on RFO&M Account)

This provision requires the PADEP to prepare a report at the end of each fiscal year, which will include a financial analysis and projections of the revenues and expenditures of the RFO&M Account. The report must be made available for review by the Pennsylvania Mining and Reclamation Advisory Board (MRAB) and the general public. This provision establishes a process by which the MRAB and the general public can examine the PADEP's expenditure of funds from the RFO&M Account for the treatment of discharges at the ABS legacy sites, the amount of revenue deposited into the account during the prior fiscal year from the various dedicated revenue sources, the projected expenditures and projected revenue. Pennsylvania believes that this provision will assist OSM, the MRAB, affected persons in the industry, and interested members of the public, with their oversight of the PADEP's compliance with the requirements of 30 CFR 800.11(e) as applied to the ABS legacy sites, the Court ruling in *Kempthorne,* and the required program amendment at 30 CFR 938.16(h).

d. Section 86.17(e)(3) (amount of the reclamation fee)

The amount of the reclamation fee is currently set at $100 per acre. Section 86.17(e)(3) requires the fee amount to be maintained at $100 per acre until December 31, 2009. After this initial period at $100 per acre, the reclamation fee will be adjusted annually based on criteria specified in Section 86.17(e)(3) and (4). This section also includes provisions concerning the potential for a permanent alternative source of funding to be used in lieu of the reclamation fee—if that alternative funding source meets the conditions in Section 86.17(e)(3)(i) and (ii). Section 86.17(e)(3) provides that the PADEP was to begin annually adjusting the amount of the reclamation fee as of January 1, 2010, and will continue to do so, until either a permanent alternative funding source is established or the ABS Legacy Account becomes actuarially sound. Section 86.17(e)(3)(i) reiterates the commitment for annual adjustment of the reclamation fee until the ABS Legacy Account is actuarially sound, unless a permanent alternative funding source in place of the reclamation fee is used to fund the RFO&M Account. Section 86.17(e)(3)(ii) establishes the conditions that a permanent alternative funding source must meet before the reclamation fee could be discontinued and the permanent alternative source used instead. The State indicates that such an alternative funding source must be permanent; must provide sufficient revenues to maintain a balance in the RFO&M Account of at least $3,000,000; and must provide sufficient revenue to pay the annual operation and maintenance costs for all the ABS legacy sites.

e. Section 86.17(e)(4) (amount of the reclamation fee)

The PADEP expected that the adjusted amount of the reclamation fee would become effective as of January 1, 2010, and will be similarly made effective on that date each year thereafter. Section 86.17(e)(3) sets the basic parameters for annually adjusting the amount of the reclamation fee, and Section 86.17(e)(4) lists the specific factors to be used in the PADEP's calculation of the adjusted amount. Section 86.17(e)(3) requires that the reclamation fee be annually adjusted to ensure that there are sufficient revenues to maintain a balance of at least $3,000,000 in the RFO&M Account. Following the close of the Commonwealth's 2008–09 fiscal year (in June 2009), the PADEP must prepare its year-end financial analysis of the RFO&M Account pursuant to Section 86.17(e)(2). The 2008–09 fiscal-year report must include the PADEP's calculation of the amount of the reclamation fee for the calendar year commencing on January 1, 2010. Section 86.17(e)(4) prescribes the factors to be used for making the calculation—essentially an analysis of the revenues and expenditures for the past year and projected revenues and expenditures for the current fiscal year.

Section 86.17(e)(3) and (4) establish a mechanism for annually adjusting the amount of the reclamation fee. Pennsylvania indicates that the adjustment procedure is necessary to accommodate the fluctuations in the operation and maintenance costs for treating pollutional discharges at the ABS legacy sites that will occur over time. The PADEP believes that the adjustment procedure is also necessary in order to maintain a sufficient cushion in the RFO&M Account to prevent pollution and assure that the PADEP has sufficient funds at any one time to treat the discharges at the ABS legacy sites, including any sites with discharges that were originally permitted under the ABS, and for which the bonds are subsequently forfeited before the posting of a full cost, conventional bond or other financial mechanism that is sufficient to cover the costs of discharge treatment, in accordance with 30 CFR 800.11(e).

f. Section 86.17(e)(5) (publishing amount of the adjusted reclamation fee; calculation appealable)

Section 86.17(e)(5) is added to prescribe a procedure for the PADEP to publish the amount of the adjusted reclamation fee. The PADEP must review its calculation of the adjusted reclamation fee amount at a public meeting of the MRAB (most likely in October of each year), where the members of the MRAB, affected persons in the industry, and the general public will have an opportunity to comment on the PADEP's financial report and its calculation of the adjusted amount of the fee. The PADEP will subsequently publish the adjusted amount of the reclamation fee in the Pennsylvania Bulletin, with the adjusted amount becoming effective upon publication. This provision also establishes that PADEP's calculation of the adjusted reclamation fee is a final action appealable to the Environmental Hearing Board. According to Pennsylvania, section 86.17(e)(5) balances the PADEP's need for a flexible mechanism to assure funding to treat discharges at the ABS legacy sites with the interests of the industry and the public in reviewing, commenting on, and challenging, before an independent forum, the PADEP's administration of the RFO&M Account and the calculation of the new reclamation fee.

g. Section 86.17(e)(6) (conditions for ceasing collection of reclamation fee)

Section 86.17(e)(6) requires the PADEP to cease assessment and collection of the reclamation fee when the ABS Legacy Account, established pursuant to section 86.187(a)(2)(i), is actuarially sound. The conditions which must be met for the ABS Legacy Account to become actuarially sound are prescribed here and in section 86.187(a)(2)(ii). The PADEP's current estimate of the annual operation and maintenance costs for treating the discharges at the ABS legacy sites is approximately $1,400,000. However, the ultimate annual amount needed for operation and maintenance costs will vary depending upon the number of additional underfunded sites which go into default and other relevant factors. When financial guarantees sufficient to cover reclamation costs have been approved for all mine sites permitted under the primacy ABS, no additional sites will need to be added to the class of ABS legacy sites. Once the PADEP completes construction of all necessary discharge treatment systems for all of the ABS legacy sites, the PADEP will determine the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat the discharges at all of the ABS legacy sites. This provision allows the PADEP to cease collection of the reclamation fee when the ABS Legacy Account contains funds which generate interest at a rate sufficient to pay the annual operation and maintenance costs for treating post-mining pollutional discharges at all the ABS legacy sites. At that point, the State believes that the PADEP will always have sufficient funds on hand in the ABS Legacy Account to cover the costs of treating the discharges at all the ABS legacy sites, and that Pennsylvania will have met the requirements of 30 CFR 800.11(e) without the need for additional revenue from the reclamation fee.

Findings: See findings in the section below.

Summary of Regulatory Changes—Section 86.187, Use of Money

a. Section 86.187(a)(1) (deposit of reclamation fee into RFO&M Account)

Section 86.187 (relating to use of money) specifies the purposes for which the PADEP must use monies from fees, fines, penalties, bond forfeitures and other monies received under the PASMCRA, as well as interest earned on these monies. Pennsylvania believes that the enforceable regulatory mechanism created by these revisions will enable its bonding program to meet the requirements of 30 CFR 800.11(e).

This provision, in conjunction with section 86.17(e)(1), has been revised to establish a separate subaccount within the SMCR Fund called the RFO&M Account, and to require that the reclamation fees collected by the PADEP pursuant to section 86.17(e) must be deposited into the RFO&M Account. The provision also directs that the interest accrued on collected reclamation fees must be deposited into the RFO&M Account.

b. Section 86.187(a)(1)(i) (deposit of civil penalties into RFO&M Account)

Under section 18(a) of PASMCRA, civil penalties may be used by the PADEP for reclamation of surface coal mine sites, restoration of water supplies affected by surface coal mining, or for any other conservation purposes provided by the PASMCRA 52 P.S. Section 1396.18(a). The PADEP is thus authorized to use civil penalty monies, as a supplement to forfeited bonds, for purposes of reclaiming the ABS legacy sites including treatment of post-mining pollutional discharges at these sites. New section 86.187(a)(1)(i) will require the PADEP to deposit into the RFO&M Account a portion of the monies collected from civil penalties assessed pursuant to PASMCRA, and to use those monies deposited into the account to pay the costs associated with treating discharges at the ABS legacy sites. PADEP believes that, in order to comply with the Court's ruling in *Kempthorne,* it must identify and dedicate specified sources of revenue that will generate enough money to cover the costs for treating discharges at all the ABS legacy sites. This subsection identifies a source of revenue—civil penalties collected pursuant to PASMCRA—and requires the PADEP to use this source of revenue to fund the discharge-treatment costs of the ABS legacy sites.

This provision recognizes that a percentage of the civil penalties collected must be allotted to the Environmental Education Fund by law. (*See* 35 P.S. Section 7528.) Section 86.187(a)(1)(i) also caps the amount of civil penalties that must be deposited into the Reclamation Fee O&M Account during a single fiscal year at $500,000. If the PADEP collects more than $500,000 in civil penalties during a fiscal year, section 86.187(a)(1)(i) gives the PADEP discretion to deposit the excess amount into the SMCR Fund where it may be used for the purposes described in section 86.187(a)(3).

This provision provides an additional source of revenue for the RFO&M Account which is restricted to the same uses as all other funds deposited into the account. This additional revenue will further enhance the financial solvency of the account, in addition to the adjustable reclamation fee, and will provide PADEP with even more dedicated revenue for water treatment at ABS legacy sites.

c. Section 86.187(a)(1)(ii) (deposit of interest earned on other monies in the SMCR Fund into the RFO&M Account)

Similar to the deposit of civil penalties required by section 86.187(a)(1)(i), this section is being added to authorize the PADEP to deposit into the RFO&M Account a portion of the interest that is earned on other monies in the SMCR Fund. The SMCR Fund includes monies from released bonds, license fees, and other sources; these funds earn interest that may be used by the PADEP for the purposes specified by section 18(a) of PASMCRA. *See* 52 P.S. section 1396.18(a); 25 Pa. Code section 86.187(a). This provision gives the PADEP discretion as to the amount of interest earned on other monies in the SMCR Fund which will be deposited into the RFO&M Account during any given fiscal year.

d. Section 86.187(a)(1)(iii) (deposit of other monies into the RFO&M Account)

Section 86.187(a)(1)(iii) will give the PADEP authority to deposit other monies from sources such as legislative appropriations or donations into the RFO&M Account. In addition, in the event a change in the applicable law provides for it, this provision will give the PADEP authority to deposit into the RFO&M Account the fees that will be collected for "sum-certain financial guarantees needed to facilitate full-cost bonding." (These devices are also known as "conversion assistance financial guarantees" or "conversion assistance bonds", and are described below in Section B.)

e. Section 86.187(a)(1)(iv) (restriction on use of monies in the RFO&M Account)

Section 86.187(a)(1)(iv) specifies that all monies deposited into the RFO&M Account must be used to pay the costs associated with treating the post-mining pollutional discharges at the ABS legacy sites. This provision establishes that the funds held in the RFO&M Account are being held by the State in trust for the benefit of all the people of the State in order to protect their rights under Article I, Section 27 of the Pennsylvania Constitution. Pennsylvania believes that an actuarially sound account will satisfy the requirements of 30 CFR 800.11(e).

f. Section 86.187(a)(2) (use of monies received from forfeiture of bonds)

A minor editorial change is being made to this provision to clarify that funds received from the PADEP's forfeiture of bonds on ABS legacy sites will be used to reclaim the land and restore water supplies affected by the surface mining operations upon which liability was charged on the bond, and, more specifically, in accordance with the provisions in section 86.187(a)(2)(i) and (ii), which are being added as part of this final rulemaking.

g. Section 86.187(a)(2)(i) (deposit of monies from bonds forfeited on ABS Legacy Sites into separate subaccount)

Section 86.187(a)(2)(i) establishes a separate subaccount within the SMCR Fund called the ABS Legacy Account. The funds received from the bonds forfeited on ABS legacy sites, and all interest accrued on such monies, must be deposited into the ABS Legacy Account according to new section 86.187(a)(2)(i). Section 86.187(a)(2)(i) will also provide regulatory authorization for the PADEP to deposit monies from other sources, such as appropriations, donations, or interest earned on other monies in the SMCR Fund, into this account. Finally, section 86.187(a)(2)(i) authorizes the PADEP to transfer "excess" monies from the RFO&M Account into the ABS Legacy Account. This provision requires the PADEP to seek the MRAB's review and recommendation prior to transferring any "excess" funds. Pennsylvania indicates that section 86.187(a)(2)(i) responds to the court ruling in the *Kempthorne* case regarding the obligation of the PADEP to meet the requirements of 30 CFR 800.11(e).

