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9:00 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 410, 416, and 419

[CMS–1404–CN]

RIN 0938–AP17; RIN 0938–AL80; RIN 0938–AH17

Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and CY 2009 Payment Rates; Changes to the Ambulatory Surgical Center Payment System and CY 2009 Payment Rates; Hospital Conditions of Participation: Requirements for Approval and Re-Approval of Transplant Centers To Perform Organ Transplants—Clarification of Provider and Supplier Termination Policy Medicare and Medicaid Programs: Changes to the Ambulatory Surgical Center Conditions for Coverage

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

ACTION: Correction of final rule with comment period.

SUMMARY: This document corrects technical errors that appeared in the final rule with comment period published in the **Federal Register** on November 18, 2008, entitled ''Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and CY 2009 Payment Rates; Changes to the Ambulatory Surgical Center Payment System and CY 2009 Payment Rates; Hospital Conditions of Participation: Requirements for Approval and Re-Approval of Transplant Centers To Perform Organ Transplants—Clarification of Provider and Supplier Termination Policy Medicare and Medicaid Programs: Changes to the Ambulatory Surgical Center Conditions for Coverage'' (hereinafter referred to as the CY 2009 OPPS/ASC final rule with comment period).

DATES: *Effective Date:* this document is effective on January 26, 2009.

Applicability Date: The corrections in this document are applicable on and after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Alberta Dwivedi, (410) 786–0378.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. E8–26212 of November 18, 2008 (73 FR 68502), there were a few technical errors that are identified in the ''Summary of Errors'' section and corrected in the ''Correction of Errors'' section below.

II. Summary of Errors

We incorrectly determined the CY 2009 status indicator for new CY 2009 Healthcare Common Procedure Coding System (HCPCS) code J3300 (Injection, triamcinolone acetonide, preservative free, 1 mg) and, as a result, incorrectly assigned HCPCS code J3300 status indicator ''N.'' Status indicator ''N'' indicates that items and services are packaged into ambulatory payment classification (APC) rates. Payment for those items and services assigned status indicator ''N'' is packaged into payment for other services, including, for example, outliers, and, therefore, there is no separate APC payment. The CY 2009 OPPS/ASC final rule with comment period included several Addenda. The erroneous assignment of status indicator ''N'' to HCPCS code J3300 appears in Addendum B on page 69228. On that page, we are changing the status indicator of HCPCS code J3300 from ''N'' to ''K'' (Nonpass-Through Drugs and Biologicals; Paid under OPPS; separate APC payment) to correctly reflect its separately payable status for CY 2009. As a result of our error in determining the status indicator of HCPCS code J3300, and the corresponding incorrect indication of status indicator ''N'' in Addendum B, we need to make two additional conforming changes.

Because we incorrectly packaged HCPCS code J3300 in the CY 2009 OPPS/ASC final rule with comment period, we provided no APC assignment for the HCPCS code in that rule. With the correct assignment of status indicator ''K'' to HCPCS code J3300, an APC must be established for payment, because each separately payable drug or biological is assigned to its own unique APC under the OPPS. Therefore, in Addendum A, on page 68831, we are adding APC 1253 (Triamcinolone A inj PRS-free) with status indicator ''K.'' Also, in Addendum BB, on page 69301, a similar change to that made in Addendum B needs to be made to correspond to the Ambulatory Surgical Center (ASC) payment system. Accordingly, we are changing the ASC payment indicator for HCPCS code J3300 from ''N1'' to ''K2'' (Drugs and biologicals paid separately when provided integral to a surgical procedure on ASC list; payment based on OPPS rate) to correctly reflect separate payment of HCPCS code J3300 under the ASC payment system.

III. Correction of Errors

In FR Doc. E8–26212 of November 18, 2008 (73 FR 68502), make the following corrections:

Addendum A.—Final OPPS APCs for CY 2009

1. On page 68831, in column 1, insert between APC 1251 and APC 1280, lines 24 and 25, the final OPPS CY 2009 entry for APC 1253 to read as follows:

APC	Group title	SI	Relative weight	Payment rate	National unadjusted copayment	Minimum unadjusted copayment
1253	Triamcinolone A inj PRS-free	K		$3.18		$0.64

Addendum B.—Final OPPS Payment by HCPCS Code for CY 2009

2. On page 69228, in line 31, for HCPCS Code J3300—

A. In column 4, the status indicator ''N'' is corrected to read ''K.''

B. In column 5, the APC is corrected to read ''1253.''

C. In column 7, the payment rate is corrected to read ''$3.18.''

D. In column 9, the minimum unadjusted copayment is corrected to read ''$0.64.''

The HCPCS Code for J3300 should read as follows:

HCPCS Code	Short descriptor	CI	SI	APC	Relative weight	Payment rate	National unadjusted copayment	Minimum unadjusted copayment
J3300	Triamcinolone A inj PRS-free	NI	K	1253	.....	$3.18	.....	$0.64

Addendum BB.—Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for CY 2009 (Including Ancillary Services for Which Payment Is Packaged)

3. On page 69301, in line 37, for HCPCS Code J3300—

A. In column 4, the payment indicator ''N1'' is corrected to read ''K2.''

B. In column 6, the CY 2009 second year transition payment is corrected to read ''$3.18.''

IV. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a notice such as this take effect, in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C. 553(d)). However, we can waive both the notice and comment procedure and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary or contrary to the public interest to follow the notice and comment procedure or to comply with the 30-day delay in the effective date, and incorporates a statement of the finding and the reasons in the notice.

The policies and payment methodologies finalized in the CY 2009 OPPS/ASC final rule with comment period have previously been subjected to notice and comment procedures. This correction notice merely provides technical corrections to the CY 2009 OPPS/ASC final rule with comment period that was promulgated through notice and comment rulemaking, and does not make substantive changes to the policies or payment methodologies that were finalized in the final rule with comment period. In order to conform the document to the final policies of the CY 2009 OPPS/ASC final rule with comment period, this notice makes changes to revise inaccurate tabular information. Therefore, we find it unnecessary to undertake further notice and comment procedures with respect to this correction notice. In addition, we believe it is important for the public to have the correct information as soon as possible and find no reason to delay the dissemination of it. For the reasons stated above, we find that both notice and comment and the 30-day delay in effective date for this correction notice are unnecessary. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in effective date for this correction notice.

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

Dated: January 16, 2009.

Ann Agnew,

Executive Secretary to the Department.

[FR Doc. E9–1519 Filed 1–23–09; 8:45 am]

BILLING CODE 4120–10–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Chapter 1

[FCC 08–243; WT Docket No. 00–230]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the Second Order on Reconsideration, the Commission denies a petition for reconsideration or, in the alternative, clarification filed by T-Mobile USA, Inc. with respect to the Commission's Secondary Markets Second Report and Order (Second R&O) in this proceeding.

FOR FURTHER INFORMATION CONTACT: Wireless Telecommunications Bureau, Spectrum and Competition Policy Division: Paul D'Ari at (202) 418–1550.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Order on Reconsideration, WT Docket No. 00–230, adopted on October 9, 2008 and released on October 17, 2008. The full text of this document is available on the Internet at the Commission's Web site: *http://hraunfoss.fcc.gov/edocs_public*. It is also available for inspection and copying from 8 a.m. to 4:30 p.m. ET Monday through Thursday or from 8 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. You may purchase the Second Order on Reconsideration from the Commission's duplicating contractor, Best Copy & Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com*. When ordering documents from BCPI, please provide the appropriate FCC document number, for example, FCC 08–243.

Summary of the Second Order on Reconsideration

1. The Second Order on Reconsideration denies a Petition for Reconsideration or, in the Alternative, Clarification (Petition) filed by T-Mobile USA, Inc. (T-Mobile). In the Second R&O, the Commission took several steps to facilitate the development of secondary markets in spectrum usage rights involving Wireless Radio Services. Among other things, the Commission established immediate approval procedures for spectrum leasing arrangements and license assignments and transfers of control where the potential lessee or assignee/transferee could certify either (1) that it does not have more than 25 percent indirect foreign ownership, or (2) that it has previously obtained a declaratory ruling from the Commission establishing that the proposed transaction falls within the scope of that declaratory ruling, including with respect to type of service and geographic coverage area, and that there has been no change in foreign ownership in the

meantime. The Commission determined that transactions raising specified potential public interest concerns, including certain transactions raising potential foreign ownership concerns associated with section 310(b)(4) of the Communications Act, would not be among those eligible for processing under the immediate approval procedures and would remain subject to the certification and declaratory ruling requirements in the existing streamlined processing procedures. However, the Commission also announced a policy of entertaining section 310(b)(4)-related petitions that could enable carriers with indirect foreign ownership interests to avail themselves of speedier processing of spectrum leasing arrangements and license assignments under certain circumstances.

2. In the Petition, T-Mobile asked the Commission not to strictly construe the new section 310(b)(4) policy and to revise or clarify it to eliminate the need for a new declaratory ruling under certain circumstances, including, among others, when foreign ownership of the ultimate controlling entity would remain unchanged and the licenses that are the subject of the proposed transaction would be utilized in the current business of the applicant and its affiliates.

3. The Commission affirmed the policy adopted in the Second R&O and denied T-Mobile's Petition. The Commission determined that it had struck an appropriate balance in the Second R&O between promoting secondary markets and ensuring adequate review of proposed transactions by the Commission and the Executive Branch. The Commission also found that the revised criteria proposed by T-Mobile were not sufficiently precise to allow the Commission to dispense with the requirement for a new declaratory ruling for purposes of its section 310(b)(4) review.

4. Accordingly, it is ordered that pursuant to sections 1, 4(i), 301, 303(r), and 310 of the Communications Act, as amended, 47 U.S.C. 151, 154(i), 301, 303(r), and 310, the Petition is hereby denied.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–1286 Filed 1–23–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 02–112, CC Docket No. 00–175 and WC Docket No. 06–120; FCC 07–159]

Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160(c) With Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On September 24, 2008, the Office of Management and Budget (OMB) approved, for a period of three years, the information collections for the service quality measurement plan for interstate special access and monthly usage requirements associated with the Commission's *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services,* Report and Order and Memorandum Opinion and Order, FCC 07–159 (released Aug. 31, 2007) (*Report and Order*). These information collection requirements required OMB approval in order to become effective.

DATES: On September 24, 2008, the Office of Management and Budget approved the information collections for the service quality measurement plan for interstate special access and monthly usage requirements adopted in the Report and Order published at 72 FR 58021, October 12, 2007.

FOR FURTHER INFORMATION CONTACT: Heather Hendrickson, Competition Policy Division, Wireline Competition Bureau, at (202) 418–7295.

SUPPLEMENTARY INFORMATION: This document announces that, on September 24, 2008, OMB approved, for a period of three years, certain information collection requirements for the service quality measurement plan for interstate special access and monthly usage requirements contained in the Commission's *Report and Order*, FCC 07–159, published at 72 FR 58021, October 12, 2007. The OMB Control Number is 3060–1120. The Commission publishes this notice as an announcement of that approval. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Thomas Butler, Federal Communications Commission, Room 5–C457, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Number, 3060–1120, in your correspondence. The Commission will also accept your comments via the Internet if you send them to *PRA@fcc.gov*.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on September 24, 2008, for the information collection requirements for the service quality measurement plan for interstate special access and monthly usage requirements associated with the *Report and Order*. The OMB Control Number is 3060–1120. The total annual reporting burden for respondents for these collections of information, including the time for gathering and maintaining the collection of information, is estimated to be: 3 respondents, 48 responses, total annual burden hours of 3,000 hours, and no annual costs.

Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB 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, which does not display a current, valid OMB Control Number.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Public Law 104–13, October 1, 1995, and 44 U.S.C. 3507.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–1256 Filed 1–23–09; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 74, No. 15
Monday, January 26, 2009

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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC–2007–0016; PRM–50–87]

Raymond A. Crandall; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying the petition for rulemaking (PRM) filed by Mr. Raymond A. Crandall on May 17, 2007, and docketed on June 22, 2007 (Docket No. PRM–50–87). In his petition, the petitioner requested that the NRC amend the regulations that govern domestic licensing of production and utilization facilities to eliminate the specific criteria related to the radiological doses for control room habitability at nuclear power plants. The petitioner stated that the current deterministic radiological dose requirements for control room habitability have resulted in several negative safety consequences, including an increased risk to public safety. He requested that the NRC delete the 5 rem whole body dose limit and the 0.05 sievert (Sv) (5 rem) total effective dose equivalent (TEDE) limit specified in the current regulations.

DATES: The docket for PRM–50–87 is closed as of January 26, 2009.

ADDRESSES: Publicly available documents related to this petition, including the PRM and the NRC's letter of denial to the petitioner may be viewed using the following methods:

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents related to this PRM filed under docket ID NRC–2007–0016.

NRC's Public Document Room (PDR): The public may examine publicly available documents and have them copied for a fee at the NRC's PDR, Public File Area O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Document Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically via the NRC's Electronic Reading Room at *http://www.nrc.gov/NRC/reading-rm/adams.html*. From this page, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or have any problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, or 301–415–4737, or by e-mail to *PDR.resource@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: A. Jason Lising, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–3220, or toll-free: 800–368–5642; e-mail: *Jason.Lising@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background
II. Petitioner's Requests
III. Reasons for Denial
IV. Public Comments
V. Denial of Petitions

I. Background

On May 17, 2007, the NRC received a PRM from Raymond A. Crandall (ADAMS Accession No. ML071490250); the PRM was docketed by the NRC as PRM–50–87. The petitioner requested that the NRC amend Title 10 of the *Code of Federal Regulations* Part 50 (10 CFR Part 50), ''Domestic Licensing of Production and Utilization Facilities'' to remove the specific criteria related to the radiological doses for control room habitability at nuclear power plants from 10 CFR 50.67, ''Accident source term,'' and General Design Criterion (GDC) 19, ''Control room,'' in Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to 10 CFR Part 50. The NRC published a notice of receipt and request for public comment in the **Federal Register** on July 12, 2007 (72 FR 38030). The 75-day public comment period ended on September 25, 2007.

The petitioner noted that the current regulations provide specific dose criteria for demonstrating the acceptability of the control room design during radiological release events. These criteria are based on deterministic radiological dose analyses performed by the licensee and reviewed by the NRC. NRC regulatory guides and standard review plans provide acceptable methodologies that can be used by licensees to perform dose analyses, which are then incorporated, as appropriate, into the licensing basis for the licensee's facility. The petitioner stated that the deterministic dose analysis methodology and associated regulatory process result in several negative safety consequences:

(1) Current Designs Not Optimum

''Control room designs that are not optimum for ensuring continued control room habitability. Current designs required in order to meet the current dose methodology criteria may actually increase the probability of having to evacuate the control room compared to establishing the design based on good engineering principles.''

(2) Procedures Not Optimized

''Site procedures for mitigation of the dose consequences to control room personnel that are not optimum for ensuring control room habitability. The procedures designed to ensure consistency with the dose analysis assumptions are inconsistent with more effective mitigation strategies.''

(3) Challenges to Safety Systems

''Unnecessary challenges to safety systems, such as increased challenges to the Emergency Diesel Generators if control room ventilation system fans are loaded on the diesels early in the accident to meet analysis assumptions.''

(4) Inappropriate Technical Specification (TS) Action Statements

''Technical Specifications Action Statement requirements that result in a net increase in the risk to the public. This specifically refers to Technical Specifications that require a plant shutdown for failure to meet a control room dose analysis input assumption.''

(5) Unjustified Technical Specification Surveillances

''Technical Specifications Surveillance requirements that cannot be cost-justified based on the risk-significance. This results in the required expenditure of resources that could be used on risk-significant improvements.''

The petitioner suggested amendments that would eliminate the specific radiological dose acceptance criteria and, thereby, the need for deterministic dose analyses and the associated regulatory processes, including the need for applicable TSs. He stated that the

proposed changes would not eliminate the requirement for the control room to be designed to ensure safe conditions under accident conditions, but it would address his safety concerns with the current regulations.

II. Petitioner's Request

In PRM–50–87 the petitioner requested that the NRC take the following actions:

1. Revise the regulations related to control room habitability at nuclear power plants by deleting the following sentences from GDC 19:

''Adequate radiation protection shall be provided to permit access and occupancy of the control room under accident conditions without personnel receiving radiation exposures in excess of 5 rem whole body, or its equivalent to any part of the body, for the duration of the accident. Applicants for and holders of construction permits and operating licenses under this part who apply on or after January 10, 1997, applicants for design certifications under part 52 of this chapter who apply on or after January 10, 1997, applicants for and holders of combined licenses under part 52 of this chapter who do not reference a standard design certification, or holders of operating licenses using an alternative source term under § 50.67, shall meet the requirements of this criterion, except that with regard to control room access and occupancy, adequate radiation protection shall be provided to ensure that radiation exposures shall not exceed 0.05 Sv (5 rem) total effective dose equivalent (TEDE) as defined in § 50.2 for the duration of the accident.''

2. Revise the regulations related to control room habitability at nuclear power plants to delete from paragraph (b)(2)(iii) in 10 CFR 50.67 this language:

''Adequate radiation protection is provided to permit access to and occupancy of the control room under accident conditions without personnel receiving radiation exposures in excess of 0.05 Sv (5 rem) total effective dose equivalent (TEDE) for the duration of the accident.''

III. Reasons for Denial

1. General

The NRC has reviewed Mr. Raymond Crandall's petition and has determined that it does not provide adequate justification to remove the control room radiological dose acceptance criteria from NRC regulations. The NRC does not agree with the petitioner's assertion that the control room radiological dose acceptance criteria have resulted in negative safety consequences.

Performance-based regulations, such as § 50.67 and Appendix A to 10 CFR Part 50, do not provide prescriptive requirements and, therefore, do not require licensees to use specific designs or methodologies to comply with the regulations. The NRC, however, does provide regulatory guidance to licensees that includes acceptable designs and methodologies for demonstrating compliance with the regulations. The use of the guidance is optional, and licensees are free to propose alternative means of complying with the NRC's regulations.

Design-basis dose consequence analyses are intentionally based upon conservative assumptions and are intended to model the potential hazards that would result from any credible accident, not necessarily the most probable accident. As stated in footnotes to 10 CFR 100.11, ''Determination of exclusion area, low population zone, and population center distance,'' and 10 CFR 50.67, ''Accident source term,'' ''[t]he fission product release assumed for these calculations should be based upon a major accident, hypothesized for purposes of site analysis or postulated from considerations of possible accidental events, that would result in potential hazards not exceeded by those from any accident considered credible. Such accidents have generally been assumed to result in substantial meltdown of the core with subsequent release of appreciable quantities of fission products.''

The performance-based control room dose criterion is designed to maintain an acceptable level of control room habitability even under the maximum credible accident scenario. The NRC has determined that providing an acceptable level of control room habitability for design-basis events is necessary to provide reasonable assurance that the control room will continue to be effectively manned and operated to mitigate the effects of the accident and protect public health and safety. Meeting or exceeding the design-basis control room dose limit would not impose an immediate evacuation requirement on the control room operators. Moreover, by removing the 5 rem acceptance criterion, a regulatory basis for the acceptance of the radiological protection aspects of control room designs would no longer exist and would not support the Commission's policy regarding performance-based regulations.

The conservative assumptions used in design-basis dose consequence analyses need not and should not form the basis for restricting actions described in emergency operating procedures. These procedures are designed to ensure that during an accident all available means are used to assess actual radiological conditions and to maintain emergency worker doses As Low As Reasonably Achievable (ALARA), as required by 10 CFR Part 20, ''Standards For Protection Against Radiation.'' Additionally, no NRC regulations, including 10 CFR Part 20, ''Standards for Protection Against Radiation,'' require evacuation of the control room when the design-basis control room dose limit is exceeded. Emergency operating procedures include guidance for controlling doses to workers under emergency conditions. This guidance would be applicable in the unlikely event that control room doses were projected to exceed the design-basis dose limit during an actual emergency.

2. NRC Staff Responses to the Petitioner's Assertions

A. Current Designs Are Not Optimum

1. The petitioner stated that because the primary objective of control room habitability is to ensure continuous occupancy, the primary focus should be on minimizing whole body doses from noble gases. He stated that some common control room designs, such as the filtered air intake pressurization design, focus on compliance with existing dose criteria. He concluded that the current requirements and operational criteria focus on minimizing the thyroid dose at the expense of increasing the whole body dose from noble gases which increases the probability that the control room will require evacuation.

The NRC reviewed the petitioner's concern regarding the increase in whole body dose from noble gases, which he believes results from the intentional intake of filtered air into the control room under design-basis accident (DBA) conditions. The NRC agrees that a relatively small increase in whole body dose due to noble gases may result from the intake of filtered air into the control room. However, this small increase in dose would not increase the probability of a control room evacuation. Therefore, operators would be able to monitor plant indications and take appropriate accident mitigating actions from the control room, and there would be no increase in risk to public health and safety. The NRC's conclusion is based on a review of several existing DBA control room dose analyses that determined the impact on whole body dose resulting from filtered air intake pressurization to the control room. The NRC performed parametric evaluations and determined that while filtered air

intake pressurization may result in a small addition to the control room whole body dose from noble gases, the increase is more than offset by the reduction in thyroid dose and TEDE from inhalation of radioactive particulates, such as iodine.

Based upon its analyses, the NRC does not agree with the petitioner's assertion regarding the negative safety impact of providing filtered intake flow into the control room. The NRC's performance-based criterion in GDC 19 requires that an applicant provide a control room habitability design that meets the specified dose criterion. Although NRC regulatory guidance provides examples of acceptable design approaches, the approach used to meet the criterion is largely under the control of an applicant. In order to meet this requirement, many licensees have chosen to incorporate filtered air intake pressurization into their control room emergency ventilation designs to reduce the cumulative dose to operators during a DBA. The purpose of providing filtered air intake pressurization flow is to establish positive pressure in the control room relative to the adjacent areas, thereby reducing the quantity of unfiltered air inleakage. Limiting unfiltered inleakage significantly reduces the thyroid dose from inhalation.

2. The petitioner also stated that the current regulation is inconsistent with the goal of allowing operators to remain in the control room in order to mitigate accident consequences. He stated that common designs, such as a filtered air intake pressurization system, which focus on compliance with existing criteria, increase the probability that the control room will have to be evacuated.

The 5 rem control room design criterion is not a maximum integrated dose above which control room evacuation is mandated during an accident. Rather, the criterion provides a design basis to ensure that the control room will maintain a habitable environment for operators to control the plant during a DBA.

The petitioner based his assertion on the assumption that filterable activity is not likely to be a significant contributor to dose in a reactor accident. As an example, the petitioner used the March 1979 Three Mile Island Unit 2 accident. Since the accident, the NRC has expended considerable resources to better define the expected quantity and distribution of activity that could be released during a major reactor accident. As a result of this research, the NRC promulgated 10 CFR 50.67 on December 23, 1999 (64 FR 72001). Under 10 CFR 50.67, a licensee can apply for a license amendment to adopt an alternative source term (AST) that reflects a more realistic assessment of the timing of the release and the quantity and distribution of activity that could be released during a major accident hypothesized for purposes of design analyses. Many licensees have used this approach to comply with NRC regulations governing control room dose.

In addition, 10 CFR 50.67 revised the control room dose criterion from a 5 rem whole body dose, or its equivalent to any organ, to a 5 rem TEDE. The relatively low thyroid organ weighting factor, as defined in 10 CFR 20.1003, ''Definitions,'' and used in the calculation of TEDE, allows for a significant reduction in the controlling aspects of the thyroid dose, which normally governed compliance with control room dose guidelines. The NRC has significantly improved the accuracy of the source term and dose methodology used in design-basis dose consequence analyses. The updated source term and dose methodology address the petitioner's concerns regarding the emphasis on thyroid dose in control room habitability analyses.

3. The petitioner noted that the dose from increased iodine concentration can be mitigated by use of potassium iodide (KI) or respiratory protection, but the current regulations do not permit these mitigation measures to be used in design analyses.

The NRC agrees that KI or Self-Contained Breathing Apparatuses (SCBAs) do have merit as short-term compensatory measures. However, the potential medical complications of KI and the potential adverse impacts to human performance of SCBAs make these measures unsuitable for long-term use. Further, the NRC's policy of ensuring that process or other engineering controls are in place instead of relying on the use of personal protective equipment is clearly set forth in 10 CFR 20.1701, ''Use of process or other engineering controls'' and 10 CFR 20.1702, ''Use of other controls.'' This policy is consistent with the recommendations of international and national radiation protection committees as described in Paragraph 167 of the International Commission on Radiological Protection (ICRP) Publication 26.

Paragraph 167 of ICRP Publication 26 recommends that ''[a]s far as is reasonably practicable, the arrangements for restricting occupational exposure should be applied to the source of radiation and to features of the workplace. The use of personal protective equipment should in general be supplementary to these more fundamental provisions. The emphasis should thus be on intrinsic safety in the workplace and only secondarily on protection that depends on the worker's own actions,'' such as the ingestion of KI or use of respiratory equipment. Further, the use of respiratory equipment by control room personnel during an emergency condition would impede the performance of functions necessary for the protection of public health and safety. Therefore, the NRC has not permitted licensees to rely on either KI or respiratory protection as a permanent solution to demonstrate compliance with the control room radiological dose guidelines, although such measures are available if the fundamental dose design provisions are less effective than anticipated.

4. The petitioner stated that it is inconsistent to provide credit for respiratory protection in control room habitability toxic gas release evaluations, but not for design analyses.

The NRC does not agree with the petitioner. In the case of toxic gas releases, continued plant operation or a normal plant shutdown would be required. In the case of a major reactor accident involving radiological releases, control room personnel must implement extensive emergency operation procedures to ensure public health and safety. Wearing respiratory protection during normal operations or even during an orderly shutdown, should it be necessary as a result of a toxic gas release, would not be expected to present significant challenges to control room personnel equivalent to those present during a reactor accident. The NRC is reluctant to place any more of a burden than is absolutely necessary on control room personnel, who would already be significantly tasked ensuring that all emergency procedures are carried out without error.

B. Procedures Are Not Optimized

The petitioner stated that control room dose mitigation procedures must be consistent with the licensing basis and may not be the optimum mitigation strategy for more likely conditions. For example, he stated that control room dose models do not model dispersion as a period during the day with higher concentrations while the plume is blowing towards the control room and then a period of zero concentration for the rest of the day. Instead, analysis methods simplify this effect by assuming that a lower concentration is present continuously. The petitioner claimed that if procedures were revised to include a control room purge mode

strategy, a ''calculated increase in consequences in the simplistic design basis analysis'' would result.

The NRC disagrees with the petitioner. The NRC's regulations do not require that procedures be limited to the most limiting licensing-basis assumptions. Further, the NRC expects licensees to develop procedures that address the full-scope review of design-basis events and conditions.

With respect to the petitioner's example, procedures to operate the control room in its design-basis mode must be provided. These procedures do not preclude licensees from creating additional procedures to purge the control room if warranted by plant conditions. Licensees are permitted to develop and implement such procedures under existing NRC regulations.

The NRC agrees that control room purging may be a reasonable action during a reactor accident when the level of outside airborne concentration of radioactive material is less than the level inside the control room. However, the conditions favorable for control room purging cannot be predicted, and the NRC cannot credit control room purging in the DBA analysis unless the timing of the release can be accurately established. For accidents where NRC regulatory guidance has established the release duration, the NRC has accepted credit for control room purging after the release has ended. As a design criterion, GDC 19 does not supplant the radiation protection standards of 10 CFR Part 20, which treat the radiation exposure of control room operators as occupational exposure. Therefore, the NRC expects licensees to maintain the accumulated dose of their radiation workers ALARA. During an accident, health physics personnel would monitor the radiological conditions in the control room and other emergency response facilities. These health physicists are responsible for making appropriate recommendations to plant personnel on actions that can be taken to maintain the dose to emergency responders ALARA.