Section 86.187(a)(2)(i) will establish a type of savings account for monies ultimately to be used to pay the annual operation and maintenance costs associated with all of the ABS legacy sites. The PADEP currently has approximately $4.8 million in forfeited bonds held for primacy ABS forfeited discharge sites; these funds will constitute the initial principal in the ABS Legacy Account. Section 86.187(a)(2)(iii), discussed below, prohibits the PADEP from making any disbursements from the ABS Legacy Account until the account becomes actuarially sound. The RFO&M Account will be used to pay the ongoing operation and maintenance costs on a pay-as-you-go basis, while funds in the ABS Legacy Account accumulate from earned interest and other potential income sources. Pennsylvania believes that the amendments to section 86.17(e) will enable the PADEP to annually replenish and maintain funds in the RFO&M Account sufficient to cover the annual operation and maintenance costs for treating discharges at the ABS legacy sites. Pennsylvania indicates that the ABS Legacy Account will grow to the point that the interest earned on that account will be enough to cover all the annual operation and maintenance costs for the ABS legacy sites, without the need to generate any additional revenue from other sources such as the reclamation fee.

h. Section 86.187(a)(2)(ii) (restriction on use of monies in ABS Legacy Account)

This provision requires that all monies deposited into the ABS Legacy Account be used only to pay the operation and maintenance costs for treating discharges at the ABS legacy sites. As in section 86.187(a)(1)(iv), the PADEP is declaring that it is establishing the ABS Legacy Sites Trust as an account in the SMCR Fund. The PADEP has included language in section 86.187(a)(2)(ii) that specifically establishes the trust called the ABS Legacy Account. This regulation states that all monies deposited in the ABS Legacy Account are held by the State in trust for the benefit of the people of the State to protect their rights under Article 1, Section 27 of the Pennsylvania Constitution.

i. Section 86.187(a)(2)(iii), (A), (B), (C) (restrictions on ABS Legacy Account)

Section 86.187(a)(2)(iii) prohibits the PADEP from making any disbursements from the ABS Legacy Account until the account becomes actuarially sound. The conditions that must be met for the ABS Legacy Account to become actuarially sound are prescribed here. First, financial guarantees sufficient to cover all reclamation costs must have been approved by the PADEP for all mine sites permitted under the primacy ABS. Second, the PADEP must have completed construction of all necessary discharge treatment systems for all of the ABS legacy sites. Once the entire class of ABS legacy sites is known, and all necessary discharge treatment systems have been constructed for these sites, the PADEP will be able to establish the amount of annual operation and maintenance costs, including recapitalization costs, which will be necessary to treat all the discharges at all of the ABS legacy sites. Once this figure is known, the third condition precedent may be satisfied, *i.e.*, the ABS Legacy Account and Reclamation O&M Trust Account must contain funds that generate interest at a rate and amount sufficient to pay the annual operation and maintenance costs for treating all post-mining pollutional discharges at all the ABS legacy sites. Pennsylvania believes that once the ABS Legacy Account becomes actuarially sound, the PADEP will always have sufficient funds on hand in the Account to cover the costs of treating the discharges at all the ABS legacy sites, and therefore, Pennsylvania's bonding program will meet the requirements of 30 CFR 800.11(e) without the need for any revenue from the reclamation fee or the other revenue sources dedicated to the RFO&M Account.

j. Section 86.187(a)(2)(iv) (transfer of remaining funds in RFO&M Account to ABS Legacy Account)

Section 86.187(a)(2)(iv) provides for termination of the RFO&M Account when the ABS Legacy Account becomes actuarially sound. This provision authorizes the PADEP to transfer the remaining funds in the RFO&M Account into the ABS Legacy Account when the latter account becomes actuarially sound. At that point, the RFO&M Account will no longer be necessary and will terminate. In addition, the reclamation fee (or an alternative permanent funding source established in lieu of the reclamation fee) will no longer be needed and will cease to be collected, and the deposit of civil penalty monies into the RFO&M Account pursuant to section 86.186(a)(1)(i) will also cease.

Findings: Sections 86.17(e), Reclamation Fees and 86.187, Use of Money

By creating the RFO&M Account that is funded in large part by an adjustable reclamation fee dedicated to the treatment of AMD discharges on bond forfeiture sites that were originally covered by the ABS, Pennsylvania has created an alternative system of financial guarantees consistent with 30 CFR 800.11(e). Our finding recognizes that Pennsylvania has provided an alternative system that provides sufficient funding to treat AMD pollution originating from a defined set of bond forfeiture sites (ABS legacy sites), that the system can be adjusted to accommodate increases and decreases in treatment obligations, that implementation is supported by an enforceable commitment by Pennsylvania to provide the funding needed to construct treatment facilities, and that Pennsylvania has considered and accounted for foreseeable risks to its operation. Our finding also recognizes that even though this system is restricted to the treatment of mine drainage on ABS legacy sites, the system provides a substantial economic incentive to active mine operators because treatment costs are tied to reclamation fees assessed on each active operation. These reclamation fees may be raised due to operators' failures to provide for fully funded treatment guarantees on active sites that are subsequently forfeited. Indeed, any increases in ABS legacy site treatment costs potentially raise reclamation fee assessments on active mine sites.

There are no specific Federal counterparts to the changes to 25 Pa. Code 86.17(e), 86.187(a)(1) and 86.187(a)(2). However, for the reasons set forth above, we find that these changes are consistent with the Federal regulation at 30 CFR 800.11(e), which contains the criteria for approval of an ABS, and we are therefore approving the changes. Nevertheless, some of the revisions warrant more detailed explanation, which follows.

ABS Legacy Account: We find that the specific conditions at section 86.17(e)(6)(i)(iii) for determining when the ABS Legacy Account is financially capable of covering the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS legacy sites are sufficient and observe that OSM will have oversight responsibilities at the time that any such transition to the use of the ABS Legacy Account is being proposed and acted upon. OSM's finding is limited to the creation of, or an alternative source of funding to, the RFO&M Account. When the State notifies OSM that it has determined that the ABS Legacy Account is deemed to be actuarially sound in accordance with the provisions of section 86.17(e)(6), OSM will review the basis for such a determination and approve or disapprove any termination of the reclamation fee or alternative permanent funding source.

Alternative Permanent Funding Source: We are hereby approving these regulations at sections 86.17(e)(3), (e)(3)(i), (e)(3(ii), and 86.187(a)(2)(iv), which refer to a possible "alternative permanent funding source" that could be created to substitute for the reclamation fee. The creation of any alternative permanent funding source, however, must first be proposed to us as a State program amendment, and could not be used to replace the reclamation fee to pay for treatment costs on ABS legacy sites until we approve such an amendment.

Other Sources of Funding: Sections 86.17(e)(4)(ii), (e)(4)(v), 86.187(a(1)(iii), and (a)(2)(iv) refer to "other sources" of money, including appropriations, donations, and fees paid by operators who receive conversion assistance guarantees. The regulations provide that these funds from "other sources" may be deposited into the RFO&M Account and, except for fees for conversion assistance guarantees, into the ABS Legacy Account. 86.187(a)(1)(iii), (a)(2)(i). The transfer of fees from conversion assistance guarantees into the Reclamation Fee O&M Account must be authorized by State law. Therefore, no such transfers may take place until Pennsylvania enacts the necessary statutory revision, and then obtains our approval of the revision as a program amendment. Any use of "other sources" of money cannot be made until we either approve the proposed sources through the State program amendment process or decide that the proposed sources do not constitute program amendments requiring our approval.

Part B. The Conversion Assistance Program

When implementing the revised full-cost bonding program and converting the ABS permits to full-cost bonding, Pennsylvania had concerns regarding the financial ability of existing permittees to post significantly-increased bond amounts. Operators contemplating a new mining operation after August 2001 would be able to factor the revised bond guidelines into their decision making process, but existing ABS operators had already made financial and operational commitments based on their existing bonds and the ABS. Surety providers had made decisions to provide existing ABS bonds based on the risk they were willing to take at the time of permit issuance. As a result, many operators were unlikely to be able to comply with the mandatory bond adjustment. Those operators would be faced with the uncertainty of a negotiated settlement with the Department regarding bonding and reclamation liability or risk being forced out of business. The choice for the surety industry would likewise be difficult. They could either provide more bonds than their risk assessment dictated or be subject to forfeiture of the existing bond. There was a risk to Pennsylvania that forfeiture of existing inadequate bonds would further increase the deficit of the ABS.

To address these risks, in 2001–2002, the PADEP developed and implemented a conversion assistance program in which Pennsylvania essentially operates as a surety and provides part of the bonding for sites converting to full-cost bonding, thus easing the transition for active operators to full-cost bonding and thereby preventing bankruptcies and/or abandonment of sites. Funded with an initial general-revenue appropriation of $7 million in June 2001 and supplemented by annual premiums paid by the industry, the Department issued a "land reclamation financial guarantee" in a sum-certain amount to individual ABS permittees required to convert to a full-cost bond for land reclamation on an existing permit. *See* Act of June 22, 2001 (P.L. 979, No. 6A) known as the General Appropriation Act of 2001," at 213. The Land Reclamation Financial Guarantees (LRFG) were issued only to ABS permittees that were converting to full-cost bonding; permit applicants who submitted applications after termination of the ABS are not eligible for the conversion assistance program.

The PADEP indicates that as of November 30, 1999, the forfeiture rate for primacy ABS permits was 10.4%. The PADEP concluded that, based on this historic rate, the $7 million principal would cover up to $70 million in bond exposure. The PADEP determined that the $7 million, when combined with existing site bonds, would be sufficient to pay for all forfeitures that may occur. Additionally, premiums collected for the LRFGs would provide additional funds to complete reclamation.

As part of this submission, Pennsylvania requests that OSM approve the Conversion Assistance Program and its use of the LRFG as a financial guarantee equivalent to a conventional bond. Section 4(d.2) of PASMCRA is submitted as part of this program amendment as the authority for employing LRFGs under the Conversion Assistance Program.

Finding: Pennsylvania's use of LRFGs is consistent with the use of other conventional bonding mechanisms that provide sum-certain amounts payable to the regulatory authority to provide for reclamation in the event of operator default. In this case, the form of performance guarantee is provided by the Commonwealth of Pennsylvania as conversion assistance in an amount necessary to supplement the original site-specific bond, such that the total amount of bond coverage provided is equivalent to the amount required under a CBS. In effect, for a limited number of permits that were in the ABS, and that are transitioning to full-cost bonding, the State is acting as a surety to guarantee part of the reclamation costs. However, SMCRA Section 509 (b) provides that a surety executing a bond must be "* * * a corporate surety licensed to do business in the State * * *" Given that restriction, OSM cannot approve the conversion assistance program as a conventional bond as requested by PADEP. Rather, OSM finds that the conversion assistance program is an alternative system that will achieve the objectives and purposes of a bonding program in accordance with Section 509(c) of SMCRA, and that the conversion assistance program meets the objectives of an ABS pursuant to 30 CFR 800.11(e). OSM is approving the conversion assistance program as a one-time alternative bonding mechanism implemented solely for the conversion process from the ABS to conventional bonding.

Other Sites Not Fully Converted to Full Cost Bonding

PADEP stated that at the end of the conversion process (*i.e.*, active ABS permits converting to conventional bonding) two permitted sites remain insufficiently bonded. These two anthracite operations are permitted by Lehigh Coal & Navigation (LCN) and Coal Contractors Inc. (CCI). The State contends it has made provisions for fully funding the outstanding reclamation obligations for these two sites through reclamation and payment schedules. PADEP stated in its submission that the land reclamation on the LCN site "does not present a potential liability to Pennsylvania at this time because it is being adequately addressed through the Consent Order and Agreement (CO&A) process and, in any event, will most likely be addressed through permit transfer or remining operations." PADEP indicated the bond deficiency as of June 2, 2008, amounted to $8.96 million, which was being addressed through quarterly payments ending in December 2011. In addition, LCN is required under a CO&A to complete backfilling at a rate of 1.7 million cubic yards annually to meet the bond obligation.

We disagree with the State's assertion that the LCN site land reclamation is not a potential liability; neither bond deficiency payments nor land reclamation schedules pursuant to a CO&A, potential permit transfers, nor potential remining operations are equivalent substitutes for a full cost bond. None of these instruments constitutes the guarantee of sufficient funding to pay for the land reclamation required to be performed under the approved State program.

For the CCI site, Pennsylvania contends it has sufficient monies available in the SMCR Fund to complete land reclamation in the event of forfeiture. The State estimates the CCI land reclamation liability in excess of the available bond amount to be about $170,000. Pennsylvania's contention that it has sufficient funds falls short of the type of "guarantee" ensured by the posting of an adequate bond, because it is not enforceable.

Finding: Pennsylvania has not provided guaranteed funding to cover the cost of the outstanding land reclamation liabilities at the LCN and CCI sites in the event the bonds for these sites are forfeited. Therefore, OSM is revising the required amendment at 30 CFR 938.16(h) to require the PADEP to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

Part C. Trust Funds as an Alternative System and Other Equivalent Guarantee

Beginning in the early 1990s, Pennsylvania developed and implemented treatment trust funds to guarantee the treatment of unanticipated post-mining pollutional discharges in perpetuity. Permittees unable or unwilling to provide a surety or collateral bond to cover the costs of a post-mining discharge can establish a site-specific trust fund managed by a third-party trustee. The purpose of the trust is to generate sufficient income to cover all costs associated with treating these discharges in perpetuity. Trust funds have been established to cover discharge-treatment costs at ABS sites, although the Department's implementation of trust funds is not limited to sites formerly covered by the ABS. Pennsylvania had received approval from OSM to add annuities and trust funds to the list of acceptable collateral bonds on May 13, 2005. 70 FR 25472, amended at 70 FR 52916.

Pennsylvania is submitting the provision in Section 4(d.2) of PASMCRA for the additional purpose of providing the authority for the establishment of site-specific trust funds to be used to pay the costs of treating unanticipated post-mining pollutional discharges in perpetuity. Pennsylvania is requesting approval of site-specific trusts as an alternative financial assurance mechanism (not a collateral bond) consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA. Pennsylvania states that its site-specific trust fund program is an alternative financial system to a bonding program that achieves the objectives and purposes of a conventional bonding program, and provides equivalent guarantees no less effective than a performance bond and 30 CFR subchapter J.

In support of its request for approval of site-specific trusts as an alternative financial assurance mechanism consistent with Section 509(c) of SMCRA and other applicable provisions of SMCRA, PADEP provided descriptions of its authority to enter into trust agreements, trust development and management process, and some of the administrative and financial components. More specifically, PADEP has provided the following: Discussions of its authority, under Section 4(d.2) of PASMCRA, to establish alternative financial assurance mechanisms; the use of the CO&A and a companion Trust Agreement; factors currently used to determine the amount of a site-specific trust fund; and the use of AMDTreat for treatment cost estimation. PADEP's proposed amendment also discusses rates of return, inflation rates, and volatility rates used on previous trust agreements as well as how operation and maintenance and recapitalization costs are addressed. Finally, the amendment submission describes trust disbursement procedures and flexibility to allow the permittee a reasonable period of time to fully fund a treatment trust. (Administrative Record No. PA 802.44, Attachments 5 and 7).

Site-specific trusts are established by forms prescribed and furnished by the PADEP. The trust covers the area of land within the permit area necessary for the operator to operate and maintain the treatment facility. The amount of the trust is calculated based on all the costs of treating the post-mining discharge in perpetuity, and the trust generates sufficient money to cover the costs of treating the discharge even if the operator defaults on its obligation. Moreover, unlike a performance bond—a sum-certain instrument which does not increase in value—trust funds can keep pace with inflation, making them more suitable for guaranteeing long-term treatment obligations. Liability under the trust is for the duration of the reclamation. The CO&A is executed by the operator and the PADEP, and the declaration of trust will be executed by a trustee who must be registered to do business in Pennsylvania and meet criteria for reliability similar to a surety company. Finally, the trust amount is adjusted by the PADEP in the event the cost of reclamation changes, in accordance with Section 509(e) of SMCRA. Thus, Pennsylvania asserts the trust funds program assures that the State will have available sufficient money to complete the reclamation plan for sites covered by site-specific trusts.

Pennsylvania states that site-specific trusts also provide a substantial economic incentive for the permittee to comply with all reclamation provisions because the permittee must fund the necessary trust principal. Moreover, the CO&A for the treatment trust contains stipulated civil penalties which are invoked if the operator fails to comply with the terms of the CO&A or the Trust Agreement. A failure to comply would also effectively put the operator out of business due to the permit block and permit revocations that would result. Thus, Pennsylvania concludes, all of these aspects of the trust fund program render it no less stringent than Section 509 of SMCRA.

Finding: When we approved Pennsylvania's use of treatment trusts and annuities as collateral bonds in 2005, we noted that Section 4(d.2) of PASMCRA expressly provides for the establishment of alternative financial assurance mechanisms including site-specific trust funds for the perpetual treatment of unanticipated post-mining discharges. We noted that the Federal rules do not expressly include site-specific trust funds or annuities in the Federal collateral bonding regulations at 30 CFR 800.21. However, with the safeguards that were included in the State's provision, it appeared that trust funds and annuities presented no greater risks than those inherent in those forms of collateral bonding expressly named in 30 CFR 800.21. Therefore, we concluded that the addition of Subsection (f) of Pennsylvania's regulations would not render the Pennsylvania program less effective than 30 CFR 800.21 in meeting the bonding requirements of Section 509 of SMCRA. 70 FR at 25474.

While we have approved Pennsylvania's allowance of trust funds as a form of collateral bond, the Federal regulations at 30 CFR 800.11(e) provide another option for approving trust funds and annuities. Those regulations implement the provision in section 509(c) of SMCRA, 30 U.S.C. 1259(c), authorizing OSM and the States to establish an "alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section." The regulations at 30 CFR 800.11(e) require that those alternative systems "(1) * * * assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time;" and "(2) * * *.provide a substantial economic incentive for the permittee to comply with all reclamation provisions." As we noted in our decision approving trust funds as a form of an ABS in Tennessee, a fully-funded trust or annuity would satisfy the first criterion, while the permittee's obligation to provide the monies needed to establish a trust fund or annuity and the express terms of the trust would satisfy the second criterion. 72 FR 9616, 9618–9 (March 2, 2007).

We find that trust funds may serve as alternative funding mechanisms intended to assure long-term treatment of pollutional discharges. A fully-funded trust, *i.e.*, one that generates sufficient interest to pay for the costs of establishing a treatment facility, as well as the costs of treating pollutional discharges in perpetuity, is consistent with, and therefore no less effective than, the Federal regulations at 30 CFR 800.11(e). Section 4(d.2) of PASMCRA, and the use of site-specific trust funds as alternative bonding financial mechanisms, are hereby approved. We find, however, that specific approval of the underlying financial components Pennsylvania has used or is currently using to develop treatment trusts is not necessary. That is, we make no findings with respect to explicit portfolio mixtures, volatility rates, inflation rates, the 11.1% expected rate of return, or other financial parameters Pennsylvania now considers, such as specific recapitalization schedules, site maintenance costs, or the use of the AMDTreat program.

We have concluded that the implementation of treatment trusts allows program managers to have a degree of flexibility that may not be afforded if specific percentages, rates, or schedules are formally incorporated into the approved State program. Those flexibilities require ongoing analyses and adjustments to reclamation cost parameters such as those for fuel, materials, supplies, equipment rates, and dozens of other cost components. The State has provided a mechanism, in the form of annual evaluations of the trust funds, for determining when any such adjustments must be made. (*See* the program amendment, Attachment 7, "Postmining Treatment Trust Consent Order and Agreement", paragraph 8.) (Administrative Record No. PA 802.43)

We have accorded similar flexibility to Pennsylvania with respect to setting and adjusting site-specific bond rates where conventional types of bonding instruments, such as surety bonds, are used. The PADEP uses bond rate guidelines to set the appropriate amounts of these site-specific bonds. We have not required these guidelines, nor any changes thereto, to be submitted as amendments to the State program.

Our approach to both treatment trust fund calculations and bond rate guidelines is consistent with the Federal regulations at 30 CFR 800.14 (determination of bond amount) and 800.15 (adjustment of amount). Neither of these provisions spells out the precise parameters for calculation of the original bond amount or for periodic adjustments of the bond amount. Rather, those decisions are to be made by the regulatory authority.

We are approving treatment trust funds as alternative bonding mechanisms. However, until PADEP makes a complete formal finding that sites originally permitted under the former ABS are now adequately bonded by a fully-funded trust, monies from the RFO&M Account must remain available for the costs of discharge treatment at those sites in the event of bond forfeiture. We will continue to monitor, on an annual basis, the reclamation fee adjustment scheme approved in Part A, above, and its ability to provide revenues for existing and potential ABS legacy sites.

Finally, we maintain oversight over the use of treatment trusts under the approved Pennsylvania program. Should the State improperly find a trust to be fully funded, and, as a result, declare the site to no longer be covered by the RFO&M Account in case of forfeiture, we have the ability to require the State to take appropriate action.

Part D. Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites

An analysis by the PADEP of the existing land reclamation at ABS forfeiture sites was initially prepared in a February 2000 report titled *Assessment of Pennsylvania's Bonding Program for Primacy Coal Mining Permits.* Based on the report's conclusions, the PADEP requested that the Pennsylvania legislature appropriate general revenue funds to provide the additional money needed to complete the land reclamation of ABS forfeiture sites. In 2001, the General Assembly appropriated $5,500,000 to be used solely for the costs of land reclamation at ABS forfeiture sites (the "ABS Closeout Funds"). *See* Act of June 22, 2001 (P.L. 979, No. 6A), known as the "General Appropriation Act of 2001," at Section 213. PADEP indicates that it has used the ABS Closeout Funds to complete land reclamation for some of the ABS forfeiture sites. At the time of submission of this amendment, there was $4,431,088 remaining in ABS Close-Out Funds. In 2007–08, the PADEP prepared an updated list of primacy ABS bond forfeiture sites with outstanding land reclamation. It also prepared a detailed analysis of the current costs to complete all outstanding land reclamation at these sites and provided an estimated total cost to complete the land reclamation for all primacy ABS bond forfeiture sites of $7,946,890.

The PADEP indicates that, in addition to the $4,431,088 remaining from the $5.5 million legislative appropriation, it has sufficient other funds on hand to cover all land reclamation costs on ABS forfeiture sites. The Released Bond Account monies must be used for such reclamation; also, there is a Restricted Bond Account, from which monies can be made available and placed into the Released Bond Account. The Released Bond Account is composed of monies from forfeited bonds that have been "released" for use on sites other than the ones for which the monies were originally dedicated. Once released, the funds may be used to reclaim any primacy bond forfeiture site, and are thus available for land reclamation at these forfeited sites. As of the date of submission of this amendment, there was $2,800,000 in the Released Bond Account.

The Restricted Bond Account is composed of monies from bonds that were forfeited. This money must be used to reclaim the site for which the bond is posted, unless the PADEP determines that those monies are no longer needed to reclaim that site, in which case, those monies may be transferred from the Restricted Bond Account to the Released Bond Account. (*See* the ABS Bond Forfeiture Sites Land Reclamation Status Report, July 2008, p. 15, included as part of Attachment 8 to the State program amendment.) As of the date of submission of this amendment, there was $1,716,974 in the Restricted Bond Account. In addition, there was $68,319 in forfeited, but not yet collected, bond money for one site.

Finally, $20,844 was used from another account, called the General Operations Account, to accomplish land reclamation. This expenditure lowered the land reclamation liability total from $7,946,890 to $7,926,046. To cover this land reclamation liability, Pennsylvania has available a total of $9,016,381 in funds that it is authorized and required to expend for reclamation. (As noted below, not all of the $2,800,000 in the Released Bond Account will be needed for land reclamation. The remainder, approximately $1,100,000, will be available and used for the construction of treatment facilities at ABS legacy sites.) There are also funds available in several other accounts in the SMCR Fund. Where funds are not legally restricted solely for use in reclaiming ABS forfeiture sites, the PADEP has identified monies which it is authorized by law to spend for this purpose. (*See* ABS Financial Summary, July 2008, included as part of Attachment 10 to the State program amendment.) For these reasons, the PADEP submits that it has sufficient funds available to complete the outstanding land reclamation for the ABS forfeiture sites at any time, as required by the Third Circuit's decision interpreting 30 CFR 800.11(e)(1).