C. Challenges to Safety Systems

The petitioner stated that the current design requirements, which are usually imposed to ensure the assumptions of the dose analysis are met, may not be optimum from an overall risk perspective. As an example, he stated that a common design requirement specifies that the normal control room ventilation must isolate on receipt of a safety injection or containment isolation signal during an assumed loss-of-coolant accident. The petitioner stated that it is more logical to delay control room isolation until radioactivity is detected in the control room or it is known that a radioactive plume is blowing towards the control room. The petitioner suggested that mitigating design strategies should be based on overall risk reduction designed for more likely conditions, not on one unlikely set of fixed hypothetical conditions.

The NRC does not agree with the petitioner. Contrary to the petitioner's assertion, the NRC's regulations do not require immediate control room isolation or immediate appearance at the control room intake of the radioactive plume assumed in design-basis dose consequence analyses. The NRC has approved, in accordance with its regulations, plant designs that do not immediately isolate the control room ventilation system. Further, design bases that include the immediate startup of control room ventilation systems and loading of electrical buses and diesel generators with this equipment do not require operation of plant systems beyond their design capabilities; the diesels are specifically designed and sized to accommodate these safety loads. Therefore, the performance of these systems should not be impacted, and there is no increased risk to public health and safety.

D. Inappropriate Technical Specification Action Statements

The petitioner stated that the conservative nature of the current radiological dose mitigation analyses also results in inappropriate TS action statements. He stated that ''there is insignificant safety significance to the TS associated with control room habitability and yet there are shutdown requirements.'' The petitioner believes that in order to evaluate the net public safety risk associated with these TS shutdown requirements, small but quantifiable public risks associated with the shutdown of a nuclear power plant must be considered, including but not limited to the following:

1. Risk associated with bringing the plant through a transient and another thermal cycle;

2. Airborne pollutants released by the fossil units required to operate to make up for lost power; and

3. Potential for challenging electric power grid stability with the public risk associated with the possibility of rolling blackouts or brownouts or, under the worst conditions of grid instability, the potential for a loss of offsite power at multiple nuclear power facilities.

The petitioner claimed that the shutdown requirement increases the net public risk and should be eliminated because it is only imposed as a ''matter of compliance.''

The NRC disagrees with the petitioner. The NRC has approved license amendments to replace TS requirements for an immediate shutdown for an inoperable control room envelope boundary with requirements for immediate mitigating actions and restoration of the control room envelope to operable status within 90 days.

The NRC has determined that none of the regulations proposed to be changed by the petitioner directly require a plant shutdown in response to control room habitability issues. Existing NRC regulations permit a licensee to propose alternative TS action requirements to its plant shutdown requirements. The NRC notes that even if the petitioner's proposed regulatory changes were made, licensees would still need to submit a license amendment to justify changes to their TSs for NRC approval.

A controlled shutdown and cooldown of a plant is a safe evolution within the design capability of the plant and would not result in undue risk to public safety. In the event of unusual circumstances associated with adverse electrical power grid instability or other complicating issues that would be associated with a plant shutdown, there are processes available for a licensee to obtain regulatory relief to safely continue plant operation (*e.g.*, emergency/exigent technical specification change, enforcement discretion).

E. Unjustified Technical Specification Surveillances

The petitioner stated that ''individual input assumptions for radiological dose analyses have no significance in predicting reality or the acceptability of results. Even if actual conditions were such that one of the assumptions was non-conservative by a couple orders of magnitude, the ultimate result (in this case habitability of the control room) would still be acceptable due to the significant conservatisms in the other assumptions and the simplicity of effective mitigating actions such as the use of KI.'' He stated that although most control room habitability surveillances can be performed with minimal resources, licensees have been required to demonstrate the accuracy of the assumption regarding unfiltered inleakage using an unjustified tracer gas testing method that costs approximately $100,000 per test. The petitioner stated these tests have demonstrated that although inleakage values assumed in the analyses were nonconservative, there was no safety significance and continued operation was justified. The

petitioner concluded that the expenditure for tracer gas testing could be better used for improvements that would likely be more beneficial to plant safety; therefore, the required performance of this test could have a net negative safety consequence. The petitioner stated that previous surveillances, such as a pressurization test, combined with lessons learned from tracer gas testing result in an effective preventative maintenance program.

The NRC does not agree with the petitioner's assertion that individual input assumptions for radiological dose analyses have no significance in predicting reality or the acceptability of results. The NRC places a high priority on operator safety; the requirements contained in GDC 19 should be retained because they provide physical and psychological protection for operators and ultimately for the general public. Therefore, the data used in the analyses to determine operator safety should be accurate, and when data are uncertain, appropriate conservatisms are applied.

The NRC does not agree with the petitioner's statement that the expenditure for tracer gas testing could be better used for improvements that would likely be more beneficial to plant safety nor does the NRC agree that the performance of tracer gas testing could have a net negative safety consequence. The potential dose to the operator must be quantified in order to ensure that the requirements of GDC 19 are met; the specific measurement of inleakage is one of the inputs to the analyses used to quantify the potential dose to the operator. Prior to the use of tracer gas to measure inleakage, the quantity of inleakage was assumed rather than measured and subsequently found to be nonconservative. Tracer gas testing is justified because it ensures operator safety. Other methods of measuring inleakage have not been successfully demonstrated.

F. Petitioner's Proposed Alternatives to Current NRC Guidance

The NRC has decided to deny this petition for rulemaking and would normally not discuss the petitioner's proposed guidance in this document. However, in order to clarify the NRC's decision to maintain the current radiological dose requirements, the following discussion is provided.

Under Commission policy, the NRC's regulations for control room habitability provide performance-based requirements to ensure that plant personnel are adequately protected. The NRC has concluded that prescriptive requirements or guidance, such as that proposed by the petitioner, may unnecessarily restrict a licensee's options for complying with the NRC's regulations.

The petitioner proposed revisions to the NRC's regulatory guidance to help implement his proposed rule change. NRC regulatory guidance is not an appropriate subject for a PRM and the NRC will not generally consider such requests through this process. Further, current NRC regulatory guidance provides one acceptable mechanism for licensees and applicants to meet the requirements of the NRC's regulations. Applicants and licensees may propose alternative means of complying with the NRC's regulations, which will be evaluated by the NRC staff on a case-by-case basis.

1. The petitioner recommended that the control room ventilation system should isolate on the detection of high radiation or toxic intake. The NRC disagrees with the petitioner. All control rooms are required by TSs to take appropriate action upon detection of radiation or toxic gas. Appropriate action may differ from plant to plant depending on location, design, and TSs. Because plants are unique, licensees can demonstrate compliance with the control room design criteria by taking different approaches. The petitioner's suggestion does not address the long-term release situations that would be expected under a worst case accident scenario. Control room isolation alone would not be an acceptable solution because it does not adequately consider the long term breathing air requirements necessary to provide a safe working environment in the control room. After a relatively short period of time, an intake of air into the control room would be necessary. Licensees include these considerations in their site-specific control room habitability analyses. Therefore, the NRC concludes that changing guidance to recommend control room isolation on detection of high radiation or toxic gas is an unnecessarily prescriptive recommendation in comparison to the existing performance-based dose criterion.

2. The petitioner recommended that the control room have a minimum of one foot of concrete shielding (or equivalent) on all surfaces. The NRC disagrees with the petitioner. The NRC believes that control rooms are adequately protected from the effects of direct radiation because current regulations require that either a 5 rem whole body or a 5 rem TEDE acceptance criterion be met under DBA conditions. Licensees include the effects of direct radiation from all potential sources in their control room dose consequence analyses. Typically these sources include the following:

- Contamination of the control room atmosphere by the intake and infiltration of the radioactive material contained in the radioactive plume released from the facility;
- Direct shine from the external radioactive plume released from the facility with credit for control room structural shielding;
- Direct shine from radioactive material in the containment with credit for both the containment and control room structural shielding; and
- Radiation shine from radioactive material in systems and components inside or external to the control room envelope, including radioactive material buildup on the control room ventilation filters.

Many control rooms already have one foot or more of concrete shielding on all surfaces. One foot of concrete shielding does not guarantee adequate protection from radiation. For example, surfaces with 1 foot of concrete with penetrations for various equipment, such as electrical wiring and ventilation ducts, may not provide any more protection than non-concrete surfaces or surfaces with less than 1 foot of concrete. To show compliance with the current control room dose criterion, licensees provide detailed radiological calculations to ensure that under DBA conditions control room personnel will be adequately protected. Licensees have demonstrated compliance with the regulations crediting many different design approaches. The NRC concludes that recommending that the control rooms have one foot of concrete shielding is an unnecessarily prescriptive recommendation.

3. The petitioner recommended that because of the low risk significance of being outside the control room habitability program guidelines, a plant shutdown should not be required in this condition. Rather, the petitioner recommended that the program could specify that timely actions should be taken to return the plant to within the guidelines. If not complete within 30 days, the petitioner suggested that a special report would be sent to the NRC with a justification for continued operations and a proposed schedule for meeting the guidelines. The NRC disagrees with the petitioner that a regulatory change is required to permit these changes to plant TSs. The NRC allows deviations from the integrity of the control room envelope without requiring an immediate plant shutdown.

4. The petitioner recommended that as an alternative to the total removal of

dose guidelines from the regulations, most of his concerns could be resolved if the dose criteria were based solely on the whole body dose from noble gases. The NRC does not agree with the proposition that the dose criteria should be based solely on the whole body dose from noble gases. The control room dose criterion of 5 rem whole body or its equivalent to any organ imposes two requirements on licensees: Satisfaction of the whole body dose criterion, which is generally dominated by the dose from noble gases; and satisfaction of the organ-specific dose guidelines, which are generally dominated by the thyroid dose from the inhalation of iodine. In most cases, demonstrating compliance with thyroid dose guidelines poses a significantly greater challenge to licensees than does compliance with the whole body dose criterion.

The 1999 amendment to 10 CFR 50.67 (64 FR 12117), revised the control room dose limit to allow licensees to show compliance with either the existing limits, using the traditional Technical Information Document (TID)–14844 source term assumptions, or a revised single control room dose criterion of 5 rem TEDE,[1] if the licensee adopts the AST. With the ability to reassess a maximum credible radiological release using the AST, many licensees have shown compliance with the § 50.67 single control room dose criterion of 5 rem TEDE. Licensees have accomplished this while achieving an enhanced degree of operational flexibility not realized using the traditional TID–14844 source term with the associated whole body dose criterion and organ dose guidelines. Because compliance with § 50.67 is demonstrated by calculating the TEDE, the relative contribution of the thyroid dose to the demonstration of compliance with the control room criterion has been substantially and appropriately reduced. In addition, many licensees that continue to use the traditional TID–14844 source term have incorporated the guidance in Regulatory Guide (RG) 1.195, ''Methods and Assumptions for Evaluating Radiological Consequences for Design-Basis Accidents at Light-Water Nuclear Power Reactors'' (ML031490640) to achieve operational flexibility. Following the guidance in RG 1.195, licensees are able to evaluate control room habitability using a 50 rem thyroid dose guideline. This represents a significant relaxation from the 30 rem thyroid dose guideline that was incorporated into previous guidance documents.

The petitioner also stated that the whole body dose from noble gases is likely to be the only possible dose impact that may result in control room evacuation. The NRC does not accept the premise that any maximum credible radiological release would result in the necessity for a control room evacuation. As stated previously, the 5 rem control room design criterion is not intended to be a maximum integrated dose level at which control room evacuation would be mandated during an accident. Rather, the criterion is used as a design basis to ensure that the control room, by design, will provide a habitable environment for the control of the plant under the maximum credible radiological release conditions, and as such will provide reasonable assurance of adequate protection.

The petitioner stated that most of his concerns would be resolved if credit for SCBAs or KI was allowed in the analysis of the dose from iodines and particulates. The NRC does not agree with the option of replacing engineering controls for radiological protection with credit for personal protective equipment. As discussed previously, the option of allowing credit for SCBAs or KI to show compliance with the control room performance-based design criterion is inimical to the NRC design philosophy incorporated into 10 CFR Part 20, as well as international standards for radiological protection as set forth in ICRP Publication 26.

IV. Public Comments

1. Overview of Public Comments

The NRC's notice of receipt and request for public comment invited interested persons to submit comments. The comment period for PRM–50–87 closed on September 25, 2007. The NRC reviewed and considered the comments in its decision to deny the petition. The NRC received two public comments, one from Mr. Walston Chubb (ML072681072), and one from Mr. James H. Riley on behalf of the Nuclear Energy Institute (NEI) (ML072690232).

2. Mr. Walston Chubb Comment

Comment: Mr. Chubb recommended that operators be required to remain on duty until they are relieved or their short-time doses are between 100 and 200 rem.

NRC Response: The primary objective of GDC 19 is to ensure that the design of the control room and its habitability systems provide a ''shirt-sleeved'' environment for operators during both normal and accident conditions. This environment facilitates operator response to normal and accident conditions while minimizing errors of omission or commission. Another objective is to ensure that the radiation dose levels in the control room would make it the safest location on site, thereby allowing the operators to remain in the control room. Any reduction in operator accident response capabilities may negatively impact public health and safety.

The NRC's decision to apply the 5 rem whole body dose criterion was based on the following:

- A whole body radiation exposure of 5 rem is considered unlikely to cause increased anxiety that would result in operator impairment, since the criterion is comparable to the occupational dose limits.
- A whole body radiation exposure of 5 rem would not result in any somatic response that could result in operator impairment. Generally, the onset of clinically observable somatic effects occurs between 25 and 50 rem.
- GDC 19, as a design criterion, does not supplant the radiation protection standards of 10 CFR Part 20. The radiation exposure of control room operators is controlled, as for any radiation worker at the facility, as occupational exposure under 10 CFR Part 20. In the statements of consideration for the 10 CFR Part 20 rulemaking (56 FR 23365; May 21, 1991), the NRC stated that the dose limits for normal operation should remain the primary guidelines for an emergency.

The statement of considerations in the proposed and final rule amending 10 CFR 50.67 and GDC 19 (64 FR 12117, March 31, 1999; and 64 FR 71990, December 23, 1999, respectively) included the NRC's basis for establishing the 5 rem TEDE as the GDC 19 numeric criterion for licensees applying for amendment under 10 CFR 50.67. It also reaffirmed the position that the criteria in GDC 19 and the final rule are based on occupational exposure limits.

The 5 rem control room design criterion is not intended to be a maximum integrated dose above which control room evacuation would be mandated during an accident. Rather, the 5 rem design criterion ensures that the control room, by design, will provide a habitable environment for the

[1] As defined in 10 CFR 20.1003, ''Total Effective Dose Equivalent (TEDE) means the sum of the effective dose equivalent (for external exposures) and the committed effective dose equivalent (for internal exposures).'' The effective dose equivalent for external exposures includes the whole body dose from noble gases. The committed effective dose equivalent for internal exposure includes the thyroid dose from inhalation of iodine.

control of the plant under all DBA conditions.

Providing a safe working environment for the highly skilled professionals needed to operate a nuclear power plant is a primary objective of NRC regulations related to occupational and accident dose, and it is a paramount goal throughout the entire nuclear power industry. The NRC concludes that the proposal to set the control room design criterion at 100 rem, which is well above the level at which the onset of clinically observable somatic effects would occur, is antithetical to the fundamental principle of protecting public health and safety and is not acceptable.

3. NEI Comments

NEI provided the following comments:

Comment: ''It is not so much the value of the exposure limits that is the problem. The NRC should be more open to other methods of analysis proposed by licensees. Every Regulatory Guide states that the guidance is one method acceptable to the staff and that other methods proposed by licensees will be evaluated on a case-by-case basis. However, in practice it is often difficult to justify different approaches.''

NRC Response: To the extent that the comment implicitly criticizes the NRC for allegedly failing to consider alternatives for compliance with GDC 19 and 10 CFR 50.67 in a manner other than that suggested in a regulatory guide, that concern is beyond the scope of this petition for rulemaking. Further, the commenter presented no basis for this implicit criticism—the NRC routinely considers licensee and applicant-proposed alternatives to methods set forth in a Regulatory Guide. However, the NRC expects licensees and applicants to provide technically sufficient basis for the use of an alternative for compliance with an NRC regulation, which is also consistent with the regulatory policies of the NRC. That a licensee or applicant may find it difficult to provide sufficient basis justifying the use of an alternative approach, however, would not appear to present a valid regulatory concern.

Comment: Existing emergency filtration systems should be maintained to practical performance criteria. NEI stated that this area has a lot of potential for improvement and gave the following examples:

- The current practice (*i.e.*, RG 1.52, ''Design, Inspection, and Testing Criteria for Air Filtration and Adsorption Units of Post-Accident Engineered-Safety-Feature Atmosphere Cleanup Systems in Light-Water-Cooled Nuclear Power Plants'') (ML011710176) is to apply a safety factor of 2 for laboratory testing of charcoal beds. The actual efficiencies are typically much higher than those allowed by RGs.
- Some plants have an 8-inch charcoal bed, for which only 4 inches is allowed to be credited.
- Other plants have filtration systems in series, for which only one composite filter can be credited.

NRC Response: The NRC's position on existing emergency filtration systems is outlined in RG 1.52, Revision 3, issued June 2001. The previous revision of the RG included a safety factor as great as 7 whereas Revision 3 includes a safety factor of 2 to account for degradation of the system between test periods. A safety factor represents margin in the capability of the adsorbent (carbon) installed in the system to perform the required safety function. Because carbon can degrade between test periods, a safety factor provides confidence that the anticipated degradation will not be beyond the minimum level necessary to perform its required safety function.

RG 1.52, Revision 3, indicates that a 4-inch carbon bed in U.S. nuclear power plants is 99 percent efficient, with a safety factor of 2 and a penetration (as defined in American Society for Testing and Materials D 3803–89) of less than or equal to 0.5 percent. The NRC believes that a 4-inch carbon bed thickness is sufficient to provide adequate protection, and that the 4 inches, as reflected in the RG, is not intended to be an upper limit on bed thickness. It is acceptable to provide additional carbon that may include 6 inches, 8 inches, or even greater bed thickness. The NRC also believes there are benefits provided by carbon bed thicknesses greater than 4 inches that are not reflected in the RG. The benefits may include longer bed life contributing to lower overall cost.

With respect to filtration systems in series, they are treated as a composite (*i.e.*, the sum of individual filters in series). For example, the efficiency of two 2-inch beds in series is the same as one 4-inch bed.

Comment: In response to the petitioner's statement that current TS for system performance should be eliminated and that the administrative portion of the TS could include a requirement to have a control room habitability program, NEI commented, ''This recommendation is covered by TSTF–448 and GL 2003–01.''

Response: NRC agrees with the comment. NRC prepared and made available a model safety evaluation (SE) and a model no-significant-hazards-consideration (NSHC) determination relating to the modification of technical specification (TS) requirements regarding the habitability of the control room envelope (CRE) for referencing in license amendment requests (LARs). NRC also made available an associated model LAR for use by licensees to prepare such LARs. The TS modification is based on NRC staff approved changes to the improved standard technical specifications (STS) (NUREGs 1430–1434, available on NRC's public Web site at *www.nrc.gov/reactors/operating/licensing/techspec/current-approved-sts.html*) that were proposed by the pressurized and boiling water reactor owners groups' Technical Specifications Task Force (TSTF) on behalf of the commercial nuclear electrical power generation industry, in STS change traveler TSTF–448, Revision 3 (ML063460558). NRC published a Notice of Availability of the SER in the **Federal Register** on January 17, 2007 (72 FR 2022). Generic Letter (GL) 2003–01, dated June 12, 2003, is available on ADAMS (ML031620248).

Comment: In response to the petitioner's proposed guidance, NEI provided the following comments:

- The control room ventilation system should isolate on the detection of high radiation or toxic gas intake. NEI commented, ''A good many control rooms in the industry already operate in this manner. Conversely, there are some plants that do not have automatic initiation of the emergency mode. Making this a requirement could result in an undue (and expensive) modification/backfit. For those plants susceptible to toxic gas intrusion, automatic initiation is typically the case (although not specifically implemented in all cases). If required, this also could result in undue (and expensive) modifications.''
- The control room should have a minimum of one foot of concrete shielding (or equivalent) on all surfaces. NEI commented, ''It is unlikely that all control rooms have one foot of concrete shielding on all surfaces. This requirement could result in undue (and expensive) modifications. A similar concern applies to the technical support center, which may also be affected by this requirement.''
- SCBAs and KI tablets should be readily available for operator use. Operators should maintain training in SCBAs. NEI commented, ''The use of these methods has merit, but additional evaluation of their effects is necessary. The medical complications of ingesting KI would have to be evaluated for all CR personnel. The use of SCBA credit would require specific training for which operators will need to demonstrate the ability to conduct their

safety-related functions while wearing a SCBA for several hours.''

• Procedures should be developed to ensure control room purging is considered when the outside concentration is less than the inside concentration. NEI commented, ''Although this appears to be a good practice, it can't be credited in the operator dose analysis. The timing of purging could be critical based on the timing of the release and the release pathway. Therefore, this recommendation may not have any practical merit.''

The petitioner stated that because of the low risk significance of being outside the control room habitability program guidelines, a plant shutdown would not be required in this condition; rather, the program could specify that timely actions should be taken to return the plant within the guidelines. If not complete within 30 days, a special report would be sent to the NRC with a justification for continued operation and a proposed schedule for meeting the guidelines. NEI commented, ''This is a valid point that the industry supports.''

The petitioner stated that as an alternative to total removal of dose guidelines from the regulations, most of his concerns could be resolved if the dose criteria were based solely on the whole body dose from noble gases that he believes is the only possible dose impact that may result in control room evacuation. NEI commented, ''It is not clear that the noble gas contribution would be limiting in all cases. However, this may be the case if KI were allowed to be credited.''

Response: These comments have been addressed in Section III of this document.

V. Denial of Petition

Based upon review of the petition and comments received, the NRC has determined that the conclusions upon which the petitioner relies do not substantiate a basis to eliminate the control room radiological dose acceptance criteria from current regulations as requested. For the reasons discussed previously, the Commission denies PRM–50–87.

Dated at Rockville, Maryland, this 14th day of January 2009.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E9–1211 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM398; Notice No. 25–09–01–SC]

Special Conditions: Model C–27J Airplane; Interaction of Systems and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Alenia Model C–27J airplane. This airplane has novel or unusual design features when compared to the state of technology described in the airworthiness standards for transport-category airplanes. These design features include electronic flight-control systems. These special conditions pertain to the effects of novel or unusual design features such as effects on the structural performance of the airplane. We have issued additional special conditions for other novel or unusual design features of the C–27J.

The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by February 25, 2009.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM398, 1601 Lind Avenue SW., Renton, Washington 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM398. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Holly Thorson, FAA, International Branch, ANM–116, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1357, facsimile (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it back to you.

Background

On March 27, 2006, the European Aviation Safety Agency (EASA) forwarded to the FAA an application from Alenia Aeronautica of Torino, Italy, for U.S. type certification of a twin-engine commercial transport designated as the Model C–27J. The C–27J is a twin-turbopropeller, cargo-transport aircraft with a maximum takeoff weight of 30,500 kilograms.

Type Certification Basis

Under the provisions of Section 21.17 of Title 14 Code of Federal Regulations (14 CFR) and the bilateral agreement between the U.S. and Italy, Alenia Aeronautica must show that the C–27J meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–87. Alenia also elects to comply with Amendment 25–122, effective September 5, 2007, for 14 CFR 25.1317.

If the Administrator finds that existing airworthiness regulations do not adequately or appropriately address safety standards for the C–27J due to a novel or unusual design feature, we prescribe special conditions under provisions of 14 CFR 21.16.

In addition to the applicable airworthiness regulations and special conditions, the C–27J must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34 and the noise-certification requirements of 14 CFR part 36, and the FAA must issue a finding of regulatory adequacy pursuant to § 611 of Public Law 92–574, the ''Noise Control Act of 1972.''

The FAA issues special conditions, under §§ 11.19 and 11.38, and they become part of the type-certification basis under § 21.17(a)(2).

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

Novel or Unusual Design Features

The C–27J incorporates several novel or unusual design features. Because of rapid improvements in airplane technology, the existing airworthiness regulations do not adequately or appropriately address safety standards for these design features. This proposed special condition for the C–27J contains the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

This special condition was derived initially from standardized requirements developed by the Aviation Rulemaking Advisory Committee (ARAC), comprised of representatives of the FAA, Europe's Joint Aviation Authorities (JAA, now replaced by the European Aviation Safety Agency (EASA)), and industry. From the initial proposal, the JAA proposed this special condition in Notice of Proposed Amendment (NPA) 25C–199. When Ente Nazionale per l'Aviazione Civile (ENAC) certified the C–27J they applied NPA 25C–199, issued July 3, 1997.

Discussion

The Alenia C–27J is equipped with systems that affect the airplane's structural performance, either directly or as a result of failure or malfunction. That is, the airplane's systems affect how it responds in maneuver and gust conditions, and thereby affect its structural capability. These systems may also affect the aeroelastic stability of the airplane. Such systems represent a novel and unusual feature when compared to the technology described in the current airworthiness standards. A special condition is needed to require consideration of the effects of systems on the structural capability and aeroelastic stability of the airplane, in both the normal and the failed states.

This special condition requires that the airplane meet the structural requirements of subparts C and D of 14 CFR part 25 when the airplane systems are fully operative. The special condition also requires that the airplane meet these requirements taking into consideration failure conditions. In some cases, reduced margins are allowed for failure conditions based on system reliability.

Applicability

As discussed above, these proposed special conditions are applicable to the C–27J. Should Alenia apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, these proposed special conditions apply to that model as well under the provisions of Sec. 21.101.

Conclusion

This action affects only certain novel or unusual design features of the Alenia C–27J. It is not a rule of general applicability, and it affects only the applicant that applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Proposed Special Conditions

Accordingly, the Administrator of the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type-certification basis for the C–27J.

1. General

(a) The C–27J is equipped with systems that affect the airplane's structural performance either directly or as a result of failure or malfunction. The influence of these systems and their failure conditions must be taken into account when showing compliance with requirements of subparts C and D of part 25 of Title 14 of the Code of Federal Regulations (CFR). The following criteria must be used for showing compliance with this proposed special condition for airplanes equipped with flight control systems, autopilots, stability-augmentation systems, load-alleviation systems, flutter-control systems, fuel-management systems, and other systems that either directly, or as a result of failure or malfunction, affect structural performance. If this proposed special condition is used for other systems, it may be necessary to adapt the criteria to the specific system.

(b) The criteria defined here address only the direct structural consequences of the system responses and performances, and cannot be considered in isolation, but should be included in the overall safety evaluation of the airplane. These criteria may, in some instances, duplicate standards already established for this evaluation. These criteria are only applicable to structure the failure of which could prevent continued safe flight and landing. Specific criteria that define acceptable limits on handling characteristics or stability requirements, when operating in the system-degraded or inoperative mode, are not provided in this special condition.