Finding: We find that PADEP has demonstrated the availability of sufficient funds to address the outstanding land reclamation costs, as determined by PADEP, at ABS forfeiture sites as of the date of submission of this amendment. The ABS Closeout Funds were specifically appropriated to be used for land reclamation on primacy forfeiture sites. Funds in the Restricted Bond Account and the Released Bond Account identified for use in addressing the outstanding land reclamation are required to be used for reclamation under the State program at 25 Pa. Code 86.187 and 86.190. OSM finds that collectively, these funds represent the legally enforceable commitment envisioned by the court in order to demonstrate the availability of sufficient funding for the completion of the land reclamation at ABS forfeiture sites. In addition, we note that the General Operations Account within the SMCR Fund can be used for land reclamation as provided at 52 P.S. Section 1396.18. PADEP has indicated that this account has an unreserved balance of approximately $14.4 million. If additional funds should be required to address land reclamation needs, this account within the SMCR contains funding that could be committed to meet those needs. As such, Pennsylvania has adequate funding to complete land reclamation on all forfeited sites that were originally permitted and bonded under its ABS.

Therefore, OSM is approving the demonstration of sufficient funding regarding reclamation of all outstanding land reclamation at the primacy ABS forfeiture sites.

Part E. Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the Primacy ABS Forfeiture Sites

Pennsylvania submitted information to demonstrate that it has sufficient funding to complete any initial treatment facility construction at primacy ABS forfeiture sites. An evaluation of all the primacy ABS forfeited discharge sites was completed by PADEP to project the costs of treating the discharges. Post-mining treatment costs were evaluated in three categories: (i) Initial facility construction costs; (ii) the annual operation and maintenance cost; and (iii) recapitalization costs. Initial facility construction costs cover all of the costs to get a treatment system up and running, such as facility design costs and construction.

The PADEP calculated that, as of July 2008, the total capital cost to construct all necessary discharge-treatment facilities for the primacy ABS forfeiture discharge sites is $2,073,104. The PADEP indicates that it has taken a conservative approach to this cost calculation.

To address this aspect of the ABS legacy, the PADEP must assure that it has the funds to meet this obligation. The PADEP indicates that it currently has funds on hand that are available to cover the approximately $2,100,000 total capital cost to construct the necessary treatment facilities for the primacy ABS forfeiture discharge sites. In this submission, Pennsylvania has committed to using the approximately $1.1 million of the funds in the Released Bond Account to address the reclamation liability for the ABS legacy sites. (The $1.1 million represents the remainder of the total of $2.8 million in the Released Bond Account, after approximately $1.7 million from this account is used to complete land reclamation at ABS forfeiture sites.) As noted, the PADEP has indicated that there is $14.4 million in its SMCR Fund, General Operations Account. These monies may be used for reclamation purposes as well as general administrative costs. *See* 52 P.S. Section 1396.18. (*See* ABS Financial Summary, July 2008, included as part of Attachment 10 to the State program amendment, Administrative Record No. PA 802.43) As indicated, PADEP has committed to using money from the General Operations Account to cover the additional $1 million needed for treatment facility construction costs. Thus, PADEP submits that it has available, at any time, sufficient money to construct the necessary discharge-treatment facilities for all the ABS legacy sites, as required by 30 CFR Section 800.11(e)(1).

Finding: We find that PADEP has demonstrated the availability of sufficient funds to address the capital costs, as determined by PADEP, of constructing all known discharge treatment facilities at ABS legacy sites as of the date of submission of this amendment. Specifically, the Released Bond Account funds identified for use in the SMCR Fund are required to be used for reclamation (including construction of treatment facilities) by the approved State program at 25 Pa. Code 86.187 and 86.190, thereby providing the legally enforceable commitment required by *Kempthorne*.

Further, the General Operations Account within the SMCR Fund can be used for reclamation (including construction of treatment facilities) as provided at 52 P.S. Section 1396.18. These additional funds should be sufficient to cover the remaining costs for the construction of treatment facilities, and Pennsylvania's submission indicates that these monies will be used for that purpose.

Therefore, because the PADEP will use the monies from the Released Bond Account and the General Operations Account, when needed, to pay the costs of construction of discharge-treatment facilities, OSM is approving the demonstration of sufficient funding regarding construction of all necessary discharge-treatment facilities at the primacy ABS forfeiture sites.

Summary of OSM's Findings on Pennsylvania's Program Amendment Submission

With regard to the treatment of post-mining discharges, we are approving the following parts and provisions of the submission in accordance with the requirements of 30 CFR 800.11(e):

(1) Those regulations that provide an adjustable source of revenue dedicated to treatment and that can ensure adequate funds to treat discharges at the ABS legacy sites (those forfeited ABS sites requiring treatment of post-mining pollutional discharges that did not have sufficient bond or a fully funded treatment trust to cover costs of treating the discharge) and provide for the establishment of an alternative permanent funding source to treat post-mining pollutional discharges that is based on specific criteria and approved by OSM;

(2) Pennsylvania's demonstration of sufficient funding for the construction of all necessary discharge treatment facilities at ABS forfeiture sites; and

(3) Pennsylvania's use of treatment trusts as an alternative bonding system, intended to make available sufficient funds to complete the treatment of post-mining pollutional discharges.

With regard to the land reclamation at sites that were originally permitted under the ABS, we are approving the following parts/provisions of the submission in accordance with the requirements of 30 CFR 800.11(e):

(1) Pennsylvania's use of the Conversion Assistance Program, which provided financial guarantees for land reclamation to qualified permittees that converted to the conventional bonding system, thereby avoiding bond forfeiture; and

(2) Pennsylvania's demonstration of sufficient funding for the sites that were originally bonded under the ABS, but forfeited at the time of dissolution.

However, we find that Pennsylvania has not demonstrated sufficient funding for sites that were bonded under the former ABS and not forfeited, but have the potential to be liabilities under the ABS because the operators may not be able to obtain full-cost, site-specific bonds that are adequate to cover all reclamation costs on those sites. Several sites were actively permitted at the time of the ABS dissolution, but were not adequately covered by conventional bond or other funding mechanism subsequent to the conversion. Two such sites remain. PADEP has not identified a source of money that can be used to reclaim these two sites in the event of bond forfeiture.

We acknowledge the significant progress that Pennsylvania has made in addressing the reclamation liabilities of those sites originally covered under the ABS. However, because Pennsylvania's program amendment submission does not assure, with respect to these two currently permitted sites, that sufficient money is available to complete reclamation plans in the event of forfeiture, OSM cannot approve that aspect of Pennsylvania's program amendment.

Required Amendment: As a result of Pennsylvania's failure to assure that outstanding land reclamation liabilities at these two sites are fully funded, OSM is revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

IV. Summary and Disposition of Comments

We received comments from four entities: The Mining and Reclamation Advisory Board (Administrative Record No. PA 802.56), the United States Environmental Protection Agency (Administrative Record No. PA 802.58), the Pennsylvania Coal Association (Administrative Record No. PA 802.59), and PennFuture (Administrative Record No. PA 802.60). Two other Federal agencies responded with no comment (U.S. Fish and Wildlife Services, Administrative Record No. PA 802.52, and the U.S. Department of Labor, Administrative Record No. PA 802.54). Since PennFuture submitted the majority of the comments received, we will address those comments first and the other entities' comments following.

PennFuture submitted ten general comments with numerous specific comments that support its general comments. We will address these specific comments where we determine that the topic had not already been addressed in our response to one of the general comments.

Generally, PennFuture contends that the program amendment does not guarantee the reclamation of all existing and potential "ABS legacy sites." PennFuture has indicated that the mechanisms presented in the ABS program amendment have moved or will move Pennsylvania's regulatory program closer to the objective, but they do not fully satisfy the outstanding requirements of the Part 732 Notice and 30 CFR 800.11(e) and 938.16(h), as interpreted in *Kempthorne*. For the reasons set forth in our findings above, and in our responses to comments below, we disagree with this assertion in large part, though we are revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms, that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS

The comments and our responses to them follow.

1. The ABS Program Amendment correctly recognizes that the reclamation of all existing and potential "ABS Legacy Sites" must be guaranteed.

Response: We agree, and have found that the State program amendment satisfies this obligation.

2. OSM has the discretion to approve parts of the ABS Program Amendment while disapproving others, and has the authority to place conditions on any approval or partial approval of the ABS Program Amendment.

Pennsylvania is seeking approval of this program amendment submission as a complete package, in accordance with 30 CFR 732.17(h) and the part 732 Notices. PennFuture states that nothing in the phrase "shall approve or disapprove the amendment request" in 30 CFR 732.17(h)(7) prevents OSM from approving certain provisions in a program amendment package while disapproving others. PennFuture indicates that OSM has the discretion to approve parts of the ABS Program Amendment while disapproving others, and has the authority to place conditions on any approval or partial approval of the ABS Program Amendment.

Response: We agree that there is nothing in 30 CFR 732.17(h) that prevents OSM from approving certain provisions in a program amendment, while disapproving others. We also agree that we have the authority to qualify our approval or partial approval of any program amendment, or to require additional amendments to the State program.

3. In taking action on the ABS Program Amendment, OSM may consider only the ABS Program Amendment and its attachments, along with any comments and supporting information submitted in response to the proposed amendment.

PennFuture notes that the ABS Program Amendment purports to incorporate by reference the entire, 82-page Program Enhancements Document (PED) that was transmitted to OSM on June 5, 2003. PennFuture further states that the PED is five years old, is inconsistent with the ABS Program Amendment, and that the program amendment does not appear to cite or to rely on any specific data, guidance documents, or passages of the PED. Finally, PennFuture states that OSM may consider only the ABS Program Amendment and its attachments, along with any comments and supporting information submitted in response to the proposed amendment. It further stated that if Pennsylvania is allowed to incorporate the PED by reference, it would incorporate its July 2003 comments by reference.

PennFuture also noted that Pennsylvania submitted to OSM a report on the progress recently made on the ABS primacy bond forfeitures, including a January 2009 update of the July 2008 version of the Trust Fund/Bond Agreement Summary Report, but that the State made it clear that the updated submission is neither a program amendment nor a revision to the program amendment. Therefore, according to PennFuture, the January 15, 2009, submission should not be considered by OSM in deciding on the ABS Program Amendment, nor should it be included in the administrative record in this proceeding. If, however, OSM intends to consider that new information or to include it in the administrative record of this proceeding, PennFuture contends that it must give it and the public an opportunity to comment on any such submission.

Response: We agree that the program amendment does not appear to cite or to rely on any specific data, guidance documents, or passages of the Program Enhancement Document submission. Neither the Program Enhancement Document nor the updates to the Trust Fund/Bond Agreement Summary Report were considered during this review.

4. There is no distinction between an "alternative bonding system" approved under Section 509(c) of SMCRA and an "alternative system" approved under Section 509(c) of SMCRA.

As noted in the program amendment submission, Pennsylvania seeks approval of its use of Conversion Assistance Guarantees and mine drainage treatment trust funds as "alternative systems" under Section 509(c) of SMCRA. Pennsylvania contends that there is a significant distinction between an alternative bonding system and "alternative system" under section 509(c).

In its submission, Pennsylvania cites 30 CFR 732.15(b)(6), which provides that the Secretary of the Interior may not approve a State regulatory program unless he finds that the provisions of the State program "implement, administer and enforce a system of performance bonds and liability insurance, or other equivalent guarantees, consistent with the requirements of subchapter J of this chapter." Pennsylvania asserts that the Conversion Assistance Program and mine drainage treatment trust funds are equivalent to or better than conventional bonds and may be approved under § 732.15(b) as an "alternative system or other equivalent guarantee."

PennFuture commented that there is no distinction between an "alternative bonding system" approved under Section 509(c) of SMCRA and an "alternative system" approved under Section 509(c) of SMCRA. The authorization of an "alternative system" in Section 509(c) of SMCRA is implemented through OSM's regulation governing "alternative bonding systems" at 30 CFR 800.11(e). It cited OSM's "authoritative interpretation, originally codified through notice and comment rulemaking at 30 CFR 806.11(c) and currently codified through notice and comment rulemaking at 30 CFR 800.11(e), [that] an 'alternative system that will achieve the objectives and purposes of the bonding program' within the meaning of section 509(c) of SMCRA, 30 U.S.C. 1259(c), is an alternative bonding system.'" It further cited rulemaking language that it believes supports its position that OSM sees no distinction between an alternative system and alternative bonding system.

The last clause of § 732.15(b)(6) limits OSM's discretion by tethering it to the substantive standards in 30 CFR Chapter VII, subchapter J, which today consists entirely of Part 800. The only provisions of 30 CFR part 800 implementing section 509(c)'s authorization to approve an "alternative system that will achieve the objectives of the bonding program under this section" 30 U.S.C. 1259(c) is the regulation authorizing the approval of "alternative bonding systems," 30 CFR 800.11(e).

The criteria for approval or disapproval of State programs in 30 CFR 732.15(b)(6) do not make 30 CFR 800.11(e) inapplicable to an alternative reclamation guarantee proposed for approval under section 509(c) of SMCRA. To the contrary, in order to be consistent with the requirements of subchapter J of this chapter, 30 CFR 732.15(b)(6), any reclamation guarantee proposed for approval as an "alternative system" under section 509(c) of SMCRA must satisfy the requirements for "alternative bonding systems" codified in subchapter J at 30 CFR 800.11(e).

Response: We agree that the authorization of an "alternative system" in section 509(c) of SMCRA is implemented through OSM's regulation governing "alternative bonding systems" at 30 CFR 800.11(e). Therefore, we regard both the Conversion Assistance Program and mine drainage treatment trust funds as alternative bonding systems.

5. OSM should approve Pennsylvania's Conversion Assistance Program as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

Response: OSM agrees, and is approving the Conversion Assistance Program as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

6. OSM should partially disapprove and partially approve, with conditions, Pennsylvania's use of mine drainage treatment trusts as an alternative bonding system under section 509(c) of SMCRA and 30 CFR 800.11(e).

We received extensive comments from PennFuture expressing concerns relative to the treatment trust approach proposed by Pennsylvania. PennFuture commented, generally, that OSM's evaluation of Pennsylvania's request for approval of trust funds as an alternate system and our determination of whether the Part 732 Notice and the required amendment at 30 CFR 938.16(h) have been satisfied, must be based upon a realistic scenario in which there is no financially responsible party available to bear higher than expected treatment costs or to supplement the trust corpus in order to restore it to a perpetually sustainable level. PennFuture's comments promote the importance of establishing a sustainable primary target valuation for each trust that will provide a revenue stream sufficient to provide the necessary AMD treatment.

In support of its comment, PennFuture sets forth the following deficiencies it alleges exist with respect to treatment trust amount calculations. According to PennFuture, each of these deficiencies, by itself, precludes OSM from determining that either the 1991 732 Letter or the required amendment codified at 30 CFR 938.16(h) can be removed.

First, PennFuture asserted that the assumed investment portfolios for many existing trust funds are more aggressive than the actual investment portfolios, which tend to be more conservative. Because of this discrepancy, operators are allowed to fund the trusts with less money than will be needed for full funding, since the assumed aggressive investment strategies do not match the actual, more conservative investment mixes. PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To assume a rate of return corresponding to the most conservative investment portfolio the trustee reasonably may be expected to hold when calculating the initial amount of mine drainage treatment trust funds;

(2) To review the investment portfolio of existing treatment trusts, and, for those trusts for which the actual investment portfolio allocation deviates materially from the portfolio assumed when calculating the initial amount of the trust, to recalculate the amount of the trust using the expected rate of return for the actual investment portfolio; and

(3) Where the recalculated amount is higher than the original calculation, to either: (a) Require the mine operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define what it means by a "material" deviation between the assumed and actual investment portfolio.

Second, PennFuture contended that mine drainage treatment trust funds have low tolerance for risk, primarily because it provides the only source of funding for its intended service, *i.e.*, the payment of treatment costs at specific sites, often in perpetuity. According to PennFuture, Pennsylvania's decision to authorize trust investment mixes of 80% stocks and 20% bonds is entirely too aggressive to accommodate the extremely low risk tolerances inherent in these funding mechanisms. Instead, Pennsylvania should authorize only low risk investment mixes that do not exceed the 5.25% expected annual rate of return on investment bonds. Of course, limiting the investments to those with more conservative expected rates of return will require the operator to invest more money into the trust at the outset. PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To assume a rate of return on the trust's investment portfolio no greater than 5.25% in calculating the amount of any mine drainage treatment trust fund; and (2) to recalculate, using a gross rate of return no greater than 5.25%, the amount of any existing treatment trust for which the gross rate of return on the investment portfolio assumed in the calculation of the initial trust amount exceeded 5.25%, and to either (a) require the operator to make up any deficiency in the trust amount; or (b) where a deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Third, PennFuture commented that the assumed 11.1% rate of return on the equities portion of its authorized mine drainage treatment trust fund investment mixes is excessively optimistic, and results in unacceptably low initial trust fund investments. PennFuture illustrated what it believes to be the significance of the rate of return assumption by showing the significant difference between the initial trust investment for an assumed 11.1% rate of return on equities vs. lower assumed rates of return. PennFuture's expert, Dr. Small, recommended an assumed rate of return of no greater than 6% on equities. PennFuture claimed that Pennsylvania's mine drainage treatment trusts are "doomed to insolvency from the outset by the unrealistic [assumed] rate of return." Finally, PennFuture asserted that Pennsylvania's volatility multiplier of 1.16% does not adequately account for the trust fund portfolio's market risk. Therefore, PennFuture demanded that OSM expressly disapprove the portion of the amendment that would allow the State to assume a gross rate of return of 11.1% on equity investments, and that it codify a required amendment requiring Pennsylvania:

(1) To assume a gross rate of return on equities no higher than 6% in calculating the amount of any mine drainage treatment trust fund; and (2) to recalculate, using a gross rate of return on equities no greater than 6%, the amount of any existing treatment trust for which the gross rate of return on equities assumed in the calculation of the initial trust amount exceeded 6% and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Fourth, PennFuture argued that limiting the period used for calculating recapitalization costs for treatment facilities to 75 years "is unwarranted, unsupported by any information in the ABS Program Amendment submission, and results in trust fund amounts below the amount needed to provide a full cost guarantee of perpetual treatment." Rather, PennFuture maintained that the only way to capture the full present value of all recapitalization costs is to use a calculation period of infinite duration. Therefore, PennFuture demanded that OSM "expressly disapprove the portion of the ABS Program Amendment that would allow Pennsylvania to limit the calculation of the present value of the recapitalization costs to 75 years", and to codify a required amendment requiring Pennsylvania:

(1) To use a calculation period of infinite duration that captures the full present value of all recapitalization costs when calculating the amount of a mine drainage treatment trust fund; and (2) to recalculate the amount of existing treatment trusts using a calculation period of infinite duration that captures the full present value of all recapitalization costs and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

Fifth, PennFuture contended that mine drainage treatment trust funds fail to account for the risk of premature system failure. Therefore, according to PennFuture, the trust funds are not full-cost, perpetual guarantees. Accounting for this risk would require that additional, up front monies be invested by the operators into the trust funds. Therefore, PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To fully account for the risk of premature failure of the treatment system or its components when calculating the amount of mine drainage treatment trust funds; [and] (2) to recalculate the amount of any existing treatment trust where a material risk of premature failure of the treatment system or its components exists, and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define what it means by a "material risk of premature failure."

Sixth, PennFuture maintained that the mine drainage treatment trusts do not account for costs of complying with the National Pollutant Discharge Elimination System (NPDES) program; as such, PennFuture contended the trusts "are not full-cost, perpetual treatment guarantees." Of course, initial trust investment amounts may need to be higher in order to account for NPDES requirements. Therefore, PennFuture demanded that OSM codify a required amendment requiring Pennsylvania:

(1) To fully account for all costs of complying with the NPDES requirements when calculating the amount of mine drainage treatment trust funds; and (2) to recalculate the amount of any existing treatment trust where compliance with the NPDES requirements would materially increase the costs that must be covered by the trust, and to either: (a) Require the operator to make up any deficiency in the trust amount; or (b) where the deficiency cannot be eliminated because no viable responsible party remains available, provide an enforceable, supplemental mechanism that, together with the site-specific trust, firmly guarantees that sufficient funding will be available to treat the discharge in perpetuity.

We note that PennFuture does not define the phrase "materially increase the costs that must be covered by the trust."

Response: For the reasons discussed below, we decline to impose any of the above-referenced demanded required amendments. Likewise, we decline to disapprove the provisions for which PennFuture demanded disapproval.

When we conducted our programmatic reviews in the late 1980s and began identifying shortcomings in the Pennsylvania bonding system, there existed no site-specific financial vehicle able to provide a revenue stream for long-term reclamation needs like a pollutional discharge. Pennsylvania's treatment trust efforts since the passage of Pennsylvania Act 173 in 1992 were creative and relied on flexibility within the developmental environment. Ultimately, their efforts provided both the vehicle and structure of a financial mechanism that can serve as an alternate to traditional conventional bonds or a State-wide bond pool. The treatment trust approach of making revenues available on an ongoing basis through interest payments on investments is an important leap forward in the search for a stable and self-sustaining source of funds for long-term reclamation costs. Our implementation of treatment trusts in the Federal program in Tennessee relied heavily on the techniques and experiences of Pennsylvania program officials. Our decision to approve treatment trusts as part of the Tennessee Federal program reflects our conclusion that it is important to maintain flexibility in the program so that the treatment trusts approach can undergo necessary refinements and respond to changing economic conditions.

As discussed under our findings, we are approving treatment trusts as an alternative bonding system under SMCRA section 509(c) and 30 CFR 800.11(e). Our approval confers on Pennsylvania the authority to implement enforceable trust agreements for long-term treatment of acid mine drainage in lieu of a conventional bond. In addition, and as discussed in our findings, we are not providing specific approval of the underlying financial components Pennsylvania has used or is currently using to develop treatment trusts. Similarly, we are not requiring that Pennsylvania incorporate into mine drainage treatment trust funds any explicit portfolio mixtures, volatility rates, specific cushions against premature failure, rates of return, recapitalization calculations, or inflation rates. Furthermore, we are not approving or disapproving other financial parameters Pennsylvania now considers, such as site maintenance costs, or the use of the AMDTreat program. We have concluded that the implementation of treatment trusts requires program managers to have a degree of flexibility that may not be afforded when specific percentages, rates, or schedules are imposed through a formal amendment structure of 30 CFR Part 732. As a parallel, State regulatory programs are responsible for managing bond rate guidelines for surface mine reclamation on an annual basis. Those responsibilities require ongoing analyses and revisions to reclamation cost parameters such as those for fuel, materials, supplies, equipment rates, and dozens of other cost components. We believe that treatment trusts will also need routine periodic revisions that will be hindered if revisions are subject to the formal program amendment process.

PennFuture's assertion that existing and future trust portfolios are not being managed or may not be performing consistent with the projections used to set the primary target valuation is an important comment and potential cause for concern. However, the potential for disparity between trust target assumptions and actual trust performance further convinces us not to impose rigid financial parameters such as rates of return. Rather, we are even more convinced of the importance of preserving programmatic flexibility so that Pennsylvania can revisit trusts on a periodic basis to revise and refine trust parameters, including the financial components and the primary target valuation, within the authority of its approved program. Pennsylvania could have adopted investment strategies in line with PennFuture's demands; had it done so, we almost certainly would have approved the use of trust funds, just as we are approving them in this rulemaking. However, we believe the mechanics of trust fund structures are best left to the PADEP, which has an incentive to ensure that the funds do not fail. The annual evaluations, which may result in adjustments to the mine drainage treatment trust fund target amounts, are one such assurance against failure. (*See* Attachment 7, "Postmining Treatment Trust Consent Order and Agreement", paragraph 8.)

The PennFuture comments also highlight the importance of maintaining clarity in our decision consistent with the decision in *Kempthorne.* In our findings section, we approved the use of treatment trusts as an alternative bonding system under SMCRA section 509(c) and 30 CFR 800.11(e).

Nonetheless, and as provided for under our finding, unless and until Pennsylvania demonstrates the financial adequacy of a trust supporting a qualifying ABS discharge, that discharge will still be subject to the requirements imposed on an ABS legacy site. Our clarification is consistent with the holding in *Kempthorne* that conversion from the old ABS only takes effect when the complete reclamation costs are fully covered by the CBS bonds (or in this case, a treatment trust). Under our decision, Pennsylvania must successfully demonstrate adequate coverage by a treatment trust for any ABS discharge it wishes to remove from coverage under the definition of ABS legacy sites in Chapter 86.

Our decision also reflects our implementation of the *Kempthorne* court's direction that OSM supervision be present until full guarantees of reclamation are in place. Moreover, and as discussed in our finding above, we conclude that the regulatory revisions to Chapter 86 put into place a revenue source that accommodates changes in ABS legacy sites treatment costs through annual reviews and adjustments to the reclamation fee. PADEP also provided information indicating that the proposed annual revenues could be adjusted as necessary to cover all ABS discharge costs, including those with partially funded trusts (*see* amendment submission: Evaluation of Potential Primacy ABS Discharge Sites).