(c) Depending upon the specific characteristics of the airplane, additional studies may be required, that go beyond the criteria provided in this special condition, to demonstrate the capability of the airplane to meet other realistic conditions, such as alternative gust or maneuver descriptions, for an airplane equipped with a load-alleviation system.

(d) The following definitions are applicable to this special condition.

Structural performance:

Capability of the airplane to meet the structural requirements of 14 CFR part 25.

Flight limitations:

Limitations that can be applied to the airplane flight conditions following an in-flight occurrence, and that are included in the flight manual (e.g., speed limitations, avoidance of severe weather conditions, etc.).

Operational limitations:

Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch (e.g., fuel, payload, and Master Minimum Equipment List limitations).

Probabilistic terms:

The probabilistic terms (probable, improbable, extremely improbable) used in this special condition are the same as those used in § 25.1309.

Failure condition:

The term ''failure condition'' here is the same as that used in § 25.1309. However, this appendix applies only to system-failure conditions that affect the structural performance of the airplane (*e.g.*, system-failure conditions that induce loads, change the response of the airplane to variables such as gusts or pilot actions, or reduce flutter margins).

2. Effects of Systems on Structures

(a) General. The following criteria determine the influence of a system and its failure conditions on the airplane structure.

(b) System fully operative. With the system fully operative, the following apply:

(1) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions specified in Subpart C, taking into account any special behavior of such a system or associated functions, or any effect on the structural performance of the airplane that may occur up to the limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds, or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(2) The airplane must meet the strength requirements of 14 CFR part 25 (static strength, residual strength) using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the airplane has design features that will not allow it to exceed those limit conditions.

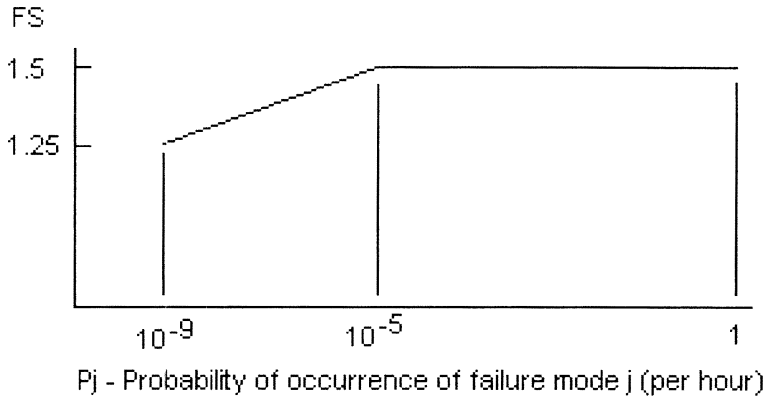
(3) The airplane must meet the aeroelastic-stability requirements of § 25.629.

(c) System in the failure condition. For any system-failure condition not shown to be extremely improbable, the following apply:

(1) At the time of occurrence. Starting from 1-g level-flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after failure.

(i) For static-strength substantiation, these loads, multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure, are ultimate loads to be considered for design. The factor of safety (F.S.) is defined in Figure 1.

Figure 1
Factor of safety at the time of occurrence



(ii) For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in subparagraph (c)(1)(i).

(iii) Freedom from aeroelastic instability must be shown up to the speeds defined in § 25.629(b)(2). For failure conditions that result in speed increases beyond V_C/M_C, freedom from aeroelastic instability must be shown to increased speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(iv) Failures of the system that result in forced structural vibrations (oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(2) For the continuation of the flight. For the airplane in the system-failed state, and considering any appropriate reconfiguration and flight limitations, the following apply:

(i) The loads derived from the following conditions at speeds up to V_C/M_C, or the speed limitation prescribed for the remainder of the flight, must be determined:

(A) The limit-symmetrical-maneuvering conditions specified in § 25.331 and in § 25.345.

(B) The limit-gust-and-turbulence conditions specified in § 25.341 and in § 25.345.

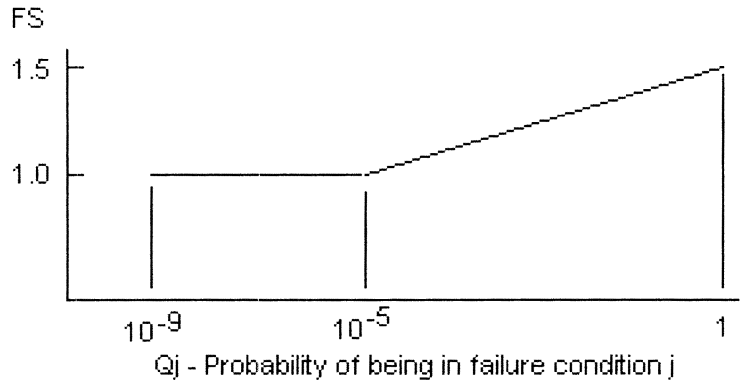
(C) The limit-rolling conditions specified in § 25.349, and the limit-unsymmetrical conditions specified in § 25.367 and § 25.427(b) and (c).

(D) The limit-yaw-maneuvering conditions specified in § 25.351.

(E) The limit-ground-loading conditions specified in § 25.473 and § 25.491.

(ii) For static-strength substantiation, each part of the structure must be able to withstand the loads in subparagraph (2)(i) of this paragraph, multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety is defined in Figure 2.

Figure 2
Factor of safety for continuation of flight



$Q_j = (T_j)(P_j)$

Where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

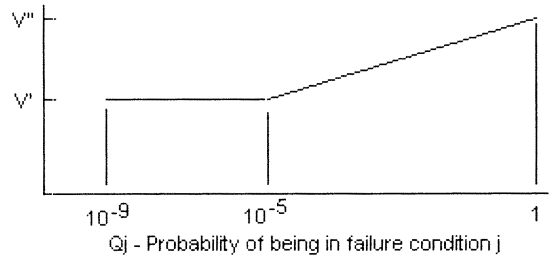
Note: If P_j is greater than 10^{-3} per flight hour, then a 1.5 factor of safety must be applied to all limit-load conditions specified in Subpart C.

(iii) For residual-strength substantiation, the airplane must be able to withstand two-thirds of the ultimate loads defined in subparagraph (c)(2)(ii).

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance, then their effects must be taken into account.

(v) Freedom from aeroelastic instability must be shown up to a speed determined from Figure 3. Flutter-clearance speeds V′ and V″ may be based on the speed limitation specified for the remainder of the flight using the margins defined by § 25.629(b).

Figure 3
Clearance speed



V′ = Clearance speed as defined by § 25.629(b)(2).

V″ = Clearance speed as defined by § 25.629(b)(1).

Where:

$Q_j = (T_j)(P_j)$

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then the flutter clearance speed must not be less than V″.

(vi) Freedom from aeroelastic instability must also be shown, up to V′ in Figure 3 above, for any probable system-failure condition combined with any damage required or selected for investigation by § 25.571(b).

(3) Consideration of certain failure conditions may be required by other subparts of part 25 regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(d) Failure indications. For system-failure detection and indication, the following apply:

(1) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability below the level required by part 25, or that significantly reduce the reliability of the remaining system. To the extent practicable, these failures must be detected and annunciated to the flight crew before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of warning systems, to achieve the objective of this requirement. These certification-maintenance requirements must be limited to components that are not readily detectable by normal warning systems, and where service history shows that inspections provide an adequate level of safety.

(2) The existence of any failure condition, not extremely improbable, during flight, that could significantly affect the structural capability of the airplane and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flight crew. Failure conditions that result in a factor of safety between the airplane strength and the loads of Subpart C below 1.25,

or flutter margins below V″, must be signaled to the crew during flight.

(e) Dispatch with known failure conditions. If the airplane is to be dispatched in a known system-failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of § 25.302 must be met for the dispatched condition and for subsequent failures. Flight limitations and expected operational limitations may be taken into account in establishing Q_j as the combined probability of being in the dispatched failure condition and the subsequent failure condition for the safety margins in Figures 2 and 3. These limitations must be such that the probability of being in this combined failure state, and then subsequently encountering limit-load conditions, is extremely improbable. No reduction in these safety margins is allowed if the subsequent system-failure rate is greater than 10^{-3} per hour.

Issued in Renton, Washington, on December 31, 2008.

Linda Navarro,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–1327 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

[Release Nos. 33–9000, 34–59248, 39–2460, IC–28600, IA–2830; File No. S7–03–09]

List of Rules To Be Reviewed Pursuant to the Regulatory Flexibility Act

AGENCY: Securities and Exchange Commission.

ACTION: Publication of list of rules scheduled for review.

SUMMARY: The Securities and Exchange Commission is today publishing a list of rules to be reviewed pursuant to Section 610 of the Regulatory Flexibility Act. The list is published to provide the public with notice that these rules are scheduled for review by the agency and to invite public comment on them.

DATES: Comments should be submitted by February 25, 2009.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–03–09 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. S7–03–09. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Anne Sullivan, Office of the General Counsel, 202–551–5019.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (''RFA''), codified at 5 U.S.C. 600–611, requires an agency to review its rules that have a significant economic impact upon a substantial number of small entities within ten years of the publication of such rules as final rules. 5 U.S.C. 610(a). The purpose of the review is ''to determine whether such rules should be continued without change, or should be amended or rescinded * * * to minimize any significant economic impact of the rules upon a substantial number of such small entities.'' 5 U.S.C. 610(a).

The RFA sets forth specific considerations that must be addressed in the review of each rule:

- The continued need for the rule;
- The nature of complaints or comments received concerning the rule from the public;
- The complexity of the rule;
- The extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. (5 U.S.C. 610(c)).

The Securities and Exchange Commission, as a matter of policy, reviews all final rules that it published for notice and comment to assess not only their continued compliance with the RFA, but also to assess generally their continued utility.[1] The list below is therefore broader than that required by the RFA, and may include rules that do not have a substantial impact on a significant number of small entities. Where the Commission has previously made a determination of a rule's impact on small businesses, the determination is noted on the list. The Commission particularly solicits public comment on whether the rules listed below affect small businesses in new or different ways than when they were first adopted.

The rules and forms listed below are scheduled for review by staff of the Commission during the next twelve months. The list includes rules from 1998, 1997, 1996 and 1995. The rules are grouped according to which Division or Office of the Commission recommended their adoption.

Division of Corporation Finance

Title: Plain English Disclosure.

Citation: 17 CFR 230.421, 17 CFR 230.481.

Authority: 15 U.S.C. 77a *et seq.*

Description: This rule requires that issuers write the cover page, summary and risk factors sections of prospectuses in plain English.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7497, which was approved by the Commission on January 28, 1998, which amended Rules 421 and 481. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Regulation S.

Citation: 17 CFR 230.900–905.

Authority: 15 U.S.C. 77a *et seq.*

Description: This rule provides a safe harbor from the term ''offer'' for certain offshore communications made by a registrant.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in

[1] When the Commission implemented the Act in 1980, it stated that it ''intend[ed] to conduct a broader review [than that required by the RFA], with a view to identifying those rules in need of modification or even rescission.'' Securities Act Release No. 6302 (Mar. 20, 1981), 46 FR 19251 (Mar. 30, 1981).

accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7470, which was approved by the Commission on October 10, 1997. Rule 902 was originally adopted as part of Regulation S in Release No. 33–6863, containing a Final Regulatory Flexibility Analysis which was approved by the Commission on April 24, 1990. Comments to the proposing releases and Initial Regulatory Flexibility Analyses were considered at those times.

* * * * *

Title: Rule 135e: Offshore press conferences, meetings with issuer representatives conducted offshore, and press-related material released offshore.

Citation: 17 CFR 230.135e.

Authority: 15 U.S.C. 77a *et seq.*

Description: This rule provides a safe harbor from the term ''offer'' for certain offshore communications made by a registrant.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7470, which was approved by the Commission on October 10, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 12a–8: Exemption of depositary shares
Rule 15d–3: Reports for depositary shares registered on Form F–6.

Citation: 17 CFR 240.12a–8, 17 CFR 240.15d–3

Authority: 15 U.S.C. 78a *et seq.*

Description: These rules are designed to provide exemptions for depositary shares from section 12(a) of the Securities Act and from certain reporting requirements.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7431, which was approved by the Commission on July 18, 1997. Comments to the proposing release and Initial Flexibility Analysis were considered at that time.

* * * * *

Title: Item 305 of Regulation S–K.

Citation: 17 CFR 229.305.

Authority: 15 U.S.C. 77a *et seq.*

Description: This rule requires quantitative and qualitative disclosures about market risk.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7386, which was approved by the Commission on January 31, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Delivery of Prospectus.

Citation: 17 CFR 240.15c2–8.

Authority: 15 U.S.C. 78a *et seq.*

Description: This rule establishes the requirements for brokers and dealers to deliver a prospectus to purchasers of securities.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7168, which was approved by the Commission on May 11, 1995. Comments to the proposing release and Initial Flexibility Analysis were considered at that time.

* * * * *

Title: Exemption for Certain California Limited Issues.

Citation: 17 CFR 230.1001.

Authority: 15 U.S.C. 77a *et seq.*

Description: The rule exempts from the registration requirements of the Securities Act offers and sales up to $5 million that are exempt from state qualification under paragraph (n) of Section 25102 of the California Corporations Code. The purpose of the rule is to assist small businesses' capital raising ability by creating a federal exemption for offering of up to $5 million that meet the qualifications of a California exemption.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7285, which was approved by the Commission on May 1, 1996. Comments to the proposing release and Initial Flexibility Analysis were considered at that time.

* * * * *

Title: Settlement Cycle.

Citation: 17 CFR 240.15c6–1.

Authority: 15 U.S.C. 77a *et seq.*

Description: This rule imposes a time requirement for brokers and dealers to complete the settlement of a securities transaction.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7168, which was approved by the Commission on May 11, 1995. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

Division of Investment Management

Title: Rule 203A–1.

Citation: 17 CFR 275.203A–1.

Authority: 15 U.S.C. 80b–3a(a)(1)(A), 15 U.S.C. 80b–3a(c), 15 U.S.C. 80b–11(a).

Description: The Commission adopted rule 203A–1 to implement the Investment Advisers Supervision Coordination Act, which, among other things, reallocated the responsibilities for regulating investment advisers between the Commission and the state securities regulatory authorities. The rule increases the threshold for state registered advisers to switch to Commission registration to $30 million in assets under management and requires that advisers to registered investment companies be registered with the Commission. The rule also provides state registered advisers with assets under management between $25 million and $30 million an option to remain registered with the states or to switch to Commission registration. In addition, the rule contains provisions prescribing procedures for switching registration from states to the Commission or vice versa.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA–1633, which was approved by the Commission on May 15, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 203A–2.

Citation: 17 CFR 275.203A–2.

Authority: 15 U.S.C. 80b–3a(c).

Description: The Commission adopted rule 203A–2 to implement the Investment Advisers Supervision Coordination Act, which, among other things, reallocates the responsibilities for regulating investment advisers between the Commission and the state securities regulatory authorities. The rule exempts certain types of investment advisers from the prohibition on Commission registration. As a result, the following investment advisers are not prohibited from registering with the Commission: Nationally recognized statistical rating organizations, pension consultants, investment advisers controlling, controlled by, or under common control with an investment adviser registered with the Commission, investment advisers expecting to be eligible for Commission registration within 120 days, multi-state investment

advisers, and Internet investment advisers.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA–1633, which was approved by the Commission on May 15, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 203A–3.

Citation: 17 CFR 275.203A–3.

Authority: 15 U.S.C. 80b–2a(17), 15 U.S.C. 80b–11(a).

Description: The Commission adopted rule 203A–3 to implement the Investment Advisers Supervision Coordination Act, which, among other things, reallocates the responsibilities for regulating investment advisers between the Commission and the state securities regulatory authorities. The rule defines certain terms for purposes of section 203A of the Investment Advisers Act (15 U.S.C. 80b–3a) and the rules thereunder. The terms defined in this rule include: ''investment adviser representative,'' ''excepted person,'' ''impersonal investment advice,'' ''place of business,'' and ''principal office and place of business.''

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA–1633, which was approved by the Commission on May 15, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 203A–4.

Citation: 17 CFR 275.203A–4.

Authority: 15 U.S.C. 80b–11(a).

Description: The Commission adopted rule 203A–4 to implement the Investment Advisers Supervision Coordination Act, which, among other things, reallocates the responsibilities for regulating investment advisers between the Commission and the state securities regulatory authorities. The rule states that the Commission shall not assert a violation of section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) by a state registered adviser for failure to register with the Commission if the adviser reasonably believes that it does not have assets under management of at least $30 million and is therefore not required to register with the Commission.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IA–1633, which was approved by the Commission on May 15, 1997. Comments to the proposing release and Initial Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 2a51–1.

Citation: 17 CFR 270.2a51–1.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–2(a)(51)(B), 80a–6(c), 80a–37(a).

Description: Rule 2a51–1 under the Investment Company Act of 1940 (''Act'') defines the term ''investment'' for purposes of section 2(a)(51) of the Act, and section 3(c)(7) of the Act, which excludes from regulation under the Act privately offered companies that sell their securities to ''qualified purchasers'' owning or investing on a discretionary basis a specified amount of ''investments.''

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 2a51–2.

Citation: 17 CFR 270.2a51–2.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–2(a)(51)(B), 80a–6(c), 80a–37(a).

Description: Rule 2a51–2 under the Investment Company Act of 1940 (''Act'') defines the term ''beneficial owner'' for purposes of section 2(a)(51) of the Act and section 3(c)(7)(B) of the Act, which permitted unregulated private companies that, on or before September 1, 1996, relied on section 3(c)(1) of the Act (which excludes from regulation under the Act privately offered companies with 100 or fewer ''beneficial owners'') to convert to unregulated private companies in reliance on section 3(c)(7) of the Act (which excludes from regulation under the Act privately offered companies that sell their securities to ''qualified purchasers'' owning or investing on a discretionary basis a specified amount of ''investments''). Section 3(c)(7) of the Act was enacted in 1996.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 2a51–3.

Citation: 17 CFR 270.2a51–3.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–2(a)(51)(B), 80a–6(c), 80a–37(a).

Description: Rule 2a51–3 under the Investment Company Act of 1940 (''Act'') provides that a company cannot be a ''qualified purchaser'' for purposes of section 3(c)(7) of the Act (which excludes from regulation under the Act privately offered companies that sell their securities to ''qualified purchasers'' owning or investing on a discretionary basis a specified amount of ''investments'' (''private fund'')) if it was formed for the specific purpose of acquiring the securities offered by a private fund unless each beneficial owner of the company's securities is a qualified purchaser.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 3c–1.

Citation: 17 CFR 270.3c–1.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–6(c), 80a–37(a)

Description: Rule 3c–1 under the Investment Company Act of 1940 (''Act'') defines the term ''beneficial owner'' for purposes of section 3(c)(1) of the Act, which excludes from regulation under the Act privately offered companies with 100 or fewer ''beneficial owners.''

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 3c–5.

Citation: 17 CFR 270.3c–5.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–6(c), 80a–37(a).

Description: Rule 3c–5 under the Investment Company Act of 1940 (''Act'') permits ''knowledgeable employees'' of a privately offered company (or knowledgeable employees of the company's affiliates) to invest in the company without causing the

company to lose its exclusion from regulation under section 3(c)(1) or section 3(c)(7) of the Act. Section 3(c)(1) of the Act excludes from regulation under the Act privately offered companies with 100 or fewer ''beneficial owners.'' Section 3(c)(7) of the Act excludes from regulation under the Act privately offered companies that sell their securities to ''qualified purchasers'' owning or investing on a discretionary basis a specified amount of ''investments.''

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 3c–6.

Citation: 17 CFR 270.3c–6.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–3(c)(1), 80a–3(c)(7), 80a–6(c), 80a–37(a).

Description: Rule 3c–6 under the Investment Company Act of 1940 (''Act'') treats persons who acquire securities of a privately offered company that is excluded from regulation under the Act in reliance on section 3(c)(7) of the Act as qualified purchasers for purposes of those securities if the acquisition is in accordance with the rule. Section 3(c)(7) of the Act excludes from regulation under the Act privately offered companies that sell their securities to ''qualified purchasers'' owning or investing on a discretionary basis a specified amount of ''investments.''

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22597, which was approved by the Commission on April 3, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 3a–4.

Citation: 17 CFR 270.3a–4.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–6(c), 80a–37(a).

Description: Rule 3a–4 under the Investment Company Act of 1940 (''Act'') provides a nonexclusive safe harbor from the definition of investment company for certain investment advisory programs. Under the rule, an investment program organized and operated in accordance with the rule's provisions is deemed not to be an investment company within the meaning of the Act.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22579, which was approved by the Commission on March 24, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 17f–6.

Citation: 17 CFR 270.17f–6.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–6(c), 80a–37(a).

Description: Rule 17f–6 under the Investment Company Act of 1940 permits registered investment companies to maintain their assets with futures commission merchants and certain other entities in connection with futures contracts and commodity options traded on U.S. and foreign exchanges.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–22389, which was approved by the Commission on December 11, 1996. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 17a–9.

Citation: 17 CFR 270.17a–9.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–6(c), 80a–37(a).

Description: Rule 17a–9 under the Investment Company Act of 1940 (the ''Act'') specifies conditions under which, notwithstanding section 17(a) of the Act, a money market fund affiliate may purchase from the money market fund securities that are no longer ''eligible securities'' for purposes of rule 2a–7.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–21837, which was approved by the Commission on March 21, 1996. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Form 24F–2.

Citation: 17 CFR 274.24.

Authority: 15 U.S.C. 60a–1 *et seq.*

Description: Rule 24f–2 requires every open-end management investment company, face amount certificate company, or unit investment trust that is deemed to have registered an indefinite amount of securities pursuant to Section 24(f) of the Investment Company Act to file form 24F–2, Annual Notice of Securities Sold Pursuant to Rule 24f–2.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7208, which the Commission approved on September 1, 1995. Comments to the proposing release and Initial Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 18f–3.

Citation: 17 CFR 270.18f–3.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39.

Description: Rule 18f–3 under the Investment Company Act of 1940 (''Act'') specifies conditions under which, notwithstanding sections 18(f)(1) and 18(i) of the Act, a registered open-end management investment company or series or class thereof established in accordance with section 18(f)(2) of the Act whose shares are registered on Form N–1A may issue more than one class of voting stock.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 33–7143, which was approved by the Commission on February 23, 1995. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Rule 6c–10.

Citation: 17 CFR 270.6c–10.

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39.

Description: Rule 6c–10 under the Investment Company Act of 1940 (''Act'') specifies conditions under which, notwithstanding sections 2(a)(32), 2(a)(35), and 22(d) of the Act, a registered open-end management investment company or series or class thereof may permit a contingent deferred sales load to be imposed on shares issued by the company.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. IC–20916, which was approved by the Commission on February 23, 1995. Comments to the

proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

Division of Trading and Markets

Title: Regulation of Exchanges and Alternative Trading Systems.

Citation: 17 CFR Parts 202, 240, 242 and 249.

Authority: 15 U.S.C. 78 *et seq.*, particularly Sections 78c(b), 78e, 78f, 78k–1, 78o, 78q(a), 78q(b), 78s, 78w(a), and 78mm.

Description: The Commission adopted new rules and rule amendments to allow alternative trading systems to choose whether to register as national securities exchanges, or to register as broker-dealers and comply with additional requirements under Regulation ATS, depending on their activities and trading volume. The Commission also adopted amendments to rules regarding registration as a national securities exchange, repealing rule 17a–23, and amending the books and records rules by transferring the recordkeeping requirements from rule 17a–23 to rules 17a–3 and 17a–4 as they apply to broker-dealer internal trading systems. Finally, the Commission excluded from the rule filing requirements for self-regulatory organizations certain pilot trading systems operated by national securities exchanges and national securities associations. These rules integrated the growing number of alternative trading systems into the national market system, accommodated the registration of proprietary alternative trading systems as exchanges, and provided an opportunity for registered exchanges to better compete with alternative trading systems.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–40760, which was approved by the Commission on December 11, 1998. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products.

Citation: 17 CFR 240.19b–4(e).

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11.

Description: The Commission amended rule 19b–4 under the Securities Exchange Act of 1934 to permit self-regulatory organizations to list and trade new derivative securities products pursuant to existing self-regulatory organization trading rules, procedures, surveillance programs and listing standards without submitting a proposed rule change pursuant to Section 19(b).

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–40761, which was approved by the Commission on December 8, 1998. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

* * * * *

Title: OTC Derivatives Dealers.

Citation: 17 CFR 200.30–3, 240.3b–12, 240.3b–13, 240.3b–14, 240.3b–15, 240.8c–1, 240.11a1–6, 240.15a–1, 240.15b1–1, 240.15c2–1, 240.15b9–2, 240.15c2–5, 240.15c3–1, 240.15c3–2, 240.15c3–3, 240.15c3–4, 240.17a–3, 240.17a–4, 240.17a–5, 240.17a–11, 240.17a–12, 240.36a1–1, 240.36a1–2, and 249.617.

Authority: 15 U.S.C. 78a *et seq.* (3(b), 11(a), 15(a), 15(b), 15(c), 17(a), 23, and 36) (15 U.S.C. 78c(b), 78k(a), 78o(a), 78o(b), 78o(c), 78q(a), 78w, and 78mm).

Description: The Commission adopted new rules and rule amendments to tailor capital, margin, and other broker-dealer regulatory requirements to a class of registered dealers, called OTC derivatives dealers, that are active in over-the-counter derivatives markets. Registration as an OTC derivatives dealer under these rules is optional and is an alternative to registration as a broker-dealer under the traditional broker-dealer regulatory structure. It is available only to entities that engage in dealer activities in eligible over-the-counter derivative instruments and that meet certain financial responsibility and other requirements.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–40594, which was approved by the Commission on October 23, 1998. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

* * * * *

Title: Lost Securityholders.

Citation: 17 CFR 240.17Ad–17, 240.17Ad–7, and 249b.102.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 79a *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission adopted rules 17Ad–17 and 17a–24 [2] under the Securities Exchange Act of 1934, and amended form TA–2 and rule 17Ad–7 under the Securities Exchange Act. Rule 17Ad–17 (designed to reduce the number of ''lost securityholders'') requires transfer agents to conduct searches in an effort to locate lost securityholders. The amendment to rule 17Ad–7 set forth the retention time period for the records relating to compliance with rule 17Ad–17, and the amendments to form TA–2 provide the means for transfer agents to report required information to the Commission.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–39176, which was approved by the Commission on October 1, 1997. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Net Capital Rule.

Citation: 17 CFR 240.15c3–1.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 79a *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission amended rule 15c3–1 (''Net Capital Rule'') under the Securities Exchange Act of 1934 to permit broker-dealers to employ theoretical option pricing models in determining net capital requirements for listed options and related positions. Alternatively, the rule permits broker-dealers to elect a strategy-based methodology. The amendments simplified the Net Capital Rule's treatment of options for capital purposes and were designed to more accurately reflect the risk inherent in broker-dealer options positions.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–38248, which was approved by the Commission on February 6, 1997. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

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[2] The Commission rescinded rule 17a–24 in a revised transfer agent rule, Release No. 34–42892 (July 9, 2000).

Title: Reporting Requirements for Brokers or Dealers under the Securities Exchange Act of 1934.

Citation: 17 CFR 240.17a–4.

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78ll(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11.

Description: The Commission amended the broker-dealer record preservation rule to allow broker-dealers to employ, under certain conditions, electronic storage media to maintain records required to be retained. The Commission also issued an interpretation of its record preservation rule relating to the treatment of electronically generated communications.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–38245, which was approved by the Commission on January 31, 1997. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

* * * * *

Title: Anti-Manipulation Rules Concerning Securities Offerings.

Citation: 17 CFR 228.502, 228.508, 229.502, 229.508, 230.418, 230.461, 240.10b–18, 240.11a–1, 240.13e–4, 240.13e–102, 240.14d–102, 240.17a–2, and 17 CFR Part 242.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 79a *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission adopted new Regulation M governing the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities. Regulation M was intended to preclude manipulative conduct by persons with an interest in the outcome of an offering. Regulation M significantly eased regulatory burdens on offering participants by eliminating the trading restrictions for underwriters of actively-traded securities; reducing the scope of coverage for other securities; reducing restrictions on issuer plans; providing a more flexible framework for stabilizing transactions; and deregulating rights offerings. Consisting of five new rules, plus a new definitional rule, Regulation M replaced rules 10b–6, 10b–6A, 10b–7, 10b–8, and 10b–21 (''trading practices rules'') under the Securities Exchange Act of 1934 (''Exchange Act''), which were rescinded. In addition, related amendments were made to Items 502(d) and 508 of Regulations S–B and S–K, and to rules 10b–18 and 17a–2 under the Exchange Act. Conforming changes to various rules under the Securities Act of 1933 and the Exchange Act were made to reflect the repeal of the trading practices rules and the adoption of Regulation M.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–38067, which the Commission approved on December 20, 1996. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Odd-Lot Tender Offers by Issuer.

Citation: 17 CFR 240.13e–4.

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 79a *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission adopted an amendment to rule 13e–4 under the Securities Exchange Act of 1934 (''Exchange Act''). The amendment removed the rule's requirement that an issuer cash tender offer made to odd-lot holders specify a record date of ownership for eligibility to tender into the offer. The amendment enabled issuers to conduct continuous, periodic, or extended odd-lot offers for their equity securities. The Commission also granted a class exemption from rule 10b–13,[3] and a temporary class exemption from rule 10b–6,[4] under the Exchange Act to permit issuers to conduct odd-lot offers, to ''round-up'' odd-lots on behalf of odd-lot holders, and to make purchases of their securities otherwise than pursuant to the odd-lot offer.

Prior Commission Determination Under 5 U.S.C. 601: The Chairman of the Commission certified in connection with the Proposing Release that the proposed amendment to Rule 13e–4 and the proposed class exemptions from Rules 10b–6 and 10b–13, if adopted, would not have a significant impact on a substantial number of small entities. The Commission received no comments on this certification.

* * * * *

Title: Order Execution Obligations (Rules 11Ac1–4 and 11Ac1–1).[5]

Citation: 17 CFR 240.11Aa3–1, 240.11Ac1–1 and 240.11Ac1–4 (renamed 17 CFR 242.601(a), 242.602(a)(1) and 242.604).

Authority: 15 U.S.C. 77a *et seq.*, 15 U.S.C. 78a *et seq.*, 15 U.S.C. 79a *et seq.*, 15 U.S.C. 80a *et seq.*

Description: The Commission adopted new rule 11Ac1–4 (''Display Rule'') under the Securities Exchange Act of 1934 (''Exchange Act'') to require the display of customer limit orders priced better than a specialist's or over-the-counter market maker's quote or that add to the size associated with such quote. The Commission also adopted amendments to rule 11Ac1–1 (''Quote Rule'') under the Exchange Act to require a market maker to publish quotations for any listed security when it is responsible for more than 1% of the aggregate trading volume for that security and to make publicly available any superior prices that a market maker privately quotes through certain electronic communications networks. These rules were designed to address growing concerns about the handling of customer orders for securities. Finally, the Commission deferred action on proposed rule 11Ac1–5. The substance of this regulation remains largely intact in rules 602 and 604 of Regulation NMS. *See* Release No. 34–51808, 69 FR 37496 (June 29, 2005).

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–37619A, which was approved by the Commission on September 6, 1996. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

* * * * *

Title: Unlisted Trading Privileges.

Citation: 17 CFR 240.12f–1, 17 CFR 240.12f–2, 17 CFR 240.12f–3, 17 CFR 240.12f–5, 17 CFR 240.12f–6.

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78a, 78c, 78d, 78i, 78j, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11.

Description: The Commission adopted new rules and rule amendments to reduce the period that exchanges must wait before extending Unlisted Trading Privileges (''UTP'') to any listed initial public offering, from the third trading day in the security to the second trading day in the security. The rules also require exchanges to have rules and

[3] The Commission replaced rule 10b–13 with new rule 14e–5 in adopting regulations on cross-border tender offers, Release No. 33–7760, 64 FR 61408 (Nov. 14, 1999).

[4] The Commission withdrew and replaced rule 10b–6 in adopting Regulation M, *infra*.

[5] The Commission renumbered rules 11Ac1–1 and 11Ac1–4 in adopting Regulation NMS, Release No. 34–51808, 70 FR 37496 (June 29, 2005). They are now at 17 CFR 242.602 and 242.604, respectively.

oversight mechanisms in place to ensure fair and orderly markets and the protection of investors with respect to UTP in any security.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–35637, which was approved by the Commission on April 21, 1995. Comments to the proposing release and Initial Regulatory Flexibility Analysis were considered at that time.

Office of General Counsel

Title: Rules of Practice.

Citation: 17 CFR Parts 200 and 201.

Authority: 5 U.S.C. 551, 554, 556, and 557.

Description: The Commission comprehensively revisited its Rules of Practice (''Rules''), the procedural rules that govern Commission administrative proceedings. The proceedings include enforcement proceedings initiated by the Commission and review of disciplinary proceedings brought by self-regulatory organizations. They also cover administrative temporary cease-and-desist and disgorgement orders. The Rules implemented revised procedures for the conduct of hearings, including simplified service of orders instituting proceeding, expanded use of prehearing conferences, codification of policies on the availability of certain investigation files to respondents in enforcement and disciplinary proceedings, issuance of subpoenas returnable prior to hearing and the consideration by administrative law judges of dispositive motions prior to hearing.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–35833, which was approved by the Commission on June 9, 1995. The Commission received no comments on the Initial Regulatory Flexibility Analysis.

Office of the Chief Accountant

Title: Amendments to Rule 102(e): Appearance and practice before the Commission.

Citation: 17 CFR 201.102.

Authority: 15 U.S.C. 78a *et seq.*

Description: These amendments to the Commission's Rules of Practice clarify the Commission's standard for determining when accountants engage in ''improper professional conduct'' such that the Commission can censure, suspend or bar accountants who appear and practice before it.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–40567, which was approved by the Commission on October 19, 1998. Comments to the proposing release and Initial Regulatory Flexibility analysis were considered at that time.

* * * * *

Title: Rule 10A–1: Notice to the Commission pursuant to Section 10A of the Exchange Act.

Citation: 17 CFR 240.10A–1.

Authority: 15 U.S.C. 78a *et seq.*

Description: These rules are designed to implement the reporting requirements in Section 10A of the Securities Exchange Act of 1934.

Prior Commission Determination Under 5 U.S.C. 601: A Final Regulatory Flexibility Analysis was prepared in accordance with 5 U.S.C. 604 in conjunction with the adoption of Release No. 34–38387, which was approved by the Commission on March 12, 1997. Comments to the proposing release and Initial Regulatory Flexibility analysis were considered at that time.

The Commission invites public comment on both the list and on the rules to be reviewed.

By the Commission.

Dated: January 14, 2009.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–1173 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502, 514, 531, 533, 535, 537, 539, 556, 558, 571, and 573

Amendments to Various National Indian Gaming Commission Regulations

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Notice of extension of comment period.

SUMMARY: The National Indian Gaming Commission (''NIGC'') announces the extension of the comment period on the proposed rule concerning various amendments to the National Indian Gaming Commission regulations. The proposed rule was published in the **Federal Register** on December 22, 2008 (73 FR 78242). The NIGC is extending the comment period to March 9, 2009.

DATES: Submit comments on the proposed various amendments to the National Indian Gaming Commission regulations on or before March 9, 2009.

ADDRESSES: Comments can be faxed, mailed, or e-mailed. Mail comments to ''Comments on Administrative Regulations,'' National Indian Gaming Commission, 1441 L St., NW., Washington, DC 20005, Attn: Rebecca Chapman, Office of General Counsel. Comments may be faxed to 202–632–7066 (not a toll-free number). Comments may be sent electronically to *adminregs@nigc.gov.* Comments may also be submitted through the Federal eRulemaking portal at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rebecca Chapman, Staff Attorney, Office of General Counsel, at (202) 632–7003; fax (202) 632–7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: Congress established the National Indian Gaming Commission under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701–21) (''IGRA'') to regulate gaming on Indian lands. The NIGC issued a proposed rule updating various NIGC regulations and streamlining procedures. The NIGC then published it in the **Federal Register** on December 22, 2008 (73 FR 78242). The proposed rule provided for public comments to be submitted by February 5, 2009. The NIGC is extending the comment period to March 9, 2009. Comments should be submitted on or before that date.

Dated: January 14, 2009.

Philip N. Hogen,

Chairman, National Indian Gaming Commission.

Norman H. DesRosiers,

Vice Chairman, National Indian Gaming Commission.

[FR Doc. E9–1346 Filed 1–23–09; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket No. OSHA–2007–0066]

RIN 1218–AC01

Cranes and Derricks in Construction

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; notice of hearing.

SUMMARY: OSHA is convening an informal public hearing to receive

testimony and documentary evidence on the proposed rule for Cranes and Derricks in Construction (29 CFR part 1926, subpart CC) which published on October 9, 2008 (73 FR 59714).

DATES: *Informal public hearing.* The Agency will hold the informal public hearing in Washington, DC, beginning March 17, 2009. The hearing will commence at 10 a.m. on the first day. If necessary, the hearing will continue for additional days. If the hearing is continued for additional days, it will begin at 9 a.m. on each of these days.

Notice of intention to appear to provide testimony at the informal public hearing. Parties who intend to present testimony at the informal public hearing must notify OSHA in writing of their intention to do so no later than February 13, 2009.

Hearing testimony and documentary evidence. Parties who are requesting more than 10 minutes to present their testimony, or who will be submitting documentary evidence at the hearing, must provide the Agency with copies of their full testimony and all documentary evidence they plan to present by March 3, 2009.

ADDRESSES: *Informal public hearing.* The informal public hearing will be held in Washington, DC, in the auditorium on the plaza level of the Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

Notices of intention to appear at the hearing, hearing testimony, and documentary evidence. Submit notices of intention to appear at the informal public hearing, hearing testimony, and documentary evidence, identified by the docket number (OSHA–2007–0066) or the regulation identifier number (RIN 1218–AC01), using any *one* of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting the material.

Facsimile: Send submissions consisting of 10 or fewer pages to the OSHA Docket Office at (202) 693–1648. Hard copies of these documents are not required. Instead of transmitting facsimile copies of attachments that supplement these documents (*e.g.*, studies, journal articles), submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and docket number (*i.e.*, OSHA–2007–0066) so that the Agency can attach them to the appropriate document.

Regular mail, express delivery, hand delivery, and courier service: Send submissions in triplicate (three copies) to the OSHA Docket Office, Docket No. OSHA–2007–0066, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Note that security-related problems may result in significant delays in receiving submissions by regular mail. Please contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, or courier service. The OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., *e.t.*

Instructions. All submissions must include the Agency name and the OSHA docket number (*i.e.*, OSHA–2007–0066). All submissions, including any personal information, are placed in the public docket without revision, and will be available online at *http://www.regulations.gov.* Therefore, OSHA cautions members of the public against submitting information and statements that should remain private, including comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data. For additional information on submitting notices of intention to appear, the text of testimony, and documentary evidence, see the PUBLIC PARTICIPATION—COMMENTS AND HEARINGS section below.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or to the OSHA Docket Office at the address above. Documents in the docket are listed in the *http://www.regulations.gov* index. However, some information (*e.g.*, copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions, including notices of intention to appear, the text of testimony, and documentary evidence.

FOR FURTHER INFORMATION CONTACT: *General information and press inquiries:* Contact Ms. Jennifer Ashley, Office of Communications, Room N–3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999.

Technical inquiries: Contact Ms. Cathy Legan, Directorate of Construction, Room N–3468, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2020 or fax (202) 693–1689.

SUPPLEMENTARY INFORMATION:

Background. OSHA published the proposed Cranes and Derricks in Construction Standard on October 9, 2008 (73 FR 59713). The period for submitting written comments was to expire on December 8, 2008, but was extended to January 22, 2009. During this period, a number of commenters submitted requests for an informal public hearing (*see, e.g.*, Ex. OSHA–2007–0066–0117.1). With this notice, OSHA is announcing a hearing date in response to these requests.

Public participation—comments and hearings. OSHA encourages members of the public to participate in this rulemaking by providing oral testimony and documentary evidence at the informal public hearing. Accordingly, the Agency invites interested parties having knowledge of, or experience with, the issues raised in the Notice of Proposed Rulemaking (NPRM) to participate in this process, and welcomes any pertinent data that will provide the Agency with the best available evidence to use in developing the final rule. This remainder of this section describes the procedures the public must use to schedule an opportunity to deliver oral testimony and to provide documentary evidence at the informal public hearing.

Hearing arrangements. Pursuant to section 6(b)(3) of the Occupational Safety and Health Act (the Act; 29 U.S.C. 655), members of the public have an opportunity at the informal public hearing to provide oral testimony concerning the issues raised in the NPRM. An administrative law judge (ALJ) will preside over the hearing and will resolve any procedural matters relating to the hearing on the first day.

Purpose of the hearing. The legislative history of Section 6 of the Act, as well as the Agency's regulation governing public hearings (29 CFR 1911.15), establish the purpose and procedures of informal public hearings. Although the presiding officer of the hearing is an ALJ, and questions by interested parties are allowed on pertinent issues, the hearing is informal and legislative in purpose. Therefore, the hearing provides interested parties with an opportunity to make effective and expeditious oral presentations in the absence of procedural restraints that could impede or protract the rulemaking process. The hearing is not an adjudicative proceeding subject to the

technical rules of evidence. Instead, it is an informal administrative proceeding convened for the purpose of gathering and clarifying information. The regulations that govern the hearing, and the pre-hearing guidelines issued for the hearing, will ensure that participants are treated fairly and have due process. This approach will facilitate the development of a clear, accurate, and complete record. Accordingly, application of these rules and guidelines will be such that questions of relevance, procedures, and participation will be decided in favor of developing a complete record.

Conduct of the hearing. Conduct of the hearing will conform to the provisions of 29 CFR 1911.5. Although the ALJ presiding over the hearing makes no decision or recommendation on the merits of the NPRM or the final rule, the ALJ has the responsibility and authority to ensure that the hearing progresses at a reasonable pace and in an orderly manner. To ensure that interested parties receive a full and fair informal hearing, the ALJ has the authority and power to: Regulate the course of the proceedings; dispose of procedural requests, objections, and similar matters; confine the presentations to matters pertinent to the issues raised; use appropriate means to regulate the conduct of the parties who are present at the hearing; question witnesses, and permit others to question witnesses; and limit the time for such questions. At the close of the hearing, the ALJ will establish a post-hearing comment period for parties who participated in the hearing. During the first part of this period, the participants may submit additional data and information to OSHA, and during the second part of this period, they may submit briefs, arguments, and summations.

Notice of intention to appear to provide testimony at the informal public hearings. Hearing participants must file a notice of intention to appear that provides the following information: The name, address, and telephone number of each individual who will provide testimony; the capacity in which the individual will testify (*e.g.*, name of the establishment/organization the individual is representing; the individual's occupational title and position); approximate amount of time requested for the individual's testimony; specific issues the individual will address, including a brief description of the position that the individual will take with respect to each of these issues; and any documentary evidence the individual will present, including a brief summary of the evidence.

OSHA emphasizes that, while the hearing is open to the public and interested parties are welcome to attend, only a party who files a proper notice of intention to appear may ask questions and participate fully in the hearing. A party who did not file a notice of intention to appear may be allowed to testify at the hearing if time permits, but this determination is at the discretion of the presiding ALJ.

Hearing testimony and documentary evidence. OSHA will review each submission and determine if the information it contains warrants the amount of time requested. OSHA then will allocate an appropriate amount of time to each presentation, and will notify the participants of the time allotted to their presentations. Prior to the hearing, the Agency will notify participants if the allotted time is less than the requested time, and will provide the reasons for this action. OSHA may limit to 10 minutes the presentation of any participant who fails to comply substantially with these procedural requirements. The Agency also may request a participant to return for questions at a later time.

Certification of the record and final determination after the informal public hearing. Following the close of the hearing and post-hearing comment period, the ALJ will certify the record to the Assistant Secretary of Labor for Occupational Safety and Health. This record will consist of all of the written comments, oral testimony, documentary evidence, and other material received during the hearing. Following certification of the record, OSHA will review the proposed provisions in light of all the evidence received as part of the record, and then will issue the final determinations based on the entire record.

Authority and Signature

This document was prepared under the authority of Thomas M. Stohler, Acting Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655), Secretary of Labor's Order 5–2007 (72 FR 31160), and 29 CFR part 1911.

Signed at Washington, DC, on January 14, 2009.

Thomas M. Stohler,

Acting Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E9–1128 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 1355 and 1356

Request for Public Comment Concerning Regulations for Transferring Children From the Placement and Care Responsibility of a State Title IV–E Agency to a Tribal Title IV–E Agency and Tribal Share of Title IV–E Administration and Training Expenditures

AGENCY: Administration on Children, Youth and Families, Administration for Children and Families, Department of Health and Human Services.

ACTION: Proposed rule; request for public comment and Tribal consultation meetings.

SUMMARY: Effective October 1, 2009, Public Law 110–351 provides Indian Tribes with the option to operate a foster care, adoption assistance and, at tribal option, a kinship guardianship assistance program under title IV–E of the Social Security Act (the Act). The Federal government would share in the costs of Tribes operating an ACF-approved title IV–E program. Public Law 110–351 requires that ACF develop interim final rules after consulting with Tribes and affected States on the implementation of the tribal plan requirements in section 479B of the Act and other amendments made by the Tribal provisions in section 301 of Public Law 110–351. The law requires that such regulations include: (1) Procedures to ensure that a transfer of State or Tribal responsibility for the placement and care of a child under a State title IV–E plan to a Tribal title IV–E plan occurs in a manner that does not affect the child's eligibility for title IV–E or title XIX Medicaid and such services or payments; and, (2) the in-kind expenditures from third-party sources permitted for the Tribal share of administration and training expenditures under title IV–E. This notice is designed to provide a written opportunity for comment to all interested persons and notify Tribal leaders of in-person opportunities to consult with the Children's Bureau on the development of these regulations.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 27, 2009. Please see **SUPPLEMENTARY INFORMATION** for additional details on the Tribal consultation meetings.

ADDRESSES: Interested persons may submit written comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: CBComments@acf.hhs.gov*. Please include ''Comments on Tribal IV–E Regulations'' in the subject line of the message.
- *Mail or Courier Delivery:* Miranda Lynch, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, 1250 Maryland Avenue, SW., 8th Floor, Washington, DC 20024.

Instructions: Please be aware that mail sent to us may take an additional 3–4 days to process due to changes in mail handling resulting from the anthrax crisis of October 2001. If you choose to use an express, overnight, or other special delivery method, please ensure first that they are able to deliver to the above address. We urge you to submit comments electronically to ensure they are received in a timely manner. All comments received will be posted without change to *www.regulations.gov* including any personal information provided. Comments provided to us during a meeting or in-writing in response to this **Federal Register** notice will receive equal consideration by ACF.

FOR FURTHER INFORMATION CONTACT: Miranda Lynch, Children's Bureau, 1250 Maryland Avenue, SW., 8th Floor, Washington, DC 20024; (202) 205–8138, *miranda.lynch@acf.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Title IV–E Background

The Fostering Connections to Success and Increasing Adoption Act of 2008, Public Law 110–351 was enacted on October 7, 2008. Prior to the law's enactment, the title IV–E program provided States and territories with Federal funds to support eligible children in foster care, eligible children with special needs in adoptions, and to assist the State with the administrative expenses of operating the title IV–E program. The law, as amended, permits Federally-recognized Indian Tribes, tribal organizations or consortia (hereafter, ''Tribes'') to apply to ACF to operate a title IV–E program beginning October 1, 2009. By law, the requirements of the title IV–E statute apply to such Tribes ''in the same manner as this part applies to a State'' (section 479B(b) of the Act), with limited exceptions. Public Law 110–351 also provides limited funding, beginning in Federal fiscal year (FY) 2009, for Tribes that intend to submit an application to ACF for direct funding of the title IV–E program to also apply for a grant to assist in developing a title IV–E plan. Finally, the law codifies a Tribe's ability to enter into agreements and contracts with State title IV–E agencies to share in the administration of the title IV–E programs on behalf of Indian children in their placement and care responsibility.

In addition to creating this opportunity for Tribes, the law permits title IV–E agencies who choose to do so to administer a new kinship guardianship assistance program under title IV–E, revises the eligibility criteria for the title IV–E adoption assistance program, allows title IV–E agencies to choose to extend title IV–E foster care, adoption assistance, and kinship guardianship payments to youth who meet certain conditions up to age 21, among other changes to the title IV–B and IV–E requirements. The entire law and issuances related to the new provisions can be found on the Children's Bureau's Web site at *http://www.acf.hhs.gov/programs/cb*.

Implementation of the Tribal Title IV–E Plan

The law limits exceptions or modifications to the title IV–E statutory requirements for Tribes that will directly operate a title IV–E program to those granted in the law (i.e., the ability for Tribes to define their own service areas, tribal licensing standards and flexibility to use nunc pro tunc and affidavits to meet judicial determination requirements in the first 12 months of operation of the tribal title IV–E plan). This means that Tribes wishing to operate their own title IV–E plan must adhere to the following requirements:

- Secretary approval of a plan to operate a title IV–E foster care (per section 472 of the Act) and adoption assistance program (per section 473 of the Act) that complies with the applicable title IV–E plan requirements in sections 471(a) and definitions in section 475 of the Act.
- Tribal title IV–E plan provisions in section 479B of the Act;
- Regulations in 45 CFR parts 1355 and 1356 or incorporated by cross-reference, to the extent that such regulations have not been superseded by Public Law 110–351 or are not applicable to directly-funded Tribes at this time (e.g., title IV–E eligibility reviews and Child and Family Services Reviews); and,
- Federal reporting requirements as required by the Secretary (section 471(a)(6) of the Act).

Transfer of Placement and Care of Title IV–E Indian Children

The law requires the Secretary to issue interim final rules on the transfer of children in foster care under a State title IV–E plan, to the placement and care responsibility of a Tribe under a directly-funded Tribal title IV–E plan to ensure that a child maintains his eligibility for title IV–E and title XIX Medicaid. We note that the Indian Child Welfare Act (ICWA) of 1978 provides existing statutory direction for State courts to transfer certain child custody proceedings—including foster care—involving Indian children to the jurisdiction of Indian courts. The Bureau of Indian Affairs, Department of the Interior, has also issued guidelines regarding such transfers in ''Guidelines for State Courts—Indian Child Custody Proceedings'' (see 44 FR 67584, November 26, 1979).

Tribal Share of Title IV–E Administration and Training Expenditures

Tribes whose title IV–E plans are approved by the Secretary may receive Federal reimbursement of a share of title IV–E allowable administrative and training costs (section 479B(c)(1)(D) of the Act). As of October 1, 2009, the law permits such Tribes, but not States, to use in-kind funds from third-party sources in contributing their Tribal share of such costs. The law establishes initial provisions for permitted third-party sources and sets specific limits on the percentage of the Tribal share that may be used for title IV–E purposes. The law requires HHS to develop interim final regulations on the tribal share provisions to apply beginning in FY 2012.

Opportunity To Comment

Interim final rules are final rules that have immediate effect without the Federal agency first issuing and inviting public comment on a notice of proposed rule. Because the law requires us to use the interim final rule process on the limited topics of the procedures to effect the transfer of children from State to directly-funded Tribal title IV–E plans and the in-kind third party match sources and percentages, we are seeking comments from Tribes, affected States and other stakeholders through this **Federal Register** notice and the Tribal consultation meetings. Specifically, we are seeking comments on the following:

- Considering that the Secretary is to apply title IV–E of the Act to Tribes in the same manner as to States except where directed by law, what, if any, provisions and clarifications related to

the title IV–E program for directly-funded Tribes should be in regulations?

• Are guidelines above and beyond those provided pursuant to the ICWA needed to execute the transfer of placement and care responsibility of a title IV–E Indian child to a Tribe operating a title IV–E plan? If, so please provide suggestions.

• What specific information pertaining to title IV–E and title XIX Medicaid should a State make available to a Tribe that seeks to gain placement and care responsibility over an Indian child?

• Should the third-party sources and in-kind limits on Tribal administrative and training costs remain consistent with section 479B(c)(1)(D) of the Act? Please provide a rationale for this response.

Any other comments regarding the development of an interim final rule per section 301(e) of Public Law 110–351 are welcome. Please note, however, that this request is limited in scope and is not intended to solicit comments on the remaining provisions of Public Law 110–351.

Tribal Consultation

We invite Tribal leaders and/or their representatives of Federally recognized tribes to attend consultation meetings that will be held in certain ACF Regional Offices to provide their input on the issues subject to regulations as explained below. Tribal leaders and/or their representatives who choose to attend a consultation session must register at least one week in advance of the meeting date by contacting the applicable Children's Bureau (CB) Regional Program Manager. Registered participants for the consultation session may submit written remarks in advance, or present them in oral or written form at the consultation session. Tribal leaders and/or their representatives, regardless of whether they participate in the consultation session, may provide written comments as noted in the **ADDRESSES** section. Finally, please note that Federal representatives attending the consultation sessions will not be able to respond directly during the session to the concerns or questions raised by participants. The consultation sessions and contact information are listed below:

Thursday, February 12, 2009—Region VII

Federal Office Building, 601 E 12th Street, Kansas City, MO 64106. Contact: Rosalyn Wilson, CB Regional Program Manager, phone (816) 426–3981 or e-mail *rosalyn.wilson@acf.hhs.gov.*

Region includes: Iowa, Kansas, Missouri and Nebraska.

Friday, February 20, 2009—Region VI

1301 Young Street, Room 1119, Dallas, TX 75202. Contact: June Lloyd, CB Regional Program Manager, phone (214) 767–9648 or e-mail *june.lloyd@acf.hhs.gov.*

Region includes: Arkansas, Louisiana, New Mexico, Oklahoma and Texas.

Friday, February 20, 2009—Region IX

90 7th Street—Conf. Rm. B040 and B020, San Francisco, CA, 94103. Contact: Sally Flanzer, CB Regional Program Manager, phone (415) 437–8400 or e-mail *sally.flanzer@acf.hhs.gov.*

Region includes: Arizona, California, Hawaii, Nevada, Outer Pacific—American Samoa, Commonwealth of the Northern Marianas, Federated States of Micronesia (Chuuk, Pohnpei, Yap) Guam, Marshall Islands and Palau.

Wednesday, February 25—Region I

JFK Federal Building 21st Floor, Rm. 2100, Boston, MA 02203. Contact: Bob Cavanaugh, CB Regional Program Manager, phone (617) 565–1020 or e-mail *bob.cavanaugh@acf.hhs.gov.*

Region includes: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Wednesday, February 25, 2009—Region VIII

Byron Rogers Federal Building, 1961 Stout Street, Denver, CO 80294. Contact: Marilyn Kennerson, CB Regional Program Manager, phone (303) 844–3100 or e-mail *marilyn.kennerson@acf.hhs.gov.*

Region includes: Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming.