Other Permit Costs: PennFuture asserts the following: Pennsylvania fails to account for the additional costs of complying with the NPDES requirements at ABS legacy sites. PADEP generally does not require its Bureau of Abandoned Mine Reclamation (BAMR) to get NPDES permits for bond forfeiture discharge sites where BAMR takes over operation and maintenance of the treatment systems. Likewise, where the mine operator has wound up affairs or otherwise is not in control of the mine site, PADEP generally does not require either the trustee or the trustee's contractor to hold NPDES permits for treatment trust discharge sites. PennFuture suggests that OSM should direct PADEP to provide the number of the current NPDES permit and its expiration date for each treatment trust sites. But, PennFuture contends, largely because Pennsylvania has improperly assumed away the NPDES requirements for most treatment trusts and bond forfeiture sites, the amendment fails to address any added costs those requirements might impose. Pennsylvania's failure to account in the calculation of the initial amount of a site-specific mine drainage treatment trust for any additional costs associated with compliance with the NPDES requirements produces a trust that does not fully guarantee the treatment of the covered charges in perpetuity, and therefore fails "to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of a forfeiture," 30 U.S.C. 1259(a), and to assure that the regulatory authority will have available sufficient money to complete.

Next, PennFuture asserts that section 509(c) and 30 CFR 800.11(e) prohibits OSM from approving the use of treatment trusts unless these additional costs are properly taken into account in all of the scenarios in which Pennsylvania uses trust funds. Moreover, unless the treatment trust fully accounts for and guarantees the coverage of these additional costs, Pennsylvania's implementation of them does not satisfy the requirements of the Part 732 Notice and 30 CFR 938.16(h), because trust fund sites that were bonded under the ABS will continue to lack the full and firm reclamation guarantees demanded by *Kempthorne.*

Response: With regard to NPDES permit costs, approval of this alternative system does not alter existing responsibilities of permittees to address any other Federal or State agency requirements relating to treatment of post-mining pollutional discharges. In the event the party responsible for abating or treating a discharge is required to obtain an NPDES permit pursuant to the CWA in order to operate and maintain treatment facilities at ABS legacy sites, then the costs associated with obtaining such permits and treating to the required effluent limits must be absorbed by the treatment trust. These costs, if and when they are required, should be incorporated into any calculations regarding the amount of funds needed to fully fund a trust.

Pennsylvania states that once a trust has been established and fully funded, the reclamation bonds for the site may be released. In addition, after the trust is fully funded, the permittee can, at the discretion of the Department, be reimbursed at the end of each year, based on the calculated costs of treatment for that year's costs.

PennFuture states that OSM must make clear that any mine for which a treatment trust is established continues to be regulated under Title V of SMCRA and the approved State regulatory program. In partially approving Pennsylvania's use of trust funds, OSM should make clear that until PADEP has granted final release of the section 509(c) trust fund, the mine remains a permitted mining operation within the jurisdiction of the State regulatory authority and the oversight jurisdiction of OSM under Title V of SMCRA. OSM should do so by disapproving the amendment to the extent it would allow full and final bond release for the entire mine site upon the funding of a mine drainage treatment trust fund, and by conditioning partial approval of Pennsylvania's use of trust funds under section 509(c) on Pennsylvania's retaining regulatory jurisdiction under the approved State program so long as mine drainage treatment operations continue at a trust fund site.

Response: PennFuture raised this concern during the rulemaking that resulted in our approval of Pennsylvania's use of treatment trust funds and annuities as collateral bonds. 70 FR 25472, 25487 (May 13, 2005). PennFuture was concerned that use of a financial guarantee (such as a trust fund established to treat acid mine drainage) would lead to bond release and therefore termination of the regulatory authority's jurisdiction over a mine site. PennFuture commented that the Federal regulations allow release of a bond upon its replacement with another bond that provides equivalent coverage, but this substitution does not constitute a bond release. PennFuture also noted that an existing bond could be released upon establishment of a trust fund or other adequate financial guarantee of perpetual treatment, but that the substitute guarantee must be treated as the equivalent of a performance bond under section 509 of SMCRA. Section 509 does not allow bond release and the termination of jurisdiction over a site where mine drainage treatment operations are occurring.

The Federal regulations do not allow full bond release until all requirements of the State program and the permit have been met. Additionally, Pennsylvania's regulations at 25 Pa.

Code 86.151(j) provides that release of bonds does not alleviate the operator's responsibility to treat discharge of mine drainage emanating from, or hydrologically connected to, the site to the standards in the permit, PASMCRA, the Clean Stream Law, the Federal Water Pollution Control Act (or Clean Water Act) and the rules and regulations thereunder. We construe the references to "release of bonds" in section 86.151(j) to mean the replacement of the original bond by another bond, whether it be a trust fund or other financial instrument used as a collateral bond, that will cover the area and cost of treatment facilities.

When a trust fund or annuity is in place and fully funded, the regulatory authority may approve release under 30 CFR 800.40(c)(3) of conventional bonds posted for a permit or permit increment, provided that, apart from the pollutional discharge and associated treatment facilities, the area fully meets all applicable reclamation requirements and the trust fund or annuity is sufficient for treatment of pollutional discharges and reclamation of all areas involved in such treatment. The portion of the permit required for post-mining water treatment must remain bonded. The trust fund or annuity may serve as that bond. In addition, Pennsylvania may not terminate its regulatory jurisdiction over any bonded area, including a water treatment facility bonded by a trust fund or another financial mechanism. We do not expect any issues to arise pertaining to termination of jurisdiction, however, since Pennsylvania's program lacks a provision allowing termination of jurisdiction under any circumstances.

7. OSM must codify enforceable conditions requiring the completion of land reclamation at primacy ABS bond forfeiture sites and the construction of mine drainage treatment systems at ABS Legacy Sites by specified deadlines.

Pennsylvania stated in its submission that it is committed to completing the arrangements for land reclamation at the ABS sites within the next couple of years and the PADEP has the funds available to perform the work.

PennFuture contends that OSM must codify enforceable conditions requiring the completion of land reclamation at primacy ABS bond forfeiture sites and the construction of mine drainage treatment systems at ABS legacy sites by specified deadlines. PennFuture contends that the Department's commitment is not enforceable. As a result, OSM must supply the enforceability by codifying enforceable obligations at 30 CFR 938.16 for Pennsylvania to complete the outstanding land reclamation and mine drainage treatment system construction work at primacy ABS bond forfeiture sites. PennFuture agrees with Pennsylvania that a site-by-site schedule with individual completion deadlines for each mine is unnecessary. Given the extraordinary, decades-long delays in reclamation or mine drainage treatment at some PA ABS bond forfeiture sites, however, PennFuture asserts that definitive and enforceable overall deadlines for the completion of the land reclamation and treatment system construction works are essential.

PennFuture recommends that OSM codify conditions at 30 CFR 938.16 requiring Pennsylvania to complete the construction of mine drainage treatment systems at all ABS legacy sites and the land reclamation at all primacy ABS bond forfeiture sites within one year following the effective date of OSM's final rule, subject to an exception for sites where Pennsylvania is unable to complete the necessary work by the deadline because of forces beyond Pennsylvania's control.

Response: It would be ideal if necessary land reclamation and water treatment projects at bond forfeiture sites could be completed by the deadline recommended by PennFuture. However, logistical and contractual limitations mean that it would be extremely difficult, if not impossible, to reclaim all the land that needs to be reclaimed and treat all the water that needs to be treated within one year of the effective date of this final rule. To accomplish the necessary land reclamation and water treatment, the State will need time to develop specifications, bid and award contracts, secure necessary easements and permits, and design and construct needed treatment facilities. For purposes of this rulemaking, we do not believe that it is necessary to impose deadlines for completion of sites. However, progress on the completion of sites is a topic that may be reviewed during oversight activities to assure that the regulatory authority is carrying out its activities in accordance with the provisions of its approved program.

8. OSM must disapprove the use of a consent order and agreement in lieu of an approved Section 509 reclamation guarantee, and must prohibit the proposed redesignation of the existing reclamation fee account until full-cost land reclamation guarantees are posted for the two mines covered by consent orders and agreements.

PennFuture contends that OSM must disapprove the use of a consent order and agreement in lieu of an approved section 509 reclamation guarantee. PennFuture also states that the amendment does not claim that Pennsylvania has sufficient money available in the SMCR Fund or elsewhere to cover the much larger shortfall for the LCN site, which includes a post-mining discharge that has been included on PA's list of potential ABS legacy sites. Although the amendment avoids stating the dollar amount by which the LCN site is underbonded, the $7 million in reclamation guarantees posted for the LCN site was more than $8.9 million below the estimated liability for land reclamation alone. Thus, according to PennFuture, the available monies cover only 44% of the estimated land reclamation liability.

PennFuture notes that Pennsylvania wants OSM to treat a consent order and agreement as satisfying Section 509 of SMCRA. But, PennFuture contends, as a matter of law, a consent order and agreement is not a section 509 performance bond or alternative bonding system. PennFuture asserts that section 509 of SMCRA can be satisfied only by approved reclamation guarantees that meet or exceed the amount of outstanding reclamation liability, not by an agreement to bring it about in the future.

PennFuture further asserts that OSM may not consider the Part 732 Notice and required amendment at § 938.16(h) to be fully satisfied until all land reclamation liabilities at the LCN and CCI sites are guaranteed by financial guarantee mechanisms approved under section 509 of SMCRA.

Finally, PennFuture states that OSM must require that, before PADEP can limit the use of the reclamation fees to paying the costs associated with treating post-mining pollutional discharges at ABS legacy sites, PADEP must guarantee that all land reclamation liabilities at the LCN and CCI sites are fully funded.

Response: As we note in Part B of the findings, a CO&A does not constitute the guarantee of sufficient funding to pay for reclamation, as required under section 509 of SMCRA. Accordingly, we found that Pennsylvania will not have fully satisfied the requirements of 30 CFR 800.11(e) until all land reclamation liabilities at the LCN and CCI sites are guaranteed to be fully funded. We are thus revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS. Because we are taking this action, it is not necessary to prohibit Pennsylvania from using its RFO&M Account for water treatment only on ABS legacy sites.

9. The ABS Program Amendment does not fully satisfy the Part 732 Notice and 30 CFR 938.16(h) because it does not demonstrate that the two new trust accounts provide the firm guarantee of perpetual treatment at all existing and potential ABS Legacy Sites required by *Kempthorne*.

Pennsylvania stated that the RFO&M Account is designed to go into operation immediately and to continue to serve as the only funding mechanism until it is merged into the two accounts which are set up to operate in series and are part of a system that is intended to cover the costs of mine drainage treatment at ABS legacy sites after treatment systems are initially installed using other funds. The Legacy Account, which, having been found "actuarially sound" by PADEP, then takes over forever as the sole mechanism providing for mine drainage treatment at the ABS legacy sites. Pennsylvania concluded that it has established an enforceable regulatory mechanism which will generate sufficient funds to cover the total annual O&M and recapitalization costs for the ABS legacy sites (and has also accounted for the potential ABS legacy sites.

PennFuture contends, however, that the amendment does not fully satisfy the Part 732 Notice and § 938.16(h) because it does not demonstrate that the two new trust accounts provide the firm guarantee of perpetual treatment at all existing and potential ABS legacy sites. PennFuture adds that information presented in the amendment at most shows that the system described in Part 5 of the amendment may work for the very near term. Under *Kempthorne*, however, the assurance required to satisfy § 800.11(e) must extend indefinitely beyond the next few years.

Specifically, PennFuture contends that:

Inventory: The program amendment fails to account for several mines that appear to be ABS legacy sites or potential ABS legacy sites. In particular, it provided examples of sites that were in the mine drainage inventory, but not listed as existing or potential ABS legacy sites, sites that were reclassified from "primacy" to "pre-primacy," and sites for which removal from the mine drainage inventory is not justified by the documentation provided by OSM.

Reclamation Fee O&M Account: Because the ABS Program Amendment does not demonstrate that the Legacy Account will ever be "actuarially sound," it must demonstrate that the RFO&M Account guarantees the treatment of all discharges at ABS legacy sites in perpetuity.

The $3.7 million in the SMCR Fund's existing reclamation fee account remains encumbered and unavailable for the payment of mine drainage treatment costs at the ABS legacy sites until all land reclamation obligations at the LCN and CCI sites are fully guaranteed by financial guarantee mechanisms approved under section 509 of SMCRA. Only if the $9 million reclamation obligation of the existing reclamation fee account is covered by full cost bonds or some other approved financial guarantee mechanism may OSM approve restricting the $3.7 million to the purpose of paying for mine drainage treatment at ABS legacy sites through the redesignation of the existing reclamation fee account as the RFO&M Account.