Thursday, February 26, 2009—Region II

Leo O'Brien Federal Building, Room 826A, 1 Clinton Square, Albany, NY 12207. Contact: Junius Scott, CB Regional Program Manager, phone (212) 264–2890 or e-mail *junius.scott@acf.hhs.gov.*

Region includes: New Jersey, New York, Puerto Rico and the Virgin Islands.

Thursday, February 26, 2009—Region IV

Sam Nunn Atlanta Federal Center, Conf. Rm. A & B, 61 Forsyth Street SW., Suite 4M60, Atlanta, GA 30303. Contact: Ruth Walker, CB Regional Program Manager, phone (404) 562–2900 or e-mail *ruth.walker@acf.hhs.gov.*

Region includes: Alabama, Mississippi, Florida, North Carolina, Georgia, South Carolina, Kentucky and Tennessee.

Friday, February 27, 2009—Region X

2201 Sixth Avenue, Seattle, WA 98121–1827. Contact: John Henderson, CB Regional Program Manager, phone (206) 615–2482 or e-mail *john.henderson@acf.hhs.gov.*

Region includes: Alaska, Idaho, Oregon and Washington.

Thursday, March 5, 2009—Region V

ACF Tower Conference Room, 233 N Michigan Avenue, Suite 400, Chicago, IL 60601. Contact: Carolyn Wilson-Hurey, CB Regional Program Manager, phone (312) 353–4237 or e-mail *carolyn.wilson-hurey@acf.hhs.gov.*

Region includes: Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

Dated: January 14, 2009.

Joan E. Ohl,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. E9–1338 Filed 1–23–09; 8:45 am]

BILLING CODE 4184–01–P

Notices

Federal Register

Vol. 74, No. 15

Monday, January 26, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forest Service

Chequamegon-Nicolet National Forest, WI; Twin Ghost Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Great Divide Ranger District intends to prepare an Environmental Impact Statement (EIS) to disclose the environmental consequences of managing vegetation and the transportation system within the Twin Ghost Project area. The approximate legal description for the area is as follows: Township 42 North Ranges 4 and 5 West, and Township 43 North Ranges 4, 5, and 6 West. The project area encompasses approximately 67,085 acres in the west central portion of the Great Divide Ranger District, within Ashland, Bayfield, and Sawyer counties in Wisconsin. Excluding private in-holdings and lakes, there are about 53,427 acres of federal land within the project area, of which about 12,000 acres are proposed for vegetation management activities. See the **SUPPLEMENTARY INFORMATION** section for details regarding the purpose and need and proposed action.

DATES: Comments concerning the scope of the analysis should be received by February 12th, 2009 to receive timely consideration. The draft environmental impact statement is expected in May 2009 and the final environmental impact statement is expected in October 2009.

ADDRESSES: Send written comments to District Ranger Constance Chaney, Chequamegon-Nicolet National Forest, Great Divide Ranger District, P.O. Box 896, 10650 Nyman Avenue, Hayward, WI 54843. Comments may also be sent via facsimile to 715–634–3769.

FOR FURTHER INFORMATION CONTACT: Debra Proctor, Project Leader; Great Divide Ranger District, P.O. Box 896, 10650 Nyman Avenue, Hayward, WI 54843, 715–634–4821.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The vegetation proposal is to use timber harvest as a means to achieve forest health, silvicultural, and wildlife habitat improvement goals set forth in the Chequamegon-Nicolet National Forest 2004 Land and Resource Management Plan. The transportation system proposal is based on a risk/value assessment that was conducted with a goal to provide ample public and administrative motorized access while preventing undesirable natural resource impacts. The overall goal is to balance the needs of the public with the protection of the natural resources we all value.

Many of the stands within the project area are experiencing individual tree mortality and decreased growth rates due to their age, drought stress, insect and disease outbreaks, overstocking, and other factors. Many of the stands of short-lived forest types (aspen, balsam fir, paper birch, and jack pine) are beyond rotation age. These stands will experience increasing losses to decay and breakage, and be subject to greater tree mortality, if they are not treated soon. Wildlife species that are dependent upon early successional species such as aspen for food and cover benefit from the maintenance of aspen on the landscape that has a well-balanced age class distribution. Young aspen is needed for foraging, breeding, and protective nesting and brood cover. There are currently very few stands younger than 20 years. Many of the long-lived stands (oak, red pine, white pine, and northern hardwoods) are too crowded resulting in a decline of individual tree growth and greater susceptibility to insects and disease. Other needs that have been identified include: Increasing the amount of habitat for spruce grouse, reducing ladder fuels in Wildland Urban Interface areas, providing forest commodities, and providing a safe, efficient, and effective transportation system.

Proposed Action

The following proposed actions have been identified to address the needs listed above: Thin 1,425 acres of red oak, 3,008 acres of northern hardwood, 536 acres of red pine plantations, 218 acres of white pine plantations, 30 acres of aspen, and 34 acres of balsam fir; conduct a selection harvest in 1,973 acres of northern hardwoods; shelterwood harvest 326 acres of oak, 1,106 acres of paper birch, and 17 acres of balsam fir; clearcut and regenerate 1,847 acres of aspen, 491 acres of jack pine, and 169 acres of red pine; underplant up to 313 acres of white pine and 157 acres of black spruce or jack pine; plant 169 acres of red pine and 162 acres of jack pine; prescribe burn up to 1,298 acres of oak, paper birch, or jack pine sites for regeneration; mechanically scarify up to 1,780 acres of stands for regeneration; remove balsam fir trees less than 3 inches in diameter in up to 3,000 acres of Wildland Urban Interface areas; maintain 187 miles of existing roads; add to the system and maintain as open 57 miles of unauthorized roads; add to the system and maintain as closed 37 miles of unauthorized roads; construct 14 miles of temporary roads that would be decommissioned after use for accessing stands that need treatment infrequently; reconstruct 2 miles of road; convert 5 miles of road to trail; close 11 miles of road year-round; seasonally close 6 miles of road; and decommission 83 miles of predominantly unauthorized roads.

Responsible Official

The responsible official for this project is District Ranger Constance Chaney, Chequamegon-Nicolet National Forest, Great Divide Ranger District, P.O. Box 896, 10650 Nyman Avenue, Hayward, WI 54843.

Scoping Process

The Chequamegon-Nicolet National Forest began the scoping process for this project in October 2008, when it was listed on the Chequamegon-Nicolet Schedule of Proposed Actions. In November 2008, individuals, organizations, and agencies on the District's mailing list and those owning property nearby the project area were sent information packages and project information was posted on the Forest's Web site. Since that time meetings have been held when requested by individuals, organizations, and other agencies; news releases published in newspapers of record; and information shared on Wisconsin Public Radio and

other radio stations. An open house is planned to occur in early February and additional meetings and open houses will be provided if there is interest from the public. Project information is available on the Internet at *http://www.fs.fed.us/r9/cnnf/*. Click on ''Project Proposals and Decisions'', then ''Twin Ghost Project''.

Preliminary Issues

The following issues will be analyzed in the EIS: Effects of the proposed activities on forest sustainability, soil productivity, water and air quality, Regional Forester Sensitive Species (plants and wildlife), game and non-game wildlife and bird species, non-native invasive species, recreation and visuals.

Possible Alternatives

Two alternatives to the proposed action are being developed in response to public comments received. One alternative would consider different types and amounts of silvicultural treatments to achieve the vegetation related purpose and need objectives. The other would provide a higher level of motorized access opportunities.

Comment Requested

This notice of intent initiates the scoping process which guides the development of the environmental impact statement.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

A draft environmental impact statement will be prepared for comment. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, it is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal or judicial review. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22, 36 CFR 220.5(b) and Forest Service Handbook 1909.15, Section 21)

Dated: January 16, 2009.

Jeanne M. Higgins,

Forest Supervisor.

[FR Doc. E9–1601 Filed 1–23–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of the Advisory Committee on Agriculture Statistics Meeting

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Agricultural Statistics Service (NASS) announces a meeting of the Advisory Committee on Agriculture Statistics.

DATES: The Committee meeting will be held from 8 a.m. to 5 p.m. on Tuesday, February 24, 2009, and from 8 a.m. to 12:30 p.m. on Wednesday, February 25, 2009. There will be an opportunity for public questions and comments at 9:30 a.m. on February 25, 2009.

ADDRESSES: The Committee meeting will take place at the Crystal City Marriott at Reagan National Airport, 1999 Jefferson Davis Highway, Arlington, Virginia, 22202. Written comments may be filed before or within a reasonable time after the meeting with the contact person identified herein at: U.S. Department of Agriculture, National Agricultural Statistics Service, 1400 Independence Avenue, SW., Room 5041A, South Building, Washington, DC 20250–2000.

FOR FURTHER INFORMATION CONTACT: Joe Reilly, Executive Director, Advisory Committee on Agriculture Statistics, Telephone: 202–720–4333, Fax: 202–720–9013, or e-mail: *HQ_OA@nass.usda.gov*.

SUPPLEMENTARY INFORMATION: The Advisory Committee on Agriculture Statistics, which consists of 25 members appointed from 7 categories covering a broad range of agricultural disciplines and interests, has scheduled a meeting on February 24–25, 2009. The meeting will focus on the following topics: 2007 Agricultural Census Results and Issues, 2012 Agricultural Census Content, Data Enclave update, and NASS Status of Programs. The Agricultural Resource Management Survey (ARMS) will hold a Data User meeting on Wednesday, February 25, from 1:30 p.m. to 5 p.m. in the same location. The ARMS meeting is optional but open to the public.

The Committee meeting is open to the public. The public may file written comments to the USDA Advisory Committee contact person before or within a reasonable time after the meeting. All statements will become a part of the official records of the USDA Advisory Committee on Agriculture Statistics and will be kept on file for public review in the office of the Executive Director, Advisory Committee on Agriculture Statistics, U.S. Department of Agriculture, Washington, DC 20250.

Dated January 7, 2009, at Washington, DC.

Joseph T. Reilly,

Associate Administrator, National Agricultural Statistics Service.

[FR Doc. E9–1314 Filed 1–23–09; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No.: 090109014–9016–01]

Solicitation of Applications for the Minority Business Enterprise Center (MBEC) Program

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: On October 7, 2008, the Minority Business Development Agency (MBDA) published an announcement (73 FR 58555) soliciting competitive applications from organizations to operate a Minority Business Enterprise Center (MBEC) in Houston, TX for a new three (3) year award period, in accordance with 15 U.S.C. Section 1512 and Executive Order 11625. However, the competition was deemed unsuccessful by MBDA due to a lack of responsive applications. This notice solicits competitive applications for a new operator of the Houston MBEC project and supersedes in its entirety the notice published on October 7, 2008.

The Houston MBEC operates through the use of business consultants and provides a range of business consulting and technical assistance services directly to eligible minority-owned businesses in the Houston-Sugar Land-Baytown, Texas Metropolitan Statistical Area (MSA). Responsibility for ensuring that applications in response to this competitive solicitation are complete and received by MBDA on time is the sole responsibility of the applicant. Applications submitted must be to operate a MBEC and to provide business consultation services to eligible clients. Applications that do not meet these requirements will be rejected. This is not a grant program to help start or to further an individual business.

DATES: The closing date for receipt of applications is March 2, 2009 at 5 p.m. Eastern Standard Time (EST). Completed applications must be received by MBDA at the address below for paper submissions or at *http://www.Grants.gov* for electronic submissions. The due date and time is the same for electronic submissions as it is for paper submissions. The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered. Anticipated time for processing is seventy-five (75) days from the closing date for receipt of applications. MBDA anticipates that one award under this notice will be made with a start date of June 1, 2009.

Pre-Application Conference: In connection with this solicitation, a pre-application conference is scheduled for February 6, 2009 in Houston, TX. The time and location of the pre-application conference have yet to be determined. Participants must register at least 24 hours in advance of the conference and may participate in person or by telephone. Please visit the MBDA Internet Portal at *http://www.mbda.gov* (MBDA Portal) or contact an MBDA representative listed below for the specific time and location of the pre-application conference and for registration instructions.

ADDRESSES: *(1a) Paper Submission—If Mailed:* If the application is sent by postal mail or overnight delivery service by the applicant or its representative, one (1) signed original plus two (2) copies of the application must be submitted. Applicants are encouraged to also submit an electronic copy of the proposal, budget and budget narrative on a CD–ROM to facilitate the processing of applications. Complete application packages must be mailed to: Office of Business Development—MBEC Program, Office of Executive Secretariat, HCHB, Room 5063, Minority Business Development Agency, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Applicants are advised that MBDA's receipt of mail sent via the United States Postal Service may be substantially delayed or suspended in delivery due to security measures. Applicants may therefore wish to use a guaranteed overnight delivery service. Department of Commerce delivery policies for overnight delivery services require all packages to be sent to the address above.

(1b) Paper Submission—If Hand-Delivered: If the application is hand-delivered by the applicant or by its representative, one (1) signed original plus two (2) copies of the application must be delivered. Applicants are encouraged to also submit an electronic copy of the proposal, budget and budget narrative on a CD–ROM to facilitate the processing of applications. Complete application packages must be delivered to: U.S. Department of Commerce, Minority Business Development Agency, Office of Business Development—MBEC Program (extension 1940), HCHB—Room 1874, Entrance #10, 15th Street, NW. (between Pennsylvania and Constitution Avenues), Washington, DC. MBDA will not accept applications that are submitted by the deadline, but that are rejected due to the applicant's failure to adhere to Department of Commerce protocol for hand-deliveries.

(2) Electronic Submission: Applicants are encouraged to submit their proposal electronically at *http://www.Grants.gov.* Electronic submissions should be made in accordance with the instructions available at Grants.gov (see *http://www.grants.gov/forapplicants* for detailed information). MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as, in some cases, the process for completing an online application may require 3–5 working days.

FOR FURTHER INFORMATION CONTACT: For further information or for an application package, please visit MBDA's Minority Business Internet Portal at *http://www.mbda.gov.* Paper applications may also be obtained by contacting the MBDA Office of Business Development or the MBDA National Enterprise Center (NEC) in the region in which the MBEC will be located (see below Agency Contacts). In addition, Standard Forms (SF) may be obtained by accessing *http://www.whitehouse.gov/omb/grants or http://www.grants.gov* and Department of Commerce (CD) forms may be accessed at *http://www.doc.gov/forms.*

Agency Contacts:

1. MBDA Office of Business Development, 1401 Constitution Avenue, NW., Room 5075, Washington, DC 20230. Contact: Efrain Gonzalez, Chief, 202–482–1940.

2. Dallas National Enterprise Center (DNEC), 1100 Commerce Street, Room 726, Dallas, Texas, 75242. This region covers the states of Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. Contact: John F. Iglehart, Regional Director, 214–767–8001.

SUPPLEMENTARY INFORMATION:

Electronic Access: A link to the full text of the Announcement of Federal Funding Opportunity (FFO) for this solicitation may be accessed at: *http://www.Grants.gov, http://www.mbda.gov,* or by contacting the appropriate MBDA representative identified above. The FFO contains a full and complete description of the requirements under the MBEC Program. In order to receive proper consideration, applicants must comply with all information and requirements contained in the FFO. Applicants will be able to access, download and submit electronic grant applications for the MBEC Program through *http://www.Grants.gov.* MBDA

strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as in some cases the process for completing an online application may require additional time (e.g., 3–5 working days). The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered.

Background: The MBEC Program is a key component of MBDA's overall minority business development assistance program and promotes the growth and competitiveness of eligible minority-owned businesses. MBEC operators leverage project staff and professional consultants to provide a wide range of direct business assistance services to eligible minority-owned firms, including but not limited to initial consultations and assessments, business technical assistance, and access to federal and non-federal procurement and financing opportunities. MBDA currently funds a network of 33 MBEC projects located throughout the United States. Pursuant to this notice, competitive applications for new awards are being solicited for the MBEC project identified below.

MBDA originally made a three (3) year award for the operation of the Houston MBEC project for the period January 1, 2007—December 31, 2009. *See* 71 FR 42352. The original award was subsequently terminated at the recipient's request effective January 1, 2009. On October 7, 2008, MBDA published an announcement soliciting competitive applications for an operator of the Houston MBEC for a new three (3) year award period. *See* 73 FR 58555. However, the competition was deemed unsuccessful by MBDA due to a lack of responsive applications. This notice solicits competitive applications for a new operator of the Houston MBEC project and supersedes in its entirety the notice published on October 7, 2008. The new award for the Houston MBEC project is expected to be made with a three (3) year award period of June 1, 2009—May 31, 2012.

Program Description: The MBEC Program generally requires project staff to provide standardized business assistance services directly to eligible ''minority business enterprises,'' with an emphasis on those firms with $500,000 or more in annual revenues and/or those eligible firms with ''rapid growth potential'' (''Strategic Growth Initiative'' or ''SGI'' firms); to develop and maintain a network of strategic partnerships; to provide collaborative consulting services with MBDA and other MBDA funded programs and strategic partners; and to provide referral services (as necessary) for client transactions. For this purpose, minority business enterprises are business concerns that are owned or controlled by the following persons or groups of person: African Americans, Puerto Ricans, Spanish-speaking Americans, Asian and Pacific Islander Americans, Native Americans (including Alaska Natives, Alaska Native Corporations and tribal entities), Eskimos, Aleuts, Asian Indians, and Hasidic Jews. *See* 15 CFR 1400.1 and Executive Order 11625.

The MBEC Program incorporates an entrepreneurial approach to building market stability and improving the quality of client services. This entrepreneurial strategy expands the reach of the MBECs by requiring project operators to develop and build upon strategic alliances with public and private sector partners as a means of serving minority-owned firms within each MBEC's geographical service area. The MBEC Program is also designed to effectively leverage MBDA resources, including but not limited to: MBDA Office of Business Development and MBDA National Enterprise Centers; MBDA's Business Internet Portal; and MBDA's nationwide network of MBECs, Native American Business Enterprise Centers (NABECs) and Minority Business Opportunity Centers (MBOCs). MBEC operators are also required to attend a variety of MBDA training programs designed to increase operational efficiencies and the provision of value-added client services.

MBEC operators are generally required to provide the following four client services: (1) Client Assessment—this is a standardized service activity that includes identifying the client's immediate and long-term needs and establishes a projected growth track; (2) Strategic Business Consulting—this involves providing intensive business consulting services that can be delivered as personalized consulting or group consulting; (3) Access to Capital—this assistance is designed to secure the financial capital necessary for client growth, and (4) Access to Markets—this involves assisting clients to identify and access opportunities for increased sales and revenues.

Please refer to the FFO pertaining to this competitive solicitation for a full and complete description of the application and programmatic requirements under the MBEC Program.

Location and Geographical Service Area: MBDA is soliciting competitive applications from organizations to operate an MBEC in the following location and geographical service area:

Name of MBEC	Location of MBEC	MBEC geographical service area **
Houston MBEC.	Houston, TX.	Houston-Sugar Land-Baytown, TX MSA.**

** Metropolitan Statistical Area, please see OMB Bulletin No. 09–01, Update of Statistical Area Definitions and Guidance on Their Uses (November 20, 2008) at *http://www.whitehouse.gov/omb/bulletins.*

Eligibility: For-profit entities (including but not limited to sole-proprietorships, partnerships, and corporations), non-profit organizations, state and local government entities, American Indian Tribes, and educational institutions are eligible to operate an MBEC.

Match Requirements: The MBEC Program requires a minimum non-federal cost share of 20%, which must be reflected in the proposed project budget. Non-federal cost share is the portion of the project cost not borne by the Federal Government. Applicants must satisfy the non-federal cost sharing requirements in one or more of the following four means or any combination thereof: (1) Client fees; (2) applicant cash contributions; (3) applicant in-kind (*i.e.*, non-cash) contributions; or (4) third-party in-kind contributions. The MBEC is required to charge client fees for services rendered and such fees must be used by the operator towards meeting the non-federal cost share requirements under the award. Applicants will be awarded up to five bonus points to the extent that the proposed project budget includes a non-federal cost share contribution, measured as a percentage of the overall project budget, exceeding 20% (see Evaluation Criterion below).

Funding Availability: MBDA anticipates that approximately $291,000 will be available in each of Fiscal Years (FYs) 2009—2011 to fund the financial assistance award for the Houston MBEC project. The total award period for the project is anticipated to be three (3) years and to cover the period June 1, 2009–May 31, 2012. The anticipated level of Federal funding and the minimum non-federal matching share for the Houston MBEC project for each funding period is set forth in the below table (the actual award amount may vary depending on the availability of appropriated funds and on MBDA and Department of Commerce priorities).

Project name	June 1, 2009 through May 31, 2010			June 1, 2010 through May 31, 2011			June 1, 2011 through May 31, 2012		
	Total cost ($)	Federal share ($)	Non-Federal share ($) (20% min.)	Total cost ($)	Federal share ($)	Non-Federal share ($) (20% min.)	Total cost ($)	Federal share ($)	Non-Federal share ($) (10% min.)
Houston MBEC	363,750	291,000	72,500	363,750	291,000	72,500	363,750	291,000	72,500

Applicants must submit project plans and budgets for each of the three (3) funding periods under this award (June 1, 2009—May 31, 2010, June 1, 2010—May 31, 2011, and June 1, 2011—May 31, 2012). Projects will initially be funded for the first funding period and will not have to compete for funding in the second and third funding periods. However, operators that fail to achieve a ''Satisfactory'' or better performance rating for the current funding period may be denied funding for subsequent funding periods. Recommendations for funding for subsequent funding periods are generally evaluated by MBDA based on a ''Satisfactory'' or better mid-year program performance rating (*i.e.*, June 1, 20xx—November 30, 20xx) and/or a combination of a mid-year and cumulative third-quarter (*i.e.*, June 1, 20xx—February 28, 20xx) ''Satisfactory'' or better performance rating for the current funding period. In making such funding recommendations, MBDA and the Department of Commerce will consider the facts and circumstances of each case, such as but not limited to market conditions, most recent performance of the operator and other mitigating circumstances.

Funding for the program listed in this notice is contingent upon the availability of FY 2009 appropriations. MBDA issues this notice subject to the appropriations made available under the current continuing resolution, H.R. 2638, ''Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009,'' Public Law 110–329. In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other Department of Commerce or MBDA priorities. All funding periods under the award are subject to the availability of funds to support the continuation of the project. Publication of this FFO does not obligate the Department of Commerce or MBDA to award any specific cooperative agreement or to obligate all or any part of available funds.

Authority: 15 U.S.C. Section 1512 and Executive Order 11625.

Catalog of Federal Domestic Assistance (CFDA): 11.800, Minority Business Enterprise Centers.

Eligibility: For-profit entities (including but not limited to sole-proprietorships, partnerships, and corporations), non-profit organizations, state and local government entities, American Indian Tribes, and educational institutions are eligible to operate an MBEC.

Match Requirements: The MBEC Program requires a minimum non-federal cost share of 20%, which must be reflected in the proposed project budget. Non-federal cost share is the portion of the project cost not borne by the Federal Government. Applicants must satisfy the non-federal cost sharing requirements in one or more of the following four means or any combination thereof: (1) Client fees; (2) applicant cash contributions; (3) applicant in-kind (*i.e.*, non-cash) contributions; or (4) third-party in-kind contributions. The MBEC is required to charge client fees for services rendered and such fees must be used by the operator towards meeting the non-federal cost share requirements under the award. Applicants will be awarded up to five bonus points to the extent that the proposed project budget includes a non-federal cost share contribution, measured as a percentage of the overall project budget, exceeding 20% (see Evaluation Criterion below).

Evaluation Criterion: Proposals will be evaluated and one applicant may be selected based on the below evaluation criterion. The maximum total number of points that an application may receive is 105, including the bonus points for exceeding the minimum required non-federal cost sharing, except when oral presentations are made by applicants. If oral presentations are made (see below: Oral Presentation—Optional), the maximum total of points that can be earned is 115. The number of points assigned to each evaluation criterion will be determined on a competitive basis by the MBDA review panel based on the quality of the application with respect to each evaluation criterion.

1. Applicant Capability (40 Points)

Proposals will be evaluated with respect to the applicant's experience and expertise in providing the work requirements listed. Specifically, proposals will be evaluated as follows:

(a) *Community*—Experience in and knowledge of the minority community, minority business sector, and strategies for enhancing its growth and expansion; particular emphasis shall be on expanding SGI firms. Consideration will be given as to whether the applicant has a physical presence in the geographic service area at the time of its application (4 points);

(b) *Business Consulting*—Experience in and knowledge of business consulting with respect to minority firms, with emphasis on SGI firms in the geographic service area (5 points);

(c) *Financing*—Experience in and knowledge of the preparation and formulation of successful financial transactions, with an emphasis on the geographic service area (5 points);

(d) *Procurements and Contracting*—Experience in and knowledge of the public and private sector contracting opportunities for minority businesses, as well as demonstrated expertise in assisting clients into supply chains (5 points);

(e) *Financing Networks*—Resources and professional relationships within the corporate, banking and investment community that may be beneficial to minority-owned firms (5 points);

(f) *Establishment of a Self-Sustainable Service Model*—Summary plan to establish a self-sustainable model for continued services to the MBE communities beyond the MBDA award period (3 points);

(g) *MBE Advocacy*—Experience and expertise in advocating on behalf of minority communities and minority businesses, both as to specific transactions in which a minority business seeks to engage and as to broad market advocacy for the benefit of the minority community at large (3 points); and

(h) *Key Staff*—Assessment of the qualifications, experience and proposed role of staff that will operate the MBEC. In particular, an assessment will be

made to determine whether proposed key staff possess the expertise in utilizing information systems and the ability to successfully deliver program services. At a minimum the applicant must identify a proposed project director. (10 points).

2. Resources (20 Points)

The applicant's proposal will be evaluated as followed:

(a) *Resources*—Resources (not included as part of the non-federal cost share) that will be used in implementing the program, including but not limited to existing prior and/or current data lists that will serve in fostering immediate success for the MBEC (8 points);

(b) *Location*—Assessment of the applicant's strategic rationale for the proposed physical location of the MBEC. Applicant is encouraged to establish a location for the MBEC that is in a building which is separate and apart from any of the applicant's existing offices in the geographic service area (2 points);

(c) *Partners*—How the applicant plans to establish and maintain the network of strategic partners and the manner in which these partners will support the MBEC in meeting program performance goals (5 points); and

(d) *Equipment*—How the applicant plans to satisfy the MBEC information technology requirements, including computer hardware, software requirements and network map (5 points).

3. Techniques and Methodologies (20 Points)

The applicant's proposal will be evaluated as follows:

(a) *Performance Measures*—For each funding period, the manner in which the applicant relates each performance measure to the financial information and market resources available in the geographic service area (including existing client list); how the applicant will create MBEC brand recognition (marketing plan); and how the applicant will satisfy program performance goals. In particular, emphasis may be placed on the manner in which the applicant matches MBEC performance goals with client service hours and how it accounts for existing market conditions in its strategy to achieve such goals (10 points);

(b) *Start-up Phase*—How the applicant will commence MBEC operations within the initial 30-day period. The MBEC shall have thirty (30) days to become fully operational after an award is made (3 points); and

(c) *Work Requirement Execution Plan*—The applicant will be evaluated on how effectively and efficiently staff time will be used to achieve the work requirements, particularly with respect to periods beyond the start-up phase (7 points).

4. Proposed Budget and Budget Narrative (20 Points)

The applicant's proposal will be evaluated as follows:

(a) *Reasonableness, Allowability and Allocability of Proposed Program Costs.* All of the proposed program costs expenditures should be discussed and the budget line-item narrative must match the proposed budget. Fringe benefits and other percentage item calculations should match the proposed budget line-item and narrative (5 points);

(b) *Non-Federal Cost Share.* The required 20% non-Federal share must be adequately addressed and properly documented, including but not limited to how client fees (if proposed) will be used by the applicant in meeting the non-federal cost-share (5 points); and

(c) *Performance-Based Budgeting.* The extent to which the line-item budget and budget narrative relate to the accomplishment of the MBEC work requirements and performance measures (*i.e.*, performance-based budgeting) (10 points).

Bonus for Non-Federal Cost Sharing (maximum of 5 points): Proposals with non-federal cost sharing exceeding 20% of the total project costs will be awarded bonus points on the following scale: More than 20%—less than 25% = 1 point; 25% or more—less than 30% = 2 points; 30% or more—less than 35% = 3 points; 35% or more—less than 40% = 4 points; and 40% or more = 5 points. Non-federal cost sharing of at least 20% is required under the MBEC Program. Non-federal cost sharing is the portion of the total project cost not borne by the Federal Government and may be met by the applicant in any one or more of the following four means (or a combination thereof): (1) Client fees; (2) cash contributions; (3) non-cash applicant contributions; or, (4) third party in-kind contributions.

5. Oral Presentation—Optional (10 Points)

Oral presentations are optional and held only when requested by MBDA. This action may be initiated for the top two (2) ranked applications. Oral presentations will be used to establish a final evaluation and ranking.

The applicant's presentation will be evaluated as to the extent to which the presentation demonstrates:

(a) How the applicant will effectively and efficiently assist MBDA in the accomplishment of its mission (2 points);

(b) Business operating priorities designed to manage a successful MBEC (2 points);

(c) A management philosophy that achieves an effective balance between micromanagement and complete autonomy for its Project Director (2 points);

(d) Robust search criteria for the identification of a Project Director (1 point);

(e) Effective employee recruitment and retention policies and procedures (1 point); and

(f) A competitive and innovative approach to exceeding performance requirements (2 points).

Funding Priorities: Preference may be given during the selection process to applications which address the following MBDA funding priorities:

(a) Proposals that include performance goals that exceed by 10% or more the minimum performance goal requirements in the FFO;

(b) Applicants who demonstrate an exceptional ability to identify and work towards the elimination of barriers which limit the access of minority businesses to markets and capital;

(c) Applicants who demonstrate an exceptional ability to identify and work with minority firms seeking to obtain large-scale contracts and/or insertion into supply chains with institutional customers;

(d) Proposals that take a regional approach in providing services to eligible clients; or

(e) Proposals from applicants with pre-existing or established operations in the identified geographic service area.

Review and Selection Process

1. Initial Screening

Prior to the formal paneling process, each application will receive an initial screening to ensure that all required forms, signatures and documentation are present. An application will be considered non-responsive and will not be evaluated by the review panel if it is received after the closing date for receipt of applications, the applicant fails to submit an original, signed Form SF–424 by the application closing date (paper applications only), or the application does not provide for the operation of a MBEC. Other application deficiencies may be accounted for through point deductions during panel review.

2. Panel Review

Each application will receive an independent, objective review by a

panel qualified to evaluate the applications submitted. The review panel will consist of at least 3 persons, all of whom will be full-time federal employees and at least one of whom will be an MBDA employee, who will review the applications for a specified project based on the above evaluation criterion. Each reviewer shall evaluate and provide a score for each proposal. Each project review panel (through the panel Chairperson) shall provide the MBDA National Director (Recommending Official) with a ranking of the applications based on the average of the reviewers' scores and shall also provide a recommendation regarding funding of the highest scoring application.

3. Oral Presentation—Upon MBDA Request

MBDA may invite the two (2) top-ranked applicants to develop and provide an oral presentation. If an oral presentation is requested, the affected applicants will receive a formal communication (via standard mail, e-mail or fax) from MBDA indicating the time and date for the presentation. In-person presentations are not mandatory but are encouraged; telephonic presentations are acceptable. Applicants will be asked to submit a PowerPoint presentation (or equivalent) to MBDA that addresses the oral presentation criteria set forth above. The presentation must be submitted at least 24 hours before the scheduled date and time of the presentation. The presentation will be made to the MBDA National Director (or his/her designee) and up to three senior MBDA staff who did not serve on the original review panel. The oral panel members may ask follow-up questions after the presentation. MBDA will provide the teleconference dial-in number and pass code. Each applicant will present to MBDA staff only; competitors are not permitted to listen (and/or watch) other presentations.

All costs pertaining to this presentation shall be borne by the applicant. MBEC award funds may not be used as a reimbursement for this presentation. MBDA will not accept any requests or petitions for reimbursement.

The oral panel members shall score each presentation in accordance with the oral presentation criterion provided above. An average score shall be compiled and added to the score of the original panel review.

4. Final Recommendation

The MBDA National Director makes the final recommendation to the Grants Officer regarding the funding of one application under this competitive solicitation. MBDA expects to recommend for funding the highest ranking application, as evaluated and recommended by the review panel and taking into account oral presentations (as applicable). However, the MBDA National Director may not make any selection, or he/she may select an application out of rank order for the following reasons:

(a) A determination that an application better addresses one or more of the funding priorities for this competition. The National Director (or his/her designee) reserves the right to conduct one or more site visits (subject to the availability of funding), in order to make a better assessment of an applicant's capability to achieve the funding priorities; or

(b) The availability of MBDA funding.

Prior to making a final recommendation to the Grants Officer, MBDA may request that the apparent winner of the competition provide written clarifications (as necessary) regarding its application.

Authority: 15 U.S.C. Section 1512 and Executive Order 11625.

Catalog of Federal Domestic Assistance (CFDA): 11.800, Minority Business Enterprise Centers.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Limitation of Liability: Funding for the program listed in this notice is contingent upon the availability of FY 2009 appropriations. MBDA issues this notice subject to the appropriations made available under the current continuing resolution, H.R. 2638, ''Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009,'' Public Law 110–329. In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if the MBEC Program fails to receive funding or is cancelled because of Department of Commerce or MBDA priorities. All funding periods under the award are subject to the availability of funds to support the continuation of the project. Publication of this notice does not obligate MBDA or the Department of Commerce to award any specific project or to obligate any available funds.

Universal Identifier: Applicants should be aware that they will be required to provide a Dun and Bradstreet Data Universal Numbering system (DUNS) number during the application process. See the June 27, 2003 **Federal Register** notice (68 FR 38402) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or by accessing the Grants.gov Web site at *http://www.Grants.gov.*

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7696) are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF-LLL, and CD–346 have been approved by OMB under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provisions of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Executive Order 12866: This notice has been determined to be not significant for purposes of E.O. 12866.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits, or contracts (5 U.S.C. 533(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 533 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: January 16, 2009.

Edith J. McCloud,

Associate Director for Management, Minority Business Development Agency.

[FR Doc. E9–1525 Filed 1–23–09; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XL79

Marine Mammals; File No. 87–1591

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that Daniel P. Costa, Ph.D., Department of Biology and Institute of Marine Sciences, University of California, Santa Cruz, CA 95064 has been issued an amendment to Permit No. 87–1851–00.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: On November 18, 2008, notice was published in the **Federal Register** (73 FR 68416) that a request for an amendment to scientific research Permit No. 87–1851–00 had been submitted by the above-named individual. The requested amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The amended permit (No. 87–1851–01) expands the study area for tagging studies and physiological research on Antarctic seals to include the Weddell Sea. The permit amendment expires on January 31, 2012.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: January 14, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–1518 Filed 1–23–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM91

Mid-Atlantic Fishery Management Council (MAFMC); Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council), its Protected Resources Committee, its Annual Catch Limit/Accountability Measures (ACL/AM) Committee, its Law Enforcement Committee, its Research Set-Aside (RSA) Committee, its Ecosystems/Ocean Planning Committee, its Surfclam/Ocean Quahog Committee, its Squid, Mackerel, Butterfish Committee, and its Executive Committee will hold public meetings.

DATES: Wednesday, February 11, 2009 through Friday, February 13, 2009. On Wednesday, February 11 the Protected Resources Committee with its Advisors will meet from 8:30 a.m. until 10:30 a.m. The ACL/AM Committee will meet from 10:30 a.m. until noon. The Law Enforcement Committee will meet from 1:00 p.m. until 2:30 p.m. The RSA Committee will meet from 2:30 p.m. until 4:00 p.m. The Ecosystems/Ocean Planning Committee will meet from 4:00 p.m. until 5:30 p.m. There will be a scoping session for Amendment 14 to the Surfclam/Ocean Quahog FMP on Wednesday evening from 7:00 p.m. until 9:00 p.m.

On Thursday, February 12 the Surfclam/Ocean Quahog Committee will meet from 8:00 a.m. until 9:00 a.m. The Squid, Mackerel, Butterfish Committee will meet from 9:00 a.m. until 10:00 a.m. The Council will convene at 10:00 a.m. and from 10:00 a.m. until 11:00 a.m. will conduct its regular business session and receive organizational reports. From 11:00 a.m. until noon, the Council will receive a report regarding annual discards for 2008 and standardized bycatch reporting methodology prioritization for 2009. From 1:00 p.m. until 1:15 p.m. there will be an award presentation and recognition. From 1:15 p.m. until 2:00 p.m. the Council will receive a report on the Northeast Data Poor Stocks Workshop. From 2:00 p.m. until 5:30 p.m. there will be a public workshop on reducing butterfish bycatch in the Loligo fishery. On Friday, February 13 the Executive Committee will meet from 9:00 a.m. until 10:00 a.m. From 10:00 a.m. until noon the Council will receive a report on Status of Fishery Management Plans, the Executive Director's Report, Committee Reports, Liaison Report and discuss any continuing and new business.

ADDRESSES: Seaview Marriott Resort and Spa, 401 South New York Road, Galloway, NJ 08205; telephone: 609–652–1800.

Council Address: Mid-Atlantic Fishery Management Council, 300 S. New St., Room 2115, Dover, DE 19904; telephone: 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331 ext. 19.

SUPPLEMENTARY INFORMATION: Agenda items by day for the Council's Committees and the Council itself are: Wednesday, February 11 - the Protected Resources Committee with Advisors will discuss an industry request to modify the Bottle Nose Dolphin Take Reduction Team (TRT) Plan by adding one month to the current ''tending requirement'' period for medium gillnet fisheries and review and discuss Atlantic Trawl TRT strategy for pilot whales and common dolphin. The ACL/AM Committee will review and discuss the NMFS' Final Rule on ACL/AM, review and discuss table of current Council control rules, and address the action plan and associated timeline for implementation. The Law Enforcement Committee will discuss regulatory implications of transfer-at-sea authorizations, discuss regulatory implication of monitoring other than a daily trip limit in party/charter boat fisheries, and address implication of Maine's study/report on fixed gear vertical line locations and densities. The RSA Committee will convene a public fact finding and receive comments on the Council's RSA program. The Ecosystems/Ocean Planning Committee will receive a report on the Northeast Fisheries Science Center's (NEFSC) recent efforts regarding development of an ecosystem based approach to fishery management and develop the Committee's work plan for 2009. An evening scoping session for Amendment 14 to the Surfclam/Ocean Quahog FMP will be held to solicit the public's ideas about needed changes to the FMP.

Thursday, February 12 - the Surfclam/Ocean Quahog Committee will review and discuss scoping comments to decide and adopt management measures to be included in Amendment 14. The Squid, Mackerel, and Butterfish Committee will review and discuss the outcome of the January Committee

meeting to determine and select (if possible) preferred alternatives for Council consideration and inclusion in the Public Hearing document for Amendment 11. The Council will convene for its regular business session to receive various reports including a report by Dr. Rago (NMFS NEFSC) on ''Annual Discard Report for 2008 and the Standardized Bycatch Reporting Methodology Prioritization for 2009'' and a report by Dr. Weinberg (NMFS NEFSC) on the outcome of the Northeast Data Poor Workshop which included scup and black sea bass among others, the Council will also present its Fisheries Achievement Award. A public workshop will be held in the afternoon to encourage early adoption of voluntary fishing practices to reduce butterfish bycatch in the Loligo squid fishery. Discussion items will include: potential effects of implementation of Amendment 10 which would establish a butterfish bycatch mortality cap for the Loligo squid fishery in 2011, possible mitigation actions to avoid future closures of the Loligo fishery owing to attainment of the butterfish mortality cap. Current Loligo fishing practices will be reviewed with the intent to identify practices that contribute to butterfish bycatch. Information and data will be presented as catalysts for discussion purposes regarding problem identification and possible solutions. Friday, February 13 - the Executive Committee will review the outcome of the State-Federal Alignment Work Group meeting, receive results from Scientific and Statistical Committee (SSC) actions, and review the agenda for the Council Coordination Committee. The Council will receive a report on Status of MAFMC's FMPs, the Executive Director's report, Committee reports, and any continuing and new business.

Although non-emergency issues not contained in this agenda may come before the Council for discussion, these issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address such emergencies.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Bryan (302–674–2331 ext 18) at least five days prior to the meeting date.

Dated: January 21, 2009

Tracey L. Thompson,

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

[FR Doc. E9–1570 Filed 1–23–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM89

New England Fishery Management Council; Public Meeting

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

ACTION: Public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a three-day Council meeting on February 9–11, 2009 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Monday, February 9 beginning at 9:00 a.m., and Tuesday, February 10 and Wednesday, February 11, beginning at 8:30 a.m.

ADDRESSES: The meeting will be held at the Sheraton Harborside Hotel, 250 Market Street, Portsmouth, NH 03801; telephone: (603) 431–2300; fax: (603) 433–5649. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; telephone (978) 465–0492.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council, (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Monday, February 9, 2009

Following introductions and any announcements, the Council will receive a series of brief reports from the Council Chairman and Executive Director, the NOAA Fisheries Northeast Regional Administrator, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel, representatives of the U.S. Coast Guard and the Atlantic States Marine Fisheries Commission, as well as NOAA Enforcement. Presentations will be will be provided to the Council on the recent Data Poor Stocks Workshop and the Standard Bycatch Reporting Methodology annual report. For the latter, NMFS will solicit recommendations from the Council concerning the prioritization of observer coverage. The Council's Herring Committee will report during the afternoon session and review progress to date on the development of management alternatives for Amendment 4 to the Herring Fishery Management Plan (FMP). The focus of the action is catch monitoring, but measures also will address annual catch limits (ACLs) and accountability measures (AMs).

Tuesday, February 10, 2009

The meeting will begin with a brief overview of the NMFS final rule concerning procedures and voting eligibility requirements for referenda on Individual Fishing Quota program proposals in accordance with the new requirements of the Magnuson-Stevens Act. Time will then be allocated to discuss the NMFS Secretarial Interim Action for the Northeast Multispecies fishery, to be followed by discussion and approval of Draft Amendment 16 to the Northeast Multispecies FMP and it accompanying Environmental Impact Statement for review at public hearings.

Wednesday, February 11, 2009

The last day of the Council meeting will begin with, in the following order, possible consideration and approval of revisions to several Council operating policies, a review of recent experimental fishery permit applications and an open comment period during which any interested party may address the Council about fishery management related issues that are otherwise not listed on the agenda. These items will be followed by an overview of the NMFS final rule containing guidance on how to comply with the new annual catch limit (ACL) and accountability measure (AM) requirements in fishery management plans. Prior to a lunch break, the Council's Scientific and Statistical Committee will provide advice on the adequacy of the analyses that could form the basis of Amendment 3 to the Northeast Skate Complex FMP and Amendment 15 to the Scallop FMP. Council consideration of skate management measures will follow with a decision on whether to develop final alternatives for further consideration by the Council or to develop new management measures, based on the receipt of new as well as updated information. The Scallop Committee will ask the Council for approval of a range of alternatives under consideration for Amendment 15 to the Scallop FMP for purposes of completing

the analytical underpinings of the action. The amendment may address excess capacity and other changes to the scallop management program, including essential fish habitat closures and a change to scallop fishing year time frame. Finally, the Council will address any other outstanding business prior to adjournment of its February meeting.

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

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: January 21, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–1560 Filed 1–23–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XM90

Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) coastal pelagic species (CPS) advisory bodies will hold meetings, which are open to the public, on February 10–12, 2009. The primary purpose of the meetings is to comment on the draft terms of reference for the CPS stock assessment review process, review 2009 survey plans, develop plans for a report to the Council on long-term sardine allocation, and discuss revisions to the CPS Fishery Management Plan (FMP) in accordance with the reauthorized Magnuson-Stevens Fishery Conservation and Management Act.

DATES: The CPS Management Team (CPSMT) will meet on Tuesday, February 10, 2009, beginning at 1 p.m. and again on Wednesday, February 11, 2009, beginning at 8:30 a.m. Both meeting days will go until business for that day is completed. The CPS Advisory Subpanel (CPSAS) will meet Thursday, February 12, 2009, from 8:30 a.m. until business for the day is completed.

ADDRESSES: All meetings will be held in the Large Conference Room at the Southwest Fisheries Science Center of the National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, CA 92037, (858) 546–7000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Burner, Pacific Fishery Management Council, (503) 820–2280.

SUPPLEMENTARY INFORMATION: The CPSMT and CPSAS will also elect officers for 2009, discuss the 2009 Stock Assessment and Fishery Evaluation document, and address other issues relating to CPS management. The CPSMT and CPSAS will develop recommendations for Council consideration at its March 8–13, 2009 meeting in Seattle, Washington.

Although nonemergency issues not contained in the meeting agendas may be discussed, those issues may not be the subject of formal action during these meetings. Advisory body action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least five days prior to the meeting date.

Dated: January 21, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–1567 Filed 1–23–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Establishment of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Establishment of federal advisory committee.

SUMMARY: Under the provisions of section 596 of Public Law 110–417, the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is establishing the Military Leadership Diversity Commission (hereafter referred to as the Commission).

The Commission is a non-discretionary federal advisory commission established under the authority of section 596 of Public Law 110–417 and 41 CFR 102–3.50(a) to conduct a comprehensive evaluation and assessment of policies that provide opportunities for the promotion and advancement of minority members of the Armed Forces, including minority members who are senior officers.

In carrying out the study, the commission shall examine the following:

1. The efforts to develop and maintain diverse leadership at all levels of the Armed Forces.
2. The successes and failures of developing and maintaining a diverse leadership, particularly at the general and flag officer positions.
3. The effect of expanding Department of Defense secondary educational programs to diverse civilian populations, to include military service academy preparatory schools.
4. The ability of current recruitment and retention practices to attract and maintain a diverse pool of qualified individuals in sufficient numbers in officer pre-commissioning programs.
5. The ability of current activities to increase continuation rates for ethnic- and gender-specific members of the Armed Forces.
6. The benefits of conducting an annual conference attended by civilian military, active-duty and retired military, and corporate leaders on diversity, to include a review of current policy and the annual demographic data from the Defense Manpower Data Center.
7. The status of prior recommendations made to the Department of Defense and to Congress concerning diversity initiatives within the Armed Forces.

8. The incorporation of private sector practices that have been successful in cultivating diverse leadership.

9. The establishment and maintenance of fair promotion and command opportunities for ethnic- and gender-specific members of the Armed Forces at the 0–5 grade level and above.

10. An assessment of pre-command billet assignments of ethnic-specific members of the Armed Forces.

11. The development of a uniform definition, to be used throughout the Department of Defense, of diversity that is congruent with the core values and vision of the Department of Defense for the future workforce.

12. The existing metrics and milestones for evaluating the diversity plans of the Department of Defense (including the plans of the Military Departments) and for facilitating future evaluation and oversight.

13. The existence and maintenance of fair promotion, assignment, and command opportunities for ethnic- and gender-specific members of the Armed Forces at the levels of warrant officer, chief warrant officer, company and junior grade, field and mid-grade, and general and flag officer.

14. The current institution structure of the Office of Diversity Management and Equal Opportunity of the Department of Defense, and of similar officers of the Military Departments, and their ability to ensure effective and accountable diversity management across the Department of Defense.

15. The option available for improving the substance or implementation of current plans and policies of the Department of Defense and the Military Departments.

No later than 12 months after the date on which the commission first meets, the commission shall submit to the President and Congress a report on the commission's study. The report shall include, as a minimum, the following:

1. The findings and conclusions of the commission;

2. The recommendations of the commission for improving diversity within the Armed Forces; and

3. Such other information and recommendations as the commission considers appropriate.

In addition, the commission may submit interim reports to the President and Congress as the commission considers appropriate.

The commission, pursuant to section 596(d)(3) of Public Law 110–417, may consult with appropriate private, for profit, and non-profit organizations and advocacy groups to learn methods for developing, implementing, and sustaining senior diverse leadership within the Department of Defense. In addition, the commission, pursuant to section 596(f)(1) of Public Law 110–416, may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the commission considers appropriate.

Members shall be appointed for the life of the commission. Any vacancy in the commission shall be filled in the same manner as the original appointment. The commission, pursuant to section 596(b) of Public Law 110–416, shall be composed of the following members:

1. The Director of the Defense Manpower Data Center;

2. The Commandant of the Director of the Defense Equal Opportunity Management Institute;

3. A commissioned officer from each of the Army, Navy, Air Force, and Marine Corps who serves or has served in a leadership position with either a Military Department command or combatant command;

4. A commissioned officer or noncommissioned officer of the Coast Guard on active duty;

5. A retired general or flag officer from each of the Army, Navy, Air Force and Marine Corps;

6. A retired flag officer of the Coast Guard;

7. A retired noncommissioned officer from each of the Army, Navy, Air Force and Marine Corps;

8. Five retired commissioned officers who served in leadership positions with either a Military Department command or combatant command, of who no less than three shall represent the views of minority veterans;

9. Four individuals with expertise in cultivating diverse leaders in private or non-profit organizations; and

10. An attorney with appropriate experience and expertise in constitutional and legal matters related to the duties and responsibilities of the committee.

The appointment of the Director of the Defense Manpower Data Center and the Commandant of the Defense Equal Opportunity Management Institute shall be based upon their ex-officio position within the Department of Defense. Representatives for the incumbents may attend committee meetings; however, they shall not exercise any authority unless they have been appointed in writing, pursuant to DoD policies and procedures, as the Acting Director.

With the exception of the representatives of the U.S. Coast Guard, the Secretary of Defense shall appoint the commission members. Commission members appointed by the Secretary of Defense, who are not full-time or permanent part-time employees of the federal government, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109, and these individuals shall serve as special government employees.

Pursuant to section 596(g)(1) of Public Law 110–416, the Secretary of Homeland Security, in consultation with the Commandant of the Coast Guard, shall appoint two individuals to represent the interests of the U.S. Coast Guard.

Commission members, who are not full-time or permanent part-time federal employees, shall serve without compensation. All commission members shall be provided travel and per diem for official commission travel.

These experts and consultants shall be considered Special Government Employees, and their appointments, regardless of their term of office, shall be renewed by the Secretary of Defense on an annual basis.

The Secretary of Defense, pursuant to section 596(b)(3) of Public Law 110–416, shall designate one member as the chairman of the commission.

The commission, pursuant to section 596(c)(2) of Public Law 110–416, shall meet at the call of the chairman. Pursuant to section 596(b)(6) of Public Law 110–416, fifteen committee members shall constitute a quorum, but a lesser number may hold hearings.

The Department of Defense, pursuant to 41 CFR 102–3.105(i) and DoD policies and procedures, shall appoint a full-time or permanent part-time DoD employee to serve as commission's Designated Federal Officer. The Designated Federal Officer shall comply with existing federal statutes and regulations governing federal advisory committees, and shall attend all commission and subcommittee meetings.

The commission shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and other appropriate federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered commission, and shall report all their recommendations and advice to the commission for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered commission nor can they report directly to the Department of Defense or any

federal officers or employees who are not commission members.

FOR FURTHER INFORMATION CONTACT: Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Military Leadership Diversity Commission membership about the commission's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Military Leadership Diversity Commission.

All written statements shall be submitted to the Designated Federal Officer for the Military Leadership Diversity Commission, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Military Leadership Diversity Commission's Designated Federal Officer, once appointed, may be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Military Leadership Diversity Commission. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: January 14, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–1423 Filed 1–23–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Reserve Forces Policy Board (RFPB)

AGENCY: Department of Defense; Office of the Secretary of Defense Reserve Forces Policy Board.

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting of the Reserve Forces Policy Board (FRPB) will take place:

DATES: February 18, 2009 (8:30 a.m.–4 p.m.) and February 19, 2009 (8:30 a.m.–3 p.m.).

ADDRESSES: Meeting address is the Pentagon, Conference Room 3E863, Arlington, VA. Mailing address is Reserve Forces Policy Board, 7300 Defense Pentagon, Washington, DC 20301–7300.

FOR FURTHER INFORMATION CONTACT: Col Marjorie Davis, Designated Federal Officer, (703) 697–4486 (Voice), (703) 614–0504 (Facsimile), *marjorie.davis@osd.mil.* Mailing address is Reserve Forces Policy Board, 7300 Defense Pentagon, Washington, DC 20301–7300.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: An open meeting of the Reserve Forces Policy Board.

Agenda: Discussion of policy issues relevant to the Reserve Components.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public.

Committee's Designated Federal Officer: To request a seat, contact the Designated Federal Official (DFO) not later than February 11, 2009, at 703–697–4486, or by e-mail, *marjorie.davis@osd.mil* and/or *donald.ahern@osd.mil.* Mailing address is Reserve Forces Policy Board, 7300 Defense Pentagon, Washington, DC 20301–7300.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the membership of the Reserve Forces Policy Board at any time or in response to the stated agenda of a planned meeting. Written statements should be submitted to the Reserve Forces Policy Board's Designated Federal Officer. The Designated Federal Officer's contact information can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

Written statements that do not pertain to a scheduled meeting of the Reserve Forces Policy Board may be submitted at any time. However, if individual comments pertain to a specific topic being discussed at a planned meeting then these statements must be submitted no later than five business days prior to the meeting in question. The Designated Federal Officer will review all submitted written statements and provide copies to all the committee members.

Dated: January 14, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–1427 Filed 1–23–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2009–0013]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Department of the Air Force is proposing to alter a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on February 25, 2009, unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on January 14, 2009, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: January 15, 2009.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F036 AETC A

SYSTEM NAME:

Lead Management System (LMS) (October 16, 1997, 62 FR 53825).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''Lead Management System Records.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Prospective Air Force enlisted and officer personnel entering Active and Guard duty.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Name, Social Security Number (SSN), date of birth, mailing address, gender, telephone number, service number, recruiting program in which interested and source of referral, including name and Air Force base assigned.''

* * * * *

PURPOSE(S):

Delete entry and replace with ''The system will notify field recruiters of prospective Active and Guard applicants who have requested information and provide a central environment for storing recruiter contact records. Analysis of the data provides insight into which leads converted or cancelled, why they cancelled or converted, and what recruitment efforts generated high conversion rates. Summaries are used to evaluate the effectiveness of the advertising and referral programs.''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''By name, Social Security Number (SSN), home address or date of birth.''