Only the revenue streams that must be deposited in the RFO&M Account may be considered in analyzing the capability of the account to provide the required guarantee of perpetual discharge treatment.

The ABS Program Amendment fails to guarantee that all recapitalization cost at ABS legacy sites are covered in perpetuity. PennFuture opposes limiting the calculation period for recapitalization costs to 75 years, for the same reasons it opposed the 75 year recapitalization cost calculation period for site-specific mine drainage treatment trust funds.

The ABS Program Amendment does not address recapitalization costs at potential ABS legacy sites. These costs must be addressed, and their present value must be based on a period of infinite duration.

The ABS Program Amendment's use of annualized recapitalization cost figures in the analysis of the RFO&M Account is improper and misleading. Because the PADEP does not contain an enforceable commitment for PADEP to collect and set aside funds to cover recapitalization costs in future years, the analysis of the RFO&M Account should not be premised on such a "set-aside." Moreover, PADEP should not assume that an equivalent amount of recapitalization costs will be spent each year, when it knows that will not be the case. Instead, the analysis of the RFO&M Account should be based on the irregular, discontinuous pattern of recap costs revealed by the Federation's "ABS Legacy Recap Cost Pattern (rev 2009)."

The ABS Program Amendment fails to account for the additional costs of complying with the NPDES requirements at ABS legacy sites.

The ABS Program Amendment fails to demonstrate that the RFO&M Account and associated mechanisms guarantee the perpetual treatment of all discharges at the existing ABS legacy sites. Instead, the analysis of the account is limited and exclusively near-term in scope. Pennsylvania has failed to demonstrate that potentially dramatic increases in the reclamation fee will not reduce the number of acres subject to the fee to the point that revenues will be insufficient to cover treatment costs. PennFuture insists that the analysis of the account must project the costs and revenues for the entire period in which the account may have to remain in operation. PennFuture's analysis of the condition of the account over a 75-year period show increasing burdens that the PADEP has failed to demonstrate what the account can bear.

The ABS Program Amendment fails to demonstrate that the RFO&M Account and associated mechanisms guarantee the perpetual treatment of all discharges at the potential ABS legacy sites. While the PADEP accounts for a "worst-case scenario" in which every potential ABS legacy site forfeits in a single year, it applies its analysis only to Year 1; in subsequent years, the needed additional revenues would be higher. In addition, and as noted above, the analysis does not account for recapitalization costs at these newly forfeited sites, but is limited to O&M costs.

Next, the amount of existing, site-specific bond money is overstated, because some of that money is needed for land reclamation on the LCN site. Finally, the site-specific bond monies would not be available anyway, because the proposed regulations require that such monies be deposited into the ABS Legacy Account, where they cannot be used until that account is declared to be actuarially sound. As with the ABS legacy sites, the analysis of the impact of future forfeitures of potential ABS legacy sites is short-sighted, and fails to demonstrate that the RFO&M Account will withstand the increased burdens that it may be required to bear.

Therefore, PennFuture demands that OSM condition its approval of the proposed regulations on Pennsylvania:

(1) Identifying the maximum period the RFO&M Account may be in operation, and providing information sufficient to demonstrate that the RFO&M Account and its ancillary mechanisms will assure treatment of all discharges from the ABS legacy sites for the entire, maximum period the account may be in operation; and, (2) including in the information submitted, and accounting for: (a) The recapitalization costs for the potential ABS legacy sites; b) the full, perpetual recapitalization costs for both existing and potential ABS legacy sites by using a calculation period of infinite duration that captures the full present value of all

recapitalization costs; and c) any additional treatment costs at the ABS legacy sites resulting from compliance with the requirements of the NPDES program.

ABS Legacy Account (Legacy Account): PennFuture demands that OSM codify a required amendment, requiring that before the Legacy Account may be found "actuarially sound," all of the conditions identified in PennFuture's comments pertaining to site-specific trust funds for sites originally bonded under the ABS must be satisfied. In addition, PennFuture contends that the ABS Program Amendment fails to demonstrate that the Legacy Account guarantees the perpetual treatment of all discharges at the ABS legacy sites. This demonstration is critical, PennFuture argues, because once the determination of actuarial soundness is made, it applies for eternity; that is, there is no provision in the proposed regulations for reviving the reclamation fee, or tapping another source of revenue, to cover treatment and recapitalization costs in the event the ABS Legacy Account ceases to be "actuarially sound." PennFuture recommends that the determination of actuarial soundness be made by an actuary.

For all of these reasons, PennFuture demands that OSM condition its partial approval of the proposed regulations on Pennsylvania:

(1) Basing the calculation of the initial, "actuarially sound" funding level of the Legacy Account on an expected gross rate of return on the Legacy Account's asset portfolio no greater than 5.25%; (2) basing the calculation of the initial, "actuarially sound" funding level of the Legacy Account on the full present value of all future recapitalization costs for the ABS legacy sites, determined by using a calculation period of infinite duration; (3) accounting for the risk of premature failure of the mine drainage treatment systems and components of the ABS legacy sites in determining the initial, "actuarially sound" funding level of the Legacy Account; and, (4) accounting for all costs of complying with the NPDES requirements at ABS legacy sites in determining the initial, "actuarially sound" funding level of the Legacy Account.

Summary: OSM must impose conditions on its approval that are necessary to ensure that the new accounts and related mechanisms provide the firm guarantee of perpetual treatment. Until those conditions are satisfied, OSM may not grant full approval of Part 5 of the amendment or terminate the 732 Notice and § 938.16(h) as being fully satisfied.

Because Pennsylvania can neither guarantee nor predict when the Legacy Account will become actuarially sound, the worse-case scenario in this regard is one in which the Legacy Account never attains actuarial soundness, and the RFO&M Account serves forever as the repository of funds for covering all treatment expenses at the ABS legacy sites. As a result, the amendment must demonstrate that the RFO&M Account and its ancillary mechanisms, even though intended to serve as only a temporary vehicle for administering the funds for discharge treatment at ABS legacy sites, nevertheless are capable of handling a worse-case scenario under which they must administer those funds permanently.

Given the lack of any proof that the Legacy Account will become actuarially sound and take over for the RFO&M Account anytime soon (or ever), the long-term sufficiency of the RFO&M Account, its capability to provide the firm financial guarantees demanded by *Kempthorne* must be proven by presentation and analysis of long-term projections.

Response:

Inventory: PennFuture commented on the inventory of ABS discharge sites PADEP submitted in support of the program amendment and stated that the ABS Program Amendment comes up short in its listing of and accounting for existing and potential ABS legacy sites. To support its comment, PennFuture discussed eight individual sites it thought should be included on the inventory list and said that it has questions concerning the classification of additional sites.

We disagree with PennFuture's implication that OSM is prohibited from removing the 1991 732 letter and the required amendment at 30 CFR 938.16(h) until there is an undisputed listing of ABS legacy sites and discharges. We conclude it is unnecessary to delay our consideration of the proposed modifications to the Pennsylvania program until OSM, PADEP, and PennFuture agree on a final list. As proposed, the PADEP amendment would establish an ABS legacy sites definition that clearly requires treatment of any discharge on a site bonded under the ABS, regardless of past, current, or future status on the MDI ABS Sites database. In addition, the proposed amendment would create a revenue source that, through annual reviews and adjustments to the reclamation fee, accommodates changes in ABS treatment costs, including changes in the number of qualifying sites or discharges (*see* program amendment submission Appendix 12).

The tracking of the MDI ABS Sites is the responsibility of PADEP and the current database is cooperatively maintained by OSM and PADEP to facilitate the reclamation of AMD and other pollutional discharges on sites that operated under the ABS. As essential as the MDI ABS Sites database is to OSM and PADEP, it is merely a program management tool and does not in itself determine whether a particular site is an "ABS Legacy Site." For this reason, we are not approving or disapproving the MDI ABS Sites database in this rulemaking. Because the database is not, *per se,* a component of the Pennsylvania regulatory program, any changes to the database do not need to be submitted to OSM as program amendments. Requiring database changes to be submitted as program amendments is not only unnecessary, but could also seriously delay or hinder PADEP efforts to complete required reclamation.

Our view is based upon an acceptance that the information on the MDI ABS Sites database will change as sites are reviewed and better information is collected. We believe such an approach is essential. Information on ABS sites is constantly being collected as treatment techniques and estimates are being refined. Since its inception in 1999, the database has been modified to include improved water quality information and to add ABS sites that were thought to qualify. OSM and PADEP have also had occasion to reclassify sites that no longer appear to represent an ABS treatment liability. Even with modifications being made over the last nine to ten years, the number of ABS discharges has remained relatively constant at approximately 100 discharges. OSM believes an active database management process is the best tool and approach for moving forward with reclamation while guaranteeing treatment of discharges on all qualifying sites.

In closing, we are not modifying our decision based upon PennFuture's comments concerning eight specific sites and its indication that it may have questions concerning additional sites. We conclude that delaying our decision on this program amendment until there is an undisputed list between OSM, PADEP, and PennFuture is unnecessary. If a site meets the definition of an "ABS Legacy Site," the old ABS, as modified in this amendment, remains responsible for the treatment of that site, regardless of whether it is on the MDI ABS Sites database. We encourage PennFuture and any other interested parties with important information concerning ABS site eligibility and treatment to contact PADEP and provide it with sufficient details to conduct an investigation.

RFO&M Account: Section 86.17 (Reclamation Fee) was significantly revised by Pennsylvania. Under the proposed revisions, the reclamation fee amount must be set to guarantee that sufficient revenue is generated to both cover the ongoing and projected O&M costs. In addition, the fee must provide sufficient revenues to maintain, on a State fiscal year basis, a minimum account balance to protect against unforeseen cost increases. To accomplish these tasks, section 86.17 relies on the new definitions in section 86.1 (Definitions) and restrictions on the use of the funds under section 86.187 (Use of Money). Section 86.17(e) establishes, collects, and deposits an adjustable reclamation fee (currently $100) into the RFO&M Account. Through defined procedural steps, Pennsylvania proposed annual assessments of the account balance, expected revenues, and anticipated costs. Pennsylvania proposed an adjustable fee sufficient to pay for the operation and maintenance costs of AMD treatment, including recapitalization costs and to maintain a $3 million minimum balance in the O&M Trust Account.

Pennsylvania significantly revised section 86.187 (Use of Money) to address how funds collected under section 86.17(e) would be dedicated to AMD treatment on ABS legacy sites. Pennsylvania's submission also makes available monies collected from civil penalties assessed by the Department under the Surface Mining Conservation and Reclamation Act. Under the proposed amendment, Pennsylvania must deposit into the O&M Trust Account all civil penalty collections up to $500,000 in a fiscal year, minus a small percentage that are required for deposit into the Pennsylvania Environmental Education Fund. While section 86.187(a) also allows, at the discretion of the Department, the deposit interest on other monies in the SMCR Fund, appropriations, donations, or fees collected from operators participating in the Conversion Assistance Program, the reclamation fees and civil penalties represent the only mandatory sources of funding. To provide a perspective on current revenues from mandatory and other sources, Pennsylvania submitted a document titled ABS Financial Summary July 2008. The summary describes various accounts in the SMCR Fund, available monies, interest, civil penalty collections, and miscellaneous sources.

Pennsylvania's proposed amendment includes discussions of AMD treatment costs on sites defined as ABS legacy sites at the time of the submission to OSM. The Primacy ABS Bond Forfeiture Discharge Sites Status Report for July 2008 provides the forfeited primacy permits bonded under the ABS with site-specific costs for treatment facility construction, annual operation and maintenance costs (O&M), recapitalization costs (system rehabilitation/replacement), and the status of the site. The report provides that, as of July 2008, the annual estimated O&M cost for all sites was approximately $1.35 million. Pennsylvania's proposed approach also considers annualized recapitalization cost estimates.

Pennsylvania's submission provides recapitalization costs for each year, continuing up to year 75 and estimates that for the first ten years recapitalization costs slowly escalate from approximately $230,000 to $302,000. Because Pennsylvania's submission proposes that recapitalization costs will be addressed on a "pay-as-you-go" approach, the maximum potential treatment outlay for year one is estimated to be approximately $1,580,000.