SAFEGUARDS:

Delete entry and replace with ''Records are maintained in a controlled facility. Records are stored in locked rooms, cabinets, and computers. Access to computerized data is restricted by passwords, which are changed periodically. Access is limited to person(s) responsible with a need to know for servicing the system of record in performance of their official duties and those authorized personnel who are properly screened and cleared.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Retained for two years after end of fiscal year in which all actions are completed, and then records are destroyed by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by erasing, deleting or overwriting.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Chief, Strategic Communications Division, Headquarters, U.S. Air Force Recruiting Service, 550 D Street West, Suite 1, Randolph Air Force Base, TX 78150–4527.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to the Chief, Advertising Branch, Headquarters, U.S. Air Force Recruiting Service, 550 D Street West, Suite 01, Randolph Air Force Base, TX 78150–4527.

The individual should provide complete name, address, Social Security Number (SSN), date of birth, service number, and signature certified/verified by a notary public.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the Operations Division, Headquarters, Air Force Recruiting Service, 550 D Street West, Suite 1, Randolph AFB, TX 78150–4527.

The individual should provide complete name, address, Social Security Number (SSN), date of birth, service number, and signature certified/verified by a notary public.''

* * * * *

F036 AETC A

SYSTEM NAME:

Lead Management System Records.

SYSTEM LOCATION:

Headquarters, Air Force Recruiting Service, 550 D Street, Suite 01, Randolph Air Force Base, TX 78150–4527, and a contracted advertising agency provide recruitment advertising for the Air Force—location depends on the contractor.

Air Force Opportunity Center (AFOC). Contact the system manager for specific locations.

Air Force Recruiting activities. Official mailing addresses are published as an appendix to the Air Force's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS IN THE SYSTEM:

Prospective Air Force enlisted and officer personnel entering Active and Guard duty.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), date of birth, mailing address, gender, telephone number, service number, recruiting program in which interested and source of referral, including name and Air Force base assigned.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 503, Enlistments; Air Education and Training Command Instruction 36–2002 and E.O. 9397 (SSN).

PURPOSE(S):

The system will notify field recruiters of prospective Active and Guard applicants who have requested information and provide a central environment for storing recruiter contact records. Analysis of the data provides insight into which leads converted or cancelled, why they cancelled or converted, and what recruitment efforts generated high conversion rates. Summaries are used to evaluate the effectiveness of the advertising and referral programs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic storage media.

RETRIEVABILITY:

By name, Social Security Number (SSN), home address or date of birth.

SAFEGUARDS:

Records are maintained in a controlled facility. Records are stored in

locked rooms, cabinets, and computers. Access to computerized data is restricted by passwords, which are changed periodically. Access is limited to person(s) responsible with a need to know for servicing the system of record in performance of their official duties and those authorized personnel who are properly screened and cleared.

RETENTION AND DISPOSAL:

Retained for two years after end of fiscal year in which all actions are completed, and then records are destroyed by tearing into pieces, shredding, pulping, macerating or burning. Computer records are destroyed by erasing, deleting or overwriting.

SYSTEM MANAGER(S) AND ADDRESS:

Chief, Strategic Communications Division, Headquarters, U.S. Air Force Recruiting Service, 550 D Street West, Suite 1, Randolph Air Force Base, TX 78150–4527.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information on themselves should address written inquiries to the Chief, Advertising Branch, Headquarters, U.S. Air Force Recruiting Service, 550 D Street West, Suite 01, Randolph Air Force Base, TX 78150–4527.

The individual should provide complete name, address, Social Security Number (SSN), date of birth, service number, and signature certified/verified by a notary public.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Operations Division, Headquarters, Air Force Recruiting Service, 550 D Street West, Suite 1, Randolph AFB, TX 78150–4527.

The individual should provide complete name, address, Social Security Number (SSN), date of birth, service number, and signature certified/verified by a notary public.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 37–132; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual respondent and automated system interfaces.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–1436 Filed 1–23–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Availability for Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Provisional Patent Application Concerning Computer Controlled System for Laser Energy Delivery to the Retina

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/116,931 entitled ''Computer Controlled System for Laser Energy Delivery to the Retina,'' filed November 21, 2008. The United States Government, as represented by the Secretary of the Army, has rights in this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, *Attn:* Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research & Technology Assessment, (301) 619–6664, both at telefax (301) 619–5034.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E9–1634 Filed 1–23–09; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors, United States Military Academy (USMA)

AGENCY: Department of the Army, DoD.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place:

1. *Name of Committee:* United States Military Academy Board of Visitors.

2. *Date:* Wednesday, February 11, 2009.

3. *Time:* 1 p.m.–4 p.m. Members of the public wishing to attend the meeting will need to show photo identification in order to gain access to the meeting location. All participants are subject to security screening.

4. *Location:* Room 385, Senate Russell Office Building, Washington DC 20510.

5. *Purpose of the Meeting:* This is the 2009 Organizational Meeting of the USMA Board of Visitors (BoV). Members of the Board will be provided updates on Academy issues.

6. *Agenda:* The Academy leadership will provide the Board updates on the following: Accreditation, United States Military Academy Preparatory School (USMAPS) move to West Point, Sexual Assault/Sexual Harassment, Suicide Awareness and Prevention, Resource Update, Class of 2009 Update, and Incoming Class of 2013. The Board will discuss proposed meeting dates for the 2009 Spring and Summer meetings, and will hold elections for the 2009 Chairperson and Vice-Chairperson.

7. *Public's Accessibility to the Meeting:* Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

8. *Committee's Designated Federal Officer or Point of Contact:* Lieutenant Colonel (LTC) Paul S. Sarat, Jr., (845) 938–4200, *paul.sarat@us.army.mil.*

SUPPLEMENTARY INFORMATION: Any member of the public is permitted to file a written statement with the USMA Board of Visitors. Written statements should be sent to the Designated Federal Officer (DFO) at: United States Military Academy, Office of the Secretary of the General Staff (MASG), 646 Swift Road, West Point, NY 10996–1905 or faxed to the Designated Federal Officer (DFO) at (845) 938–3214. Written statements must be received no later than five working days prior to the next meeting in order to provide time for member consideration. By rule, no member of the public attending open meetings will be allowed to present questions from the floor or speak to any issue under consideration by the Board.

FOR FURTHER INFORMATION CONTACT: LTC Paul S. Sarat, Jr., (845) 938–4200 (fax 845–938–3214) or via e-mail: *paul.sarat@us.army.mil.*

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E9–1631 Filed 1–23–09; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Intent To Prepare an Environmental Impact Statement for the Missouri River Ecosystem Restoration Plan, Missouri River Basin, United States

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended and in furtherance of the Water Resources Development Act of 2007, the U.S. Army Corps of Engineers, Kansas City and Omaha Districts, intend to prepare the Missouri River Ecosystem Restoration Plan and Environmental Impact Statement (plan/EIS). In developing the plan, the Corps must study actions required to mitigate habitat losses of aquatic and terrestrial habitat, recover federally listed species under the Endangered Species Act and restore ecosystem functions to prevent further declines among other native species. During an extended scoping process, we will invite comment on the draft purpose and need statements for the plan/EIS.

The plan/EIS will describe a range of alternatives for achieving the purpose of the plan and assess the effects of those alternatives, including a preferred alternative, on the human environment as defined by NEPA. The goal of this planning effort is to develop and implement a single, comprehensive and integrated plan to guide the implementation of programs associated with mitigation, recovery, and restoration activities in the Missouri River Basin.

ADDRESSES: Public scoping on this plan will begin May 1, 2009. A future notice will identify how written comments and suggestions concerning the plan may be submitted. Please see *http://www.mrerp.org* for additional information. Please see the Scoping and Public Involvement section below.

FOR FURTHER INFORMATION CONTACT: For further information and/or questions about the proposed plan/EIS, please contact Ms. Jennifer Switzer, Project Manager, by telephone: (816) 389–3062, by mail: 601 E. 12th Street, Kansas City, MO 64106, or by e-mail: *jennifer.l.switzer@usace.army.mil*, or Randy Sellers, Project Manager, by telephone (402) 995–2689, by mail: 1616 Capitol Avenue, Omaha, NE 68102, or by e-mail: *randy.p.sellers@usace.army.mil.* For inquiries from the media, please contact the Corps, Kansas City District Public Affairs Officer (PAO), Mr. David Kolarik by *telephone:* (816) 389–3486, *by mail:* 601 E. 12th Street, Kansas City, MO 64106, or by e-mail: *david.s.kolarik@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

1. Description of Proposed Plan. Encompassing an area of approximately 530,000 square miles and a number of governing entities, including ten states, two Canadian provinces and 28 Native American tribes, the Missouri River Basin is the second largest river basin in the United States. From its source at Three Forks, Montana the Missouri River flows east and southeast for a total of 2,341 miles before emptying into the Mississippi River, just north of St. Louis, Missouri, making it the longest river in the United States. The Missouri River passes through a variety of physiographic provinces, provides various habitats to diverse populations of flora and fauna, contains numerous cultural resources, and supports a variety of human uses. Due to its geographic scale and diverse characteristics, the management of the Missouri River falls under a variety of the U.S. Army Corps of Engineers' (the USACE) authorities and programs as well as other programs and authorities sponsored by other agencies.

The most significant human alterations to the Missouri River began as early as the late 1800s with the removal of snags in the river to improve the safety of navigation. Alterations to the river continued into the twentieth century. At the request of Congress, the USACE enhanced navigation, built dams, and regulated river flows. Simultaneously, land use changes affecting the river's floodplain occurred creating a river system very different from its pre-alteration condition. Today, the Missouri River supports less natural habitat, reduced populations of native species and communities, and reduced variability of physical processes such as flows, flooding, and sediment erosion/deposition [i.e., hydrology and geomorphology] needed to support a functioning Missouri River ecosystem.

Subsection (a) of Section 5018 of the Water Resources Development Act of 2007 (WRDA 2007) directs the Secretary of the Army, in consultation with the Missouri River Recovery Implementation Committee to conduct a study of the Missouri River and its tributaries to determine actions required to: (1) Mitigate losses of aquatic and terrestrial habitat; (2) recover federally listed species under the Endangered Species Act; and (3) restore the ecosystem to prevent further declines among other native species. The study described under Section 5018(a) is the Missouri River Ecosystem Restoration Plan and EIS. The plan/EIS will identify a single, comprehensive strategy to guide the implementation of programs associated with mitigation, recovery, and restoration activities in the Missouri River Basin. The plan/EIS will be conducted in accordance with ER 1105–2–100 and will follow a watershed approach consistent with the geographic scope and complexity of issues within the Missouri River Basin.

2. Alternatives. In compliance with the requirements of NEPA, a range of alternative strategies will be developed to address the purpose of and need for the plan while staying within the bounds of identified constraints. In developing these alternatives, multiple objectives (specific, measurable statements of the outcome or end state that restoration and management actions aim to achieve) and associated strategic actions (management, restoration and research activities functioning together to achieve an objective) will be identified and combined into several alternatives. The alternatives considered will include adaptive management strategies to allow changes and modification to the selected alternative as conditions warrant based on a described monitoring regime. Additionally, existing management objectives and related actions and activities that constitute the no action alternative will be described. Given the scope and complexity of this plan/EIS, regular and extended public scoping will occur related to the development of draft alternatives.

3. Scoping and Public Involvement Process. Multiple phases of public, agency, and tribal government scoping meetings will be conducted throughout the Missouri River Basin. The first official phase of public scoping will occur from May 2009 to December 2009 and address the plan purpose, need, and target resource conditions. This scoping period will be officially announced through the publication of an additional notice. Additional scoping phases will take place to address baseline conditions, issues, and preliminary alternatives. Dates for these scoping phases have not yet been determined. General concerns, issues, and/or needs related to the plan will also be obtained throughout all scoping phases. For more information on scoping phases, dates, meeting locations, and general information, please visit *http://www.mrerp.org.*

4. Significant Issues. Issues associated with the proposed plan to be given

significant analysis in the plan/EIS are likely to include, but may not be limited to, native species declines, including effects of invasive species; degraded and lost habitat and prevention of future losses of habitat and resources; loss of ecosystem function including an altered hydrograph and reduced sediment load; statutory responsibilities, such as complying with the Endangered Species Act; criteria, goals and objectives and priorities for restoration; program, authority, and data gaps, including identification of new strategies for mitigation, recovery, and restoration efforts; and cumulative impacts. The plan/EIS will also include identification and analysis of the social, economic, and cultural impacts of the various alternatives, as well as important ecosystem functions.

5. Cooperating Agencies. Federal agencies, Tribes, and state governments are being invited to participate in the planning process as cooperating agencies under the NEPA.

6. Additional Review and Consultation. Additional public, scientific, and statutory review and consultation, which will be incorporated into the preparation of this EIS, will include, but shall not be limited to: Section 401 of Clean Water Act, Fish and Wildlife Coordination Act, the Magnuson-Stevens Fishery Conservation and Management Act, the National Environmental Policy Act, the National Historic Preservation Act; the Endangered Species Act, and the Clean Air Act. In addition, as directed by WRDA 2007, the development of this plan will be done in consultation with the Missouri River Recovery Implementation Committee.

7. Availability of the Draft Environmental Impact Statement. The Draft Environmental Impact Statement (DEIS) is anticipated to be available as early as November of 2013 or, no later than January of 2014. A series of public meetings will be conducted following the release of the DEIS.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. E9–1629 Filed 1–23–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Flood Control, Mississippi River & Tributaries, Yazoo River Basin, Yazoo Headwaters Project, Mississippi Tributaries Unit

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers, Vicksburg District, in conjunction with the Yazoo-Mississippi Delta Levee District, the non-Federal sponsor, is undertaking studies to evaluate the authorized Yazoo Headwaters Project. As part of this work, a Supplemental Environmental Impact Statement (SEIS) is being prepared to update existing National Environmental Policy Act documentation.

DATES: Initiate SEIS, February 2, 2009.

ADDRESSES: Correspondence may be sent to Mr. Matthew Mallard, U.S. Army Engineer District, Vicksburg, CEMVK–PP–PQ, 4155 Clay Street, Vicksburg, MS 39183–3435.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Mallard at U.S. Army Corps of Engineers, Vicksburg District, telephone (601) 631–5960, fax (601) 631–5115, or e-mail at *matthew.s.mallard@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

Proposed Action. An SEIS will identify and evaluate impacts associated with construction in the remaining authorized Yazoo Tributaries subbasins, including channel improvement, levee construction and enlargement, associated water control structures, bank stabilization, grade control measures, and environmental design features.

Alternatives. Alternative urban and agricultural flood protection measures will be identified to meet existing and future flood protection needs and evaluated in cooperation with state and Federal agencies, local government, and the public.

Scoping. Scoping is the process for determining the range of the alternatives and significant issues to be addressed in the SEIS. For this analysis, a letter will be sent to all parties believed to have an interest in the analysis, requesting their input on alternatives and issues to be evaluated. The letter will also notify interested parties of the public scoping meeting that will be held in the local area. A notice will be sent to the local news media. All interested parties are invited to comment at this time, and anyone interested in the study should request to be included on the mailing list.

A public scoping meeting will be held March 2, 2009, from 7 to 9 p.m. at the Leflore County Civic Center, 200 Highway 7 North, Greenwood, MS 38930, and March 3, 2009, from 7 to 9 p.m. at the Marks Community House, Pecan Street, Marks, MS 38646.

Significant Issues. The tentative list of resources and issues to be evaluated in the SEIS includes aquatic resources, recreational and commercial fisheries, wildlife resources, water quality, air quality, threatened or endangered species, recreation resources, and cultural resources. Tentative socioeconomic items to be evaluated in the SEIS include business and industrial activity, tax revenues, population, community and regional growth, transportation, housing, community cohesion, and navigation.

Environmental Consultation and Review. The U.S. Fish and Wildlife Service (FWS) will be asked to assist in the documentation of existing conditions, impact analysis of alternatives, and overall study review through the Fish and Wildlife Coordination Act (FWCA) consultation procedures. The FWS would provide an FWCA report to be incorporated into the SEIS. The draft SEIS or a Notice of Availability will be distributed to all interested agencies, organizations, and individuals.

Estimated Date of Availability. The earliest that the draft SEIS is expected to be available is September 2012.

Dated: January 13, 2009.

Douglas J. Kamien,

Chief, Planning, Programs, and Project Management Division.

[FR Doc. E9–1627 Filed 1–23–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Compliance Agreement

AGENCY: Department of Education.

ACTION: Notice of written findings and compliance agreement with the Nevada Department of Education.

SUMMARY: This notice is being published in the **Federal Register** consistent with section 457(b)(2) of the General Education Provisions Act (GEPA). Section 457 of GEPA authorizes the U.S. Department of Education (the Department) to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements. In order to enter

into a compliance agreement, the Department must determine, in written findings, that the recipient cannot comply with the applicable program requirements until a future date.

On December 4, 2008, the Department entered into a compliance agreement with the Nevada Department of Education (NDE). Section 457(b)(2) of GEPA requires the Department to publish written findings leading to a compliance agreement, with a copy of the compliance agreement, in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Sharon Hall, U.S. Department of Education, Office of Elementary and Secondary Education, 400 Maryland Avenue, SW., room 3W214, Washington, DC 20202–6132. Telephone: (202) 260–0998.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: Title I of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Under Title I, each State is required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Title I also requires each State to implement a student assessment system to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12.

In addition to a general assessment, Title I requires States to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

In June 2007, NDE submitted evidence of its standards and assessment system. The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) submitted that evidence to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that NDE's standards and assessment system did not meet a number of the Title I requirements.

Section 454 of GEPA, 20 U.S.C. 1234c, sets out the remedies available to the Department when it determines that a recipient ''is failing to comply substantially with any requirement of law'' applicable to Federal program funds the Department administers. Specifically, the Department is authorized to—

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law. 20 U.S.C. 1234c(a).

In a letter dated September 21, 2007, to Keith W. Rheault, Nevada's Superintendent of Public Instruction, the Assistant Secretary notified NDE that, in order to remain eligible to receive Title I funds, it would have to enter into a compliance agreement with the Department. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f (a). In order to enter into a compliance agreement with a recipient, the Department must determine, in written findings, that the recipient cannot comply until a future date with the applicable program requirements.

In accordance with the requirements of section 457(b) of GEPA, 20 U.S.C 1234f (b), on June 23, 2008, Department officials conducted a public hearing in Nevada to assess whether a compliance agreement with NDE might be appropriate. Keith W. Rheault, Nevada's Superintendent of Public Instruction, testified at this hearing on behalf of NDE. The Department considered the testimony provided at the June 2008 public hearing and all other relevant information and materials and concluded that NDE would not be able to correct its non-compliance with Title I standards and assessment requirements immediately.

On January 12, 2009, the Assistant Secretary issued written findings holding that compliance by NDE with the Title I standards and assessment requirements is genuinely not feasible until a future date. Under Title I, NDE was required to implement its final assessment system no later than the 2005–2006 school year. The evidence that NDE submitted in June 2007 indicated that, well after the statutory deadline had passed, its standards and assessment system still did not fully meet Title I requirements. In addition, the compliance agreement sets out the action plan that NDE must implement to come into compliance with Title I requirements. Due to the enormity and complexity of the work that is needed to bring NDE's standards and assessment system into full compliance, NDE cannot immediately comply with all of the Title I requirements.

Nevada's Superintendent of Public Instruction, Keith W. Rheault, signed the compliance agreement on December 1, 2008, and the Assistant Secretary signed the compliance agreement on December 4, 2008.

As required by section 457(b)(2) of GEPA, 20 U.S.C. 1234f (b)(2), the text of the Assistant Secretary's written findings is set forth as Appendix A and the compliance agreement is set forth as Appendix B of this notice.

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Authority: 20 U.S.C. 1234c, 1234f.

Dated: January 16, 2009.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

Appendix A

Written Findings of the Assistant Secretary for Elementary and Secondary Education Regarding the Compliance Agreement Between the United States Department of Education and the Nevada Department of Education

I. Introduction

The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) of the U.S. Department of Education (Department) has determined, pursuant to 20 U.S.C. 1234c and 1234f, that the Nevada Department of Education (NVDOE) has failed to comply substantially with certain requirements of Title I, Part A of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.*, and that it is not feasible for NVDOE to achieve full compliance immediately. Specifically, the Assistant Secretary has determined that NVDOE did not meet, within the statutory timeframe, a number of the Title I requirements concerning the alignment of Nevada's High School Proficiency Examination (HSPE) to grade-level content standards as well as requirements concerning the academic achievement standards and alignment of the Nevada Alternate Scales of Academic Achievement (NASAA), Nevada's alternate assessment based on alternate academic achievement standards for students with the most significant cognitive disabilities.

For the following reasons, the Assistant Secretary has concluded that it would be appropriate to enter into a compliance agreement with NVDOE to bring it into full compliance as soon as feasible. During the effective period of the compliance agreement, which ends December 4, 2011, NVDOE will be eligible to receive Title I funds as long as it complies with the terms and conditions of the agreement as well as the provisions of Title I and other applicable Federal statutory and regulatory requirements.

II. Relevant Statutory and Regulatory Provisions

A. Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the No Child Left Behind Act of 2001

Title I provides financial assistance, through State educational agencies, to local educational agencies to provide services in high-poverty schools to students who are failing or at risk of failing to meet the State's student academic achievement standards. Under Title I, each State, including the District of Columbia and Puerto Rico, was required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;
- Be designed to provide coherent information about student attainment of State academic content standards across grades and subjects;
- Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited English proficient (LEP) students;
- Be aligned with the State's academic content and student academic achievement standards;
- Express student results in terms of the State's student academic achievement standards;
- Be valid, reliable, and of adequate technical quality for the purposes for which they are used and be consistent with nationally recognized professional and technical standards;
- Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
- Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
- Enable results to be disaggregated by gender, each major racial and ethnic group, migrant status, students with disabilities, English proficiency status, and economically disadvantaged students;
- Provide individual student reports; and
- Enable itemized score analyses.

20 U.S.C. 6311(b)(3); 34 CFR 200.2.

In addition to a general assessment, States were required to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. 34 CFR 200.6(a)(2). An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

B. The General Education Provisions Act

The General Education Provisions Act (GEPA) provides a number of options when the Assistant Secretary determines a recipient of Department funds is ''failing to comply substantially with any requirement of law applicable to such funds.'' 20 U.S.C. 1234c. In such a case, the Assistant Secretary is authorized to:

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law.

20 U.S.C. 1234c(a).

Under section 457 of GEPA, the Assistant Secretary may enter into a compliance agreement with a recipient that is failing to comply substantially with specific program requirements. 20 U.S.C. 1234f. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f(a). Before entering into a compliance agreement with a recipient, the Assistant Secretary must hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. At that hearing, the recipient has the burden of persuading the Assistant Secretary that full compliance with applicable requirements of law is not feasible until a future date. 20 U.S.C. 1234f(b)(1). If, on the basis of all the evidence presented, the Assistant Secretary determines that full compliance is genuinely not feasible until a future date, the Assistant Secretary must make written findings to that effect and must publish those findings, together with the substance of any compliance agreement, in the **Federal Register**. 20 U.S.C. 1234f(b)(2).

A compliance agreement must set forth an expiration date, not later than three years

from the date of the written findings, by which time the recipient must be in full compliance with all program requirements. 20 U.S.C. 1234f(c)(1). In addition, a compliance agreement must contain the terms and conditions with which the recipient must comply during the period that agreement is in effect. 20 U.S.C. 1234f(c)(2). If the recipient fails to comply with any of the terms and conditions of the compliance agreement, the Assistant Secretary may consider the agreement to be no longer in effect, and may take any of the compliance actions set forth above. 20 U.S.C. 1234f(d).

III. Analysis

In deciding whether a compliance agreement between the Assistant Secretary and NVDOE is appropriate, the Assistant Secretary must determine whether compliance by NVDOE with the Title I standards and assessment requirements is genuinely not feasible until a future date. 20 U.S.C. 1234f(b)(2).

A. NVDOE Has Failed To Comply Substantially With Title I Standards and Assessment Requirements

In June 2007, NVDOE submitted evidence of its standards and assessment system. The Assistant Secretary submitted that evidence to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that NVDOE's standards and assessment system did not meet a number of the Title I requirements. Specifically, the Assistant Secretary determined that, to demonstrate its compliance, NVDOE had to submit the following evidence regarding its alternate assessment based on alternate academic achievement standards:

Academic Achievement Standards

1. A clear and complete description of the process and decisions made in the development of the Nevada Alternate Scales of Academic Achievement (NASAA) standards for reading and mathematics, including the qualifications of participants in the standards-setting activity.

2. Documentation confirming Board approval of the revised cut scores that were applied to the 2007 results of the NASAA.

Technical Quality

1. Data that supports the current policy that accommodations yield valid scores and modifications do not.

Alignment

1. A detailed explanation of the actions that will be taken to ensure improved alignment between assessments and revised content standards as the basis for test validity.

2. Evidence of alignment of the High School Proficiency Examination (HSPE) with Nevada's academic content standards.

3. A plan for using alignment study results to guide future development activities to improve alignment of the tests to standards.

4. Documentation of alignment between the NASAA tasks administered by teachers and grade-level content standards.

B. NVDOE Cannot Correct Immediately Its Noncompliance With the Title I Standards and Assessment Requirements

Under Title I, NVDOE was required to implement its final assessment system no later than the 2005–2006 school year. 20 U.S.C. 6311(b)(3). The evidence that NVDOE submitted in June 2007 indicated that, well after the statutory deadline had passed, its standards and assessment system still did not fully meet Title I requirements. In addition, substantial work is required to bring NVDOE into compliance with the Title I requirements.

At the public hearing, which was held on June 23, 2008, NVDOE presented evidence that compliance is not feasible until a future date, particularly in light of the work necessary to come into full compliance with the Title I standards and assessment requirements. In particular, Dr. Keith W. Rheault, Nevada's Superintendent of Public Instruction, testified that NVDOE is committed to resolving all outstanding issues related to the State's high school proficiency assessment (HSPE) and its alternate assessment based on alternate academic achievement standards (NASAA) within three years, but that it would not be possible for Nevada to come into compliance with all applicable requirements sooner than the 2010–11 school year. Dr. Rheault stated that, during the period the compliance agreement is in effect, NVDOE plans to align the HSPE to the State's new reading and mathematics content standards and to field test both the reading and mathematics assessments. Dr. Rheault also testified that NVDOE remains committed to assessing student performance on the NASAA through a portfolio of student work, but that NVDOE needs time to ensure that districts and teachers receive all training necessary to implement the changes being made to the NASAA. Dr. Rheault's testimony is consistent with the comprehensive action plan that NVDOE developed and that is incorporated into the compliance agreement. That action plan sets out a very specific schedule that NVDOE has agreed to meet during the next three years for completing all of the work necessary to attain compliance with the Title I standards and assessment requirements.

Due to the enormity and complexity of the work that is needed to bring NVDOE's standards and assessment system into full compliance, NVDOE cannot immediately comply with all of the Title I requirements. As a result, the Assistant Secretary finds that it is not genuinely feasible for NVDOE to come into compliance until a future date.

IV. Conclusion

For the foregoing reasons, the Assistant Secretary finds that full compliance by NVDOE with the standards and assessment requirements of Title I is genuinely not feasible until a future date. Therefore, the Assistant Secretary has determined that it is appropriate to enter into a compliance agreement with NVDOE.

Dated: Jan. 12, 2009.

/s/ _____

Kerri L. Briggs, Ph.D.,

Assistant Secretary for Elementary and Secondary Education.