ABS legacy site treatment through the new adjustable trust account is dependent on the expenditure of approximately $2.07 million to construct treatment facilities. To develop the $2.07 million estimate, Pennsylvania reviewed existing ABS legacy sites and identified 67 discharges where systems are lacking or in need of substantive refurbishing. The funding aspects of treatment facility construction are discussed in several locations in Pennsylvania's submission. In ABS Program Amendment Part 4 (Section B), Pennsylvania describes ABS legacy site treatment facility construction, provides the number of sites that have functioning treatment systems, and provides the $2.07 million estimate. The narrative also commits to funding the facility construction effort with $1.1 million from the Released Bond Account and the remaining amount from the General Operations Account under the Department's SMCR Fund. In addition to the analysis and commitment of funding under ABS Program Amendment Part 4, Pennsylvania submitted further support information under two additional documents; the Primacy ABS Bond Forfeiture Discharge Sites Status Report for July 2008 and the ABS Financial Summary for July 2008. These support documents identify specific site treatment facility construction estimates and confirm fund amounts under the General Operations Account and the Released Bond Account.

We acknowledge that the revenues collected from reclamation fees ($190,125) and from civil penalties ($225,400.75) in 2007–2008 are less than the $1,580,000 maximum potential treatment outlay for year one. Nonetheless, the actual amount of money needed for treatment during year one will be significantly lower than the $1.58 million maximum, because that maximum amount is based on an assumption that all treatment facilities will have been constructed and be ready to start treating discharges at the beginning of year one. Actually, though, Pennsylvania must still complete construction of 67 facilities needed to treat mine drainage on ABS legacy sites. Disbursements from the O&M Trust Account cannot occur until the facility is constructed. At this time, we have no estimate on the degree to which disbursements from the O&M Trust Account will be postponed; however, we anticipate that it will be at least several years based upon discussions under ABS Program Amendment Part 4. In the event that treatment facility construction is accelerated and occurs sooner than anticipated, the O&M Trust Account has a balance of $3,699,896.50 to cover additional treatment outlays until the fee can be adjusted in the following year.

Pennsylvania also submitted information on the financial risk associated with active coal mine sites that were originally under the ABS but, at the time of the submission, had no fully funded mechanism for treatment of AMD. These sites are viewed as a potential financial burden on the O&M Trust Account because in the event of forfeiture, their treatment costs must be covered. For the 44 sites that met the potential risk scenario, Pennsylvania estimated that $1,450,000 represented a conservative AMD treatment estimate. Pennsylvania further provided that the risk to the O&M Account is minimized because some sites have bond exceeding the amount necessary for a site specific treatment trust. We accept Pennsylvania's conclusion that the risk of increased costs to the O&M Trust Account has been addressed. We agree that it is unrealistic to assume that all 44 sites would default in the same year. We also observe that the O&M Trust Account balance of $3.7 million and the adjustable fee process are available to address short-term and long-term increases in treatment costs.

As previously discussed in our finding at Part A, concerning the proposed regulatory changes to establish a legally enforceable means of funding the O&M and recapitalization costs for the ABS legacy sites, OSM recognizes that Pennsylvania has provided an alternate system that provides sufficient funding to treat AMD pollution originating from a defined set of bond forfeiture sites (ABS legacy sites). In addition we found that the reclamation fee can be adjusted to accommodate all increases and decreases in treatment obligations, and that these provisions constitute an enforceable commitment by Pennsylvania to provide the funding needed to construct treatment facilities.

ABS Legacy Account: Pennsylvania also proposed an alternate funding source under § 86.17(e)(6) called the ABS Legacy Account that, when actuarially sound, could supersede the RFO&M Account as the source of funding for AMD-treatment on the ABS legacy sites. Pennsylvania proposed specific conditions at section 86.17(e)(6)(i) through (iii) for determining when the ABS Legacy Account is financially capable of covering the annual operation and maintenance costs for treating post-mining pollutional discharges at the ABS legacy sites.

As previously discussed in our finding at Part A regarding this account, OSM did not consider this revenue to be a component of the funding required to meet any of the needs for treatment of the ABS legacy sites. Our approval of the language establishing this account, and the transfer of monies into the account is limited in that the ABS Legacy Account, and monies contained within the account, cannot be used until certain conditions are met. At that time, OSM can revisit any issue with regard to the solvency of this fund and the appropriateness of terminating the reclamation fee (or alternate revenue source).

We decline to impose any of the conditions on our approval of these two accounts demanded by PennFuture. We believe formal imposition of these conditions upon the State's approved program is unduly burdensome; it is also unnecessary, given the plain language of the regulations, which requires adjustment of the reclamation fee to account for any increased costs, and a demonstration of actuarial soundness, a defined term, for the ABS Legacy Account prior to termination of the reclamation fee. Pennsylvania's willingness, and its ability, to raise the needed additional monies through reclamation fee increases will be continually evaluated by OSM through its oversight authority. In short, the regulations create the mandate to fully fund discharge treatment costs for all existing and potential ABS legacy sites in perpetuity. The burden of ensuring the fulfillment of that mandate falls squarely on the PADEP, and indirectly on OSM, through oversight. With the commitment already set forth in the regulations, additional conditions are simply not needed, at this time. Therefore, we decline to impose them.

10. OSM should defer ruling on the proposal to allow funding of the RFO&M Account and Legacy Account through "appropriations" and funding sources that are not specifically identified in the ABS Program Amendment.

PennFuture contends that one of SMCRA's bedrock principles is cost internalization; that is, the statute in general, and its bonding requirements in particular, require that the costs of reclaiming surface mining sites, including the costs of discharge treatment at those sites, must be borne by the coal industry, and not by the public. Thus, PennFuture concludes, OSM should not approve proposed regulatory language that would allow the PADEP to deposit into the RFO&M Account or Legacy Account: (1) "appropriations * * *." 25 Pa. Code 86.187(a)(1)(iii), 86.187(a)(2)(i); (2) fees for Conversion Assistance Program guarantees, until a statutory change removing the restriction on the use of those funds is submitted as a program amendment; (3) "other monies" from sources not specifically listed in 25 Pa. Code 86.187(a)(1)(iii) and (a)(2)(i), until the specific sources of funding are identified and submitted for approval as a program amendment; or (4) the "permanent alternative funding sources for the RFO&M Account, 25 Pa. Code 86.17(e)(3), (e)(3)(i), (e)(3(ii), until the specific alternative source is identified, Pennsylvania submits the source as a State program amendment and OSM approves the source as a replacement for the reclamation fee. PennFuture thus asserts OSM should defer ruling on these provisions in this rulemaking for the substantive reason that the money purported to be authorized therein, with the exception of fees for Conversion Assistance Program guarantees, may come from outside the coal industry, and therefore violate the principle of cost internalization. PennFuture further asserts that OSM should also defer its decision on all of the above provisions, including the use of fees from Conversion Assistance Program guarantees, for a procedural reason: neither PennFuture nor any other interested party may provide meaningful comment on the provisions until they are submitted to OSM through the formal program amendment process. Moreover, and in the same vein, PennFuture contends that OSM cannot properly rule on the consistency of these provisions with the requirements of SMCRA and the Federal implementing regulations until they are squarely presented to it as State program amendments.

Response: For the reasons set forth above in Part A of our findings, we are approving the regulatory provisions cited by PennFuture here. However, any "alternative permanent funding source" that would be proposed to substitute for the reclamation fee must first be submitted to us for review and may not be used to pay treatment costs on ABS legacy sites until we either approve the amendment, or decide that the mechanism need not be treated as a program amendment requiring our approval. Nothing in SMCRA or its implementing regulations explicitly prohibits the use of "other sources" of money, such as appropriations, to pay for reclamation of forfeited sites. If any such "other sources" are deposited into either the RFO&M Account or the Legacy Account, we will determine whether a program amendment is required before PADEP may use those monies. Further, the transfer of fees from Conversion Assistance guarantees into the RFO&M Account must be authorized by State law. Therefore, no such transfers may take place until Pennsylvania enacts the necessary statutory revision, submits it to us, and we approve it.

Other Comments

The Pennsylvania Coal Association (PCA)

The PCA commented that it supported approval of the program amendment. In its comments the PCA indicated its agreement to continue paying the $100 per acre reclamation fee for pollutional discharges for which its members have no liability. This approval was conditioned on continuing efforts to find a permanent alternate source of funding to address such pollution.

The Mining and Reclamation Advisory Board (MRAB)

The MRAB commented generally on the process that resulted in the regulations recommended by the Board, as submitted in the program amendment. MRAB commented in support of OSM's approval of the amendment.

Federal Agency Comments

Mine Safety and Health Administration (MSHA)

MSHA indicated it had no comments or concerns regarding the proposed amendment.

U.S. Fish and Wildlife Service

The USFWS indicated it had no comments on the proposed amendment.

U.S. Environmental Protection Agency

The USEPA noted that all discharges of water from areas disturbed by surface mining shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by USEPA as set forth at 40 CFR Part 434.

USEPA indicated that implementation of the State's regulations, including the proposed amendments, must comply with the CWA, the regulations implementing NPDES, and other relevant environmental statutes and regulations. EPA further noted that SMCRA and its implementing regulations, including PADEP's proposed amendments, do not supersede, modify, amend or repeal the CWA and its implementing regulations.

In other words, the EPA stated, "* * * any discharges associated with ABS legacy surface mining operations must comply with the CWA."

Response: OSM agrees that approval of this amendment does not alter the State's or a permittee's responsibility for compliance with any applicable provisions of the CWA. Specifically, approval of this amendment does not alter existing or future responsibilities of the State or a permittee to address any other Federal or State agency requirements relating to treatment of post-mining pollutional discharges.

V. OSM's Decision

Based on the above findings, we are partially approving the Pennsylvania program amendment sent to us on August 1, 2008, (Administrative Record No. PA 802.43). To implement this decision, we are amending the Federal regulations at 30 CFR Part 938 which codify decisions concerning the Pennsylvania program. Pursuant to 5 U.S.C. 553(d)(3), an agency may, upon a showing of good cause, waive the 30 day delay of the effective date of a substantive rule following publication in the **Federal Register**, thereby making the final rule effective immediately.

We find that good causes exist under 5 U.S.C. 553(d)(3) to make this final rule effective immediately. Because Section 503(a) of SMCRA requires that the State's program demonstrate that the State has the capability of carrying out the provisions of the Act and meeting its purposes, making this regulation effective immediately will expedite that process.

Specifically, waiving the 30 day period after publication will allow Pennsylvania to immediately implement these new provisions that are designed to bring more financial resources to bear toward the abatement of water pollution on permitted and abandoned mine sites in the State. Improved water quality will thus inure more quickly to the benefit of the citizens of the Commonwealth of Pennsylvania. Therefore, under 5 U.S.C. 553(d)(3), this rule will be effective immediately.

In addition, for the reason set forth in our findings, we are revising the required amendment at 30 CFR 938.16(h) to require Pennsylvania, within the time provided therein, to ensure that its program provides suitable, enforceable funding mechanisms that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS. Satisfaction of the revised required program amendment at 30 CFR 938.16(h) will likewise constitute satisfaction of the remaining requirements of the October 1, 1991, 732 letter.

VI. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by Section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of Subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under Sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA, and section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13175—Consultation and Coordination With Indian Tribal Government

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian Tribes and have determined that the rule does not have substantial direct effects 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. The basis for this determination is that our decision is on a State Regulatory program and does not involve a Federal Regulation involving Indian Lands.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of $100 million; (b) will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and (c) does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or Tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the Pennsylvania submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: June 22, 2010.

Thomas D. Shope,

Regional Director, Appalachian Region.

■ For the reasons set out in the preamble, 30 CFR Part 938 is amended as set forth below:

PART 938—PENNSYLVANIA

■ 1. The authority citation for Part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Section 938.15 is amended by adding a new entry to the table in chronological order by "Date of final publication" to read as follows:

§ 938.15 Approval of Pennsylvania regulatory program amendments.

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* *	*	* * * * *
August 1, 2008	August 10, 2010	52 P.S. 1396.4(d.2); 25 Pa. Code 86.1, 86.17(e), 86.187(a); The Conversion Assistance Program; Trust Funds as an Alternative Bonding System (ABS); Demonstration of Sufficient Funding for Outstanding Land Reclamation at Primacy ABS Forfeiture Sites; and, Demonstration of Sufficient Funding for Construction of All Necessary Discharge Treatment Facilities at the ABS Forfeiture Sites.

■ 3. Section 938.16 is amended by revising paragraph (h) to read as follows:

§ 938.16 Required regulatory program amendments.

* * * * *

(h) No later than October 12, 2010, Pennsylvania must submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to ensure that its program provides suitable, enforceable funding mechanisms, that are sufficient to guarantee coverage of the full cost of land reclamation at all sites originally permitted and bonded under the ABS.

* * * * *

[FR Doc. 2010–19276 Filed 8–9–10; 8:45 am]

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