Appendix B

Compliance Agreement Under Title I of the Elementary and Secondary Education Act Between the United States Department of Education and the Nevada Department of Education

Title I of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Each State was required to adopt academic content and achievement standards in at least mathematics, reading/language arts, and, beginning in the 2005–2006 school year, science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic standards. By the 2005–2006 school year, States were required to administer mathematics and reading/language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;
- Be designed to provide coherent information about student attainment of State standards across grades and subjects;
- Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited-English-proficient students;
- Be aligned with the State's content and achievement standards;
- Express student results in terms of the State's student achievement standards;
- Be valid, reliable, and of adequate technical quality for the purpose for which they are used and be consistent with nationally recognized professional and technical standards;
- Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
- Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
- Enable results to be disaggregated by gender, each major racial and ethnic group,

migrant status, students with disabilities, LEP students, and economically disadvantaged students;

- Provide individual student reports; and
- Enable itemized score analyses.

In addition to a general assessment, States were required to develop at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level achievement standards, alternate achievement standards, or modified achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

The Nevada Department of Education (NVDOE) failed to timely meet certain of the statutory and regulatory requirements for its standards and assessment system. In order to be eligible to continue to receive Title I funds while working to comply with the requirements, Keith Rheault, Superintendent of Education, indicated NVDOE's interest in entering into a compliance agreement with the United States Department of Education (Department). On June 23, 2008, the Department conducted a public hearing regarding: (1) whether NVDOE's full compliance with Title I is not feasible until a future date; and (2) whether NVDOE is able to come into compliance with the Title I standards and assessment requirements within three years.

Pursuant to this Compliance Agreement under 20 U.S.C. Section 1234f, NVDOE must be in full compliance with the outstanding requirements of Title I no later than three years from the date of the Assistant Secretary's written findings, a copy of which is attached to, and incorporated by reference into, this Agreement. To achieve compliance with the standards and assessment requirements, NVDOE must submit the following evidence:

2.0—Academic Achievement Standards

1. A clear and complete description of the process and decisions made in the development of the Nevada Alternate Scales of Academic Achievement (NASAA) standards for reading and mathematics, including the qualifications of participants in the standards-setting activity.

2. Documentation confirming Board approval of the revised cut scores that were applied to the 2007 results of the NASAA.

4.0—Technical Quality

1. Data that supports the current policy that accommodations yield valid scores and modifications do not.

5.0—Alignment

2. A detailed explanation of the actions that will be taken to ensure improved alignment between assessments and revised content standards as the basis for test validity.

3. Evidence of alignment of the High School Proficiency Examination (HSPE) with Nevada's academic content standards.

4. A plan for using alignment study results to guide future development activities to improve alignment of the tests to standards.

5. Documentation of alignment between the NASAA tasks administered by teachers and grade-level content standards.

During the period that this Compliance Agreement is in effect, NVDOE is eligible to receive Title I, Part A funds if it complies with the terms and conditions of this Agreement, as well as the provisions of Title I, Part A and other applicable Federal statutory and regulatory requirements that are not specifically addressed by this Agreement. The attached action steps constitute a detailed plan and specific timeline for how NVDOE will come into compliance with the Title I standards and assessment requirements. The action steps are incorporated by reference into this Compliance Agreement as though fully set forth herein and may be amended by joint agreement of the parties, provided full compliance is still feasible by the expiration of the Agreement.

In addition to all of the terms and conditions set forth above, NVDOE agrees that its continued eligibility to receive Title I, Part A funds is predicated upon its compliance with all statutory and regulatory requirements of that program, including those that are not specifically addressed by this Agreement, including any amendments to the No Child Left Behind Act of 2001.

If NVDOE fails to comply with any of the terms and conditions of this Compliance Agreement, including the action steps attached hereto, the Department may consider the Agreement no longer in effect and may take any action authorized by law, including the withholding of funds or the issuance of a cease and desist order. 20 U.S.C. 1234f(d).

It is so agreed.

For the Nevada Department of Education:

/s/ _____

Keith Rheault,

Superintendent of Education.

Date: Dec. 1, 2008.

For the United States Department of Education:

/s/ _____

Kerri L. Briggs, Ph.D.,

Assistant Secretary, Office of Elementary and Secondary Education.

Date: Dec. 4, 2008.

Date this Compliance Agreement becomes effective: Dec. 4, 2008.

Expiration Date of this Agreement: Dec. 4, 2011.

BILLING CODE 4000–01–P

Action Plan for Federal Compliance Agreement

Nevada Department of Education 2008-2011

Gen	Alt	Activity	Start Date	End Date	Staff	Resources Needed	TAC /Stakeholder Input and/or Participation	1) Content Standards			2) Academic Achievement Standards						3) Statewide Assessment System			4) Technical Quality						5) Alignment							6) Inclusion				7) Assessment Reports					Date to USED	Document(s) to USED
								1.1	1.3	1.4	2.1	2.3	2.4	2.5	2.6	3.4	3.6	3.7	4.1	4.2	4.3	4.4	4.5	4.6	5.1	5.2	5.3	5.4	5.5	5.6	5.7	6.1	6.2	6.3	6.4	7.1	7.2	7.3	7.4	7.5		
X		Math Standards Revised & Approved By Academic Standards Council	Mar-05	Jan-06	Dave	Gather list of participants, agendas, support documents, & other materials			X	X																																Nov-08	List of Participants & Agendas
X		Math Standards Approved By Nevada State Board Of Education	Mar-06	Mar-06	Cindy	Get copy of Board Minutes from Front Office		X																																		Nov-08	Copy of Board Minutes & Minutes from Academic Standards Council
X		English Language Arts Standards Revised & Approved By Academic Standards Council	Mar-06	Aug-07	Tracy	Gather list of participants, agendas, support documents, & other materials			X	X																																Nov-08	List of Participants & Agendas
X		Create Draft Of Academic Achievement Standards For Math & ELA	Jan-07	Nov-08	Cindy, Dave, & Tracy	Mostly completed, but needs to be edited for changes related to DOK	TAC & Stakeholders					X	X		X																											Nov-08	Draft Academic Achievement Standards (not including cut scores)
X		English Language Arts Standards Approved By Nevada State Board Of Education	Nov-07	Nov-07	Cindy	Get copy of Board Minutes from Front Office		X																																		Nov-08	Copy of Board Minutes & Minutes from Academic Standards Council

X		CRESST Testing Accommodation Study	Jan-08	Oct-08	Cindy & Carol	Study is being conducted by CRESST staff in cooperation with Nevada School Districts	Nevada School districts																	X									X									
X		EAG Testing Accommodation Study	Feb-08	Jun-09	Cindy & Carol	Nevada is part of a consortium of states participating on an EAG and is working with Measured Progress, WestEd, & EAG staff to produce an aligned 7th grade math test form to be administered by a sample of schools in the fall of 2008	Nevada School districts & TAC																	X									X										
X		Develop Test Blueprint/Specifications For HSPE In Reading & Math	Apr-08	Oct-08	Tracy & Dave	In collaboration with WestEd, NDE staff will review revised standards & test design to ensure sufficient coverage of standards (TA Review)	TAC										X									X		X														Nov-08	HSPE Test Blueprints/Specs
X		Create Document Describing Content Standards Revision Process	Apr-08	Oct-08	Cindy	Complete outline & get feedback from content specialists (TA Review)			X	X																														Nov-08	Description of Process for Standards Revision
X		Create Document Describing How Achievement Standards Are Developed, Including Steps That Ensure Alignment	Apr-08	Oct-08	Cindy, Dave, & Tracy	Gather list of participants, agendas, support documents, & other materials Also complete outline & get feedback from content specialists (TA Review)	TAC				X	X		X																										Nov-08	Copy of Document Describing Process for Development of AAS
	X	At Meeting with TA Providers, Re-examine Criteria & Processes in Alt Assessment to Meet Critical Element	Aug-08	Aug-08	Lisa, Frankie, Carol, & Cindy	Onsite TA	Original stakeholder input from foundation of existing assessment &									X																								Nov-08	Document Describing Parameters & Guiding Assumptions Concerning the Alternate Assessment

		s; and Determine Need for Outside Contractor					TAC																																						
X		Bias Review Of Reading Passages	###	May-08	Cindy	Select Participants & Gather Passages & Training Materials. WestEd facilitates the meeting.	Stakeholders & Constituents														X																							No v-08	List of Participants (This process will be summarized in the Nevada Technical Report 2009-2010, which will be completed by the preliminary submission in December 2010)
X		Review Results of Bias Review to Identify Gaps & Determine Solution	Jun-08	Jun-08	Cindy & Tracy	Work with WestEd															X																							
X		Draft Math & Reading Items That Represent Revised Content Standards	Jun-08	Jul-08	Tracy & Dave	WestEd & content specialists generated item development materials for use in statewide meetings	Nevada teacher leaders, including professional development providers & administrators										X									X			X													No v-08	Lists of Participants & Copies of Training Materials/Resources
X		Content Review Of Items Aligned To Revised Standards (Math & Reading)	Jul-08	Jul-08	Cindy, Dave, & Tracy	Select Participants & Gather Training Materials & Items to be Reviewed (WestEd)																		X	X	X	X																(This process will be summarized in the Nevada Technical Report 2009-2010, which will be completed by the preliminary submission in December 2010)

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X		Reconciliation Of Field Test Items To Be Imbedded in March 2009 Operational Form	Aug-08	Aug-08	Cindy, Dave, & Tracy																				X	X	X	X															(This process will be summarized in the Nevada Technical Report 2009-2010, which will be completed by the preliminary submission in December 2010)
	X	Determine Scope of Work and Develop RFP for Outside Contractor (If Determined to be Necessary)	Aug-08	Sep-08	Lisa, Frankie, Carol, & Cindy	TA Assistance																																					
X		Describe Plan for Development of Test Blueprint/Specifications for HSPE, Including Plan to Ensure Alignment	Aug-08	Sep-08	Cindy, Dave, & Tracy	Outline existing plan and work with TAC & WestEd to ensure that the process is not missing any critical elements (TA Input & Review)	TAC										X					X			X			X												Nov-08	Description of Process for Development of Test Blueprint & Specifications for HSPE
	X	Describe Plan for Development of Test Blueprint/Specifications for Alt Assessment, Including Plan to Ensure Alignment	Aug-08	Sep-08	Lisa, Cindy, Dave, & Tracy	Outline existing plan and work with TAC & WestEd to ensure that the process is not missing any critical elements (TA Input & Review)	TAC										X					X			X			X												Nov-08	Description of Process for Development of Test Blueprint & Specifications for Alt Assessment
	X	Create Draft Of Extended Standards (And/Or Essence Statements) Alternate	Aug-08	Oct-08	Lisa, Tracy, Dave, Richard, Cindy, Frankie, & Carol	TA Assistance	TAC & Stakeholders					X																														Oct-08	Draft of Extended Standards (and/or Essence Statements) Alternate Achievement Standards, and Performance Level

		Achievement Standards, And Performance Level Descriptors For Math, ELA, & Science As Determined By August Policy Meeting																																										Descriptors for Math, Science, & ELA
	X	Develop Draft Of Alignment Study Plan Of Assessment Activities To Academic Content Standards	Aug-08	Oct-08	Lisa	Independent Evaluator (TA Assistance)	TAC																																			Oct-08	Draft of Alignment Study Plan of assessment activities to Academic Content Standards
X		Develop Document Describing Assessment Auditing & Monitoring Process	Aug-08	Oct-08	Carol	Work with AYP, Test Security, & Accountability Staff to Describe Process	AYP Subcommittee & Test Directors																	X								X	X	X	X							Nov-08	Document of Auditing & Monitoring Activities
X	X	With Advice of TAC, NDE Will Develop an Approach For An Independent Alignment Studies that Ensure that the Assessments Reflect the Full Range, Cognitive Complexity and Difficulty of the Standards	Aug-08	Dec-08	All Assessment Staff & Lisa	Will utilize TAC, WestEd, and Measured Progress expertise during and after meeting to ensure that all steps have been considered & accounted for	TAC																		X	X	X	X	X	X	X										TBD	Copies of Alignment Study Specs, RFPs, and/or Other Deliverables as Negotiated with USED

X		New Field Test Items (Aligned To "Revised Standards") Are Imbedded In Existing Operational Form	Aug-08	Dec-08	Tracy & Dave	After selection by WestEd, items are evaluated & approved by NDE															X					X	X															
	X	Develop Technical Manual For Alternate Assessment	Aug-08	Aug-10	Lisa	Measured Progress	TAC									X	X	X	X	X	X	X																			Dec-10	Alt Technical Manual
	X	Develop Test Blueprint/Specifications For Alt Assessment In Reading, Math, & Science	Sep-08	Oct-08	Lisa, Tracy, Dave, & Richard	In collaboration with WestEd, NDE staff will review revised standards & test design to ensure sufficient coverage of standards (TA Review)	TAC										X								X			X													Nov-08	Alt Assessment Test Blueprints/Specs
X		Provide Training & Materials To Regional Professional Development Programs. DOK, Standards, Instruction, Use & Interpretation Of Test Results (This Will Be An Ongoing Activity As New Elements To The Modules Are Developed.)	Aug-08	Aug-11	All Assessment Staff	Videos, PowerPoint, & Other Training Materials	Regional Professional Development Programs (for distribution & training to Nevada educators)														X		X									X	X	X	X							Apr-09	Copies of Materials Used in PD Modules

X		Bias Review Of Items For Reading & Math	Sep-08	Sep-08	Cindy	Select Participants & Gather Passages, Items & Training Materials	West Ed, Stakeholders & Constituents															X																					(This process will be summarized in the Nevada Technical Report 2009-2010, which will be completed by the preliminary submission in December 2010)
X		Review Results of Bias Review to Identify Gaps & Determine Solution	Sep-08	Sep-08	Cindy, Dave, & Tracy	Work with WestEd																X																					
	X	Convene Focus Group For Validation Of Extended Standards/Essence Statements, Alternate Achievement Standards, And Performance Level Descriptors For Math, ELA, & Science	Dec-08	Dec-08	Lisa, Tracy, Dave, & Richard	Determine a meeting place and logistics for travel (TA Assistance)	Small group of Gen Ed & SpEd specialists																		X		X													Feb-09	List of Participants & Final Document of Alternate Achievement Standards, etc
X		Convene Meetings Of Stakeholders To Review Results Of Accommodation Studies & Determine Appropriate Revisions To Accommodation Practices	Oct-08	Aug-09	All Assessment Staff with SpEd Representation	Gather data from national and Nevada studies and determine decision-making process for selection & evaluation of accommodations	Stakeholders & TAC																	X															Oct-09	Accommodation Technical Report

	X	Convene Development Committee To Create (& Peer Review) Activities Aligned With Test Blueprint	Nov-08	Nov-08	Lisa, Tracy, Dave, & Richard	Determine meeting location and arrange for logistics & travel of all participants	Gen Ed & SpEd specialists										X									X			X													Apr-09	List of Participants
	X	Design Small-Scale Focused Pilot Testing Activities	Nov-08	Feb-09	Lisa	Measured Progress & TA Review	TAC														X					X	X																
	X	Conduct Independent Alignment Study Of Assessment Activities To Academic Content Standards	Jan-09	Jan-09	Lisa	Independent Evaluator (TA Assistance)	TAC							X	X										X																		
	X	Analyze Data From Independent Alignment Study & Make Adjustments To Content Of Assessment As Indicated	Feb-09	Feb-09	Lisa	Measured Progress & TA Review	TAC																								X											Apr-09	Alignment Study Report
X		New Field Test Items Are Imbedded In Existing Operational Form	Mar-09	Mar-09	All Assessment Staff	Completed by Vendors	West Ed & Measured Progress														X					X	X																
	X	Develop Training Materials (I.E. Administration & Scoring Manuals) For Small Focused	Mar-09	Mar-09	Lisa	Measured Progress															X					X	X																Apr-09	Pilot Test Design

		Pilot Testing																																								
	X	Provide Training to Test Administrators For Small Focused Pilot Testing	Apr-09	Apr-09	Lisa	Measured Progress	School District Personnel														X					X	X													Apr-09	Training Materials
	X	Conduct Small-Scale Focused Pilot Of Testing Activities	Apr-09	May-09	Lisa	Measured Progress	School District Personnel														X					X	X															
	X	Develop Training Manuals For Scoring Of Small-Scale Focused Pilot Testing	###	Jun-09	Lisa	Measured Progress																	X																		Apr-09	Scoring Guideline
X		Items Are Evaluated For Statistical Bias To Determine Eligibility For Status As Core Item	###	Sep-09	All Assessment Staff	Completed by Vendors	West Ed & Measured Progress														X					X	X														
	X	Conduct Scoring Of Small-Scale Focused Pilot Testing	Jun-09	Jun-09	Lisa		School District Personnel														X					X	X														
	X	Analyze Data From Small-Scale Focused Pilot Testing & Make Adjustments As Needed	Jun-09	Jun-09	Lisa	Measured Progress															X					X	X														
X		Develop Procedural & Administration Manuals (This Includes	Jun-09	Sep-09	All Assessment, Sped, & LEP Staff	Gathering all information (national & state) to inform procedures	Stakeholder & Vendor Input														X		X									X	X	X	X						Oct-09	TAM, TCM, NPEP Procedural Manual

		All Test Administration Activities Including Testing & Accommodations Of Special Populations And Selection Criteria For Alt vs General Assessment)																																									
	X	Develop Procedural, Scoring & Administration Manuals For Pilot Of Operational Test Based On Information From Analysis Of Small-Scale Focused Pilot	Jul-09	Sep-09	All Assessment Staff & Lisa	Measured Progress						X									X		X									X	X		X						Aug-09	Procedural, Scoring, and Administration Manuals
X		Selection Of Operational Items For Test Form, Including NDE Final Review and Sign-Off of Operational Form	Jul-09	Dec-09	Tracy & Dave	After selection by WestEd, items are evaluated & approved by NDE																			X	X	X	X														(This process will be summarized in the Nevada Technical Report 2009-2010, which will be completed by the preliminary submission in December 2010)
X		Annual Test Administration & Test Security Training (This Includes All Test Administration Activitie	Aug-09	Sep-09	All Assessment, Sped, & LEP Staff	Determine locations of regional trainings & notify district test directors	School Test Coordinators & District Test Directors														X		X									X	X	X	X						Oct-09	Training Materials

		s Including Testing & Accommodations Of Special Populations And Selection Criteria For Alt vs General Assessment)																																									
	X	Develop Training Materials For Test Administrators For Fully Operational Pilot	Sep-09	Oct-09	Lisa	Measured Progress	School District Personnel					X									X		X									X	X		X						Oct-09	Alternate Assessment Training/Scoring Manual(s), NPEP Procedural Manual, Training Materials, Test Administration Manual
	X	Conduct Training Of Test Administrators For Fully Operational Pilot	Oct-09	Oct-09	Lisa	Meeting Facilities & Training Materials	School District Personnel					X									X		X									X	X		X							
	X	Administer Fully Operational Pilot	Oct-09	Jan-10	Lisa		School District Personnel														X						X	X															
X	X	Design Of Student & School/ District Summary Reports (Including Performance Level Descriptors)	Oct-09	Jan-10	All Assessment Staff & Lisa	Measured Progress & TA Review																									X		X	X	X	X	X	X	X	X	X	May-10	Copies of All Reports
X	X	Document Process for Including Assessments in the Determination of Adequate Yearly	Nov-09	Jan-10	Carol & AYP Staff	Submit Amendment to Accountability Workbook (If Necessary)	AYP Subcommittee & Test Directors											X																								May-10	Section from Accountability Workbook Describing Plan for Inclusion in AYP

		Process																																											
	X	Train Scorers Of Fully Operational Pilot	Feb-10	Mar-10	Lisa	Meeting Facilities & Training Materials	School District Personnel																	X																				Aug-10	Training Materials
X		Administration of Fully Aligned Operational Test	Mar-10	Mar-10	All Assessment Staff	Measured Progress	Nevada High Schools																																						
	X	Scoring Session For Fully Operational Pilot	Mar-10	Apr-10	Lisa	Meeting Facilities & Scoring Materials	School District Personnel																	X																					
	X	Conduct Standard Setting Of Fully Operational Pilot	May-10	May-10	Lisa	Measured Progress						X																																Aug-10	Standard Setting Report
X		Standard Setting Of Test Comprised Of Items Aligned To Revised Standards (Math & Reading)	May-10	May-10	Cindy, Dave, & Tracy	Measured Progress						X																																
X	X	State Board Approval Of Results Of Standard Settings	May-10	Jun-10	Carol & Frankie		State Board				X	X																																Aug-10	Copies of Minutes
X		Write HSPE Standard Setting Report	May-10	Sep-10	All Assessment Staff	Written by Measured Progress & Reviewed by NDE & TAC	TAC					X																																No v-10	Standard Setting Report
X		Independent Alignment Of Intact Test Form	Jun-10	Jun-10	Cindy, Dave, & Tracy	Independent Evaluator (TA Assistance)	TAC							X	X											X																		No v-10	HSPE Alignment Study
	X	Conduct Analysis Of Pilot Data Of Fully Operational Pilot, Includin	Jun-10	Jun-10	Lisa	Measured Progress																		X																				Aug-10	Inter-rater Reliability Report

		g Inter-Rater Reliability																																									
X	X	On the Advice of TAC, NDE Will Use the Results of Alignment Study to Evaluate Results In Order to Fill in Gaps	Jun-10	Aug-10	All Assessment Staff & Lisa	Independent Contractor and/or Nevada Educators who have not been involved in the Item Development Process																																			No v-10	Results of Alignment Study Review, Including Recommendations for Improvement
X		Develop Technical Manual For HSPE	Jun-10	Dec-10	Carol, Henry, Tom	Measured Progress	TAC									X	X	X	X	X	X	X																				Dec-10	HSPE Technical Manual
X	X	Web-Based School & District Summary Reports Of Assessment Data & AYP Results	Aug-10	Aug-10	All Assessment & Accountability Staff	Service-Level Agreements are in place with the Nevada Department of Information Technology for necessary technical activities	District Accountability & Assessment Staff, Nevada Department of Information Technology																							X		X	X	X	X	X	X	X	X	X	No v-10	Copies & Links for all Reporting Documents
	X	Training And Distribution Of Revised Operational Materials For All Teachers	Aug-10	Sep-10	Lisa	Outside Contractor																	X																			Aug-10	Revised Procedural, Scoring, & Test Administration Manuals
	X	Ongoing Support And Technical Assistance To Teachers & Administrators	Aug-10	May-11	Lisa	Outside Contractor																	X																				
X	X	Preliminary Submission of Final Evidence	Nov-10	Dec-10	All Assessment Staff & Lisa																																					Dec-10	Submission of All Evidence

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DEPARTMENT OF EDUCATION

Compliance Agreement

AGENCY: Department of Education.

ACTION: Notice of written findings and compliance agreement with the Vermont Department of Education.

SUMMARY: This notice is being published in the **Federal Register** consistent with section 457(b)(2) of the General Education Provisions Act (GEPA). Section 457 of GEPA authorizes the U.S. Department of Education (the Department) to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements. In order to enter into a compliance agreement, the Department must determine, in written findings, that the recipient cannot comply with the applicable program requirements until a future date.

On January 6, 2009, the Department entered into a compliance agreement with the Vermont Department of Education (VTDOE). Section 457(b)(2) of GEPA requires the Department to publish written findings leading to a compliance agreement, with a copy of the compliance agreement, in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Sharon Hall, U.S. Department of Education, Office of Elementary and Secondary Education, 400 Maryland Avenue, SW., Room 3W214, Washington, DC 20202–6132. Telephone: (202) 260–0998.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Title I of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Under Title I, each State was required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Title I also requires each State to implement a student assessment system to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12.

In addition to a general assessment, Title I requires States to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

In May 2007, VTDOE submitted evidence of its standards and assessment system. The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) submitted that evidence to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that VTDOE's standards and assessment system did not meet a number of the Title I requirements.

Section 454 of GEPA, 20 U.S.C. 1234c, sets out the remedies available to the Department when it determines that a recipient ''is failing to comply substantially with any requirement of law'' applicable to Federal program funds the Department administers. Specifically, the Department is authorized to—

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law.

20 U.S.C. 1234c(a).

In a letter dated December 19, 2007, to Richard H. Cate, Vermont's former Commissioner of Education, the Assistant Secretary notified VTDOE that, to remain eligible to receive Title I funds, it would have to enter into a compliance agreement with the Department. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f(a). In order to enter into a compliance agreement with a recipient, the Department must determine, in written findings, that the recipient cannot comply until a future date with the applicable program requirements.

In accordance with the requirements of section 457(b) of GEPA, 20 U.S.C. 1234f(b), on June 5, 2008, Department officials conducted a public hearing in Vermont to assess whether a compliance agreement with VTDOE might be appropriate. Dr. Michael Hock testified at this hearing on behalf of VTDOE. The Department considered the testimony provided at the June 2008 public hearing and all other relevant information and materials and concluded that VTDOE would not be able to correct its non-compliance with Title I standards and assessment requirements immediately.

On January 12, 2009, the Assistant Secretary issued written findings holding that compliance by VTDOE with the Title I standards and assessment requirements is genuinely not feasible until a future date. Under Title I, VTDOE was required to implement its final assessment system no later than the 2005–2006 school year. The evidence that VTDOE submitted in May 2007 indicated that, well after the statutory deadline had passed, its standards and assessment system still did not fully meet Title I requirements. In addition, the compliance agreement sets out the action plan that VTDOE must implement to come into compliance with Title I requirements. Due to the enormity and complexity of the work that is needed to bring VTDOE's standards and assessment system into full compliance, VTDOE cannot immediately comply with all of the Title I requirements.

Vermont's Acting Commissioner of Education, Bill Talbott, and the Assistant Secretary signed the compliance agreement on January 6, 2009.

As required by section 457(b)(2) of GEPA, 20 U.S.C. 1234f(b)(2), the text of the Assistant Secretary's written findings is set forth as Appendix A and the compliance agreement is set forth as Appendix B of this notice.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF, you must have the Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of a document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Authority: 20 U.S.C. 1234c, 1234f.

Dated: January 16, 2009.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

Appendix A

Written Findings of the Assistant Secretary for Elementary and Secondary Education Regarding the Compliance Agreement Between the U.S. Department of Education and the Vermont Department of Education

I. Introduction

The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) of the U.S. Department of Education (Department) has determined, pursuant to 20 U.S.C. 1234c and 1234f, that the Vermont Department of Education (VTDOE) has failed to comply substantially with certain requirements of Title I, Part A of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq*., and that it is not feasible for VTDOE to achieve full compliance immediately. Specifically, the Assistant Secretary has determined that VTDOE did not meet, within the statutory timeframe, a number of the Title I requirements concerning the academic achievement standards, technical quality, alignment, and reporting of results for Vermont's alternate assessment based on alternate academic achievement standards for students with the most significant cognitive disabilities.

For the following reasons, the Assistant Secretary has concluded that it would be appropriate to enter into a compliance agreement with VTDOE to bring it into full compliance as soon as feasible. During the effective period of the compliance agreement, which ends January 6, 2011, VTDOE will be eligible to receive Title I funds as long as it complies with the terms and conditions of the agreement as well as the provisions of Title I and other applicable Federal statutory and regulatory requirements.

II. Relevant Statutory and Regulatory Provisions

A. Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001

Title I provides financial assistance, through State educational agencies, to local educational agencies to provide services in high-poverty schools to students who are failing or at risk of failing to meet the State's student academic achievement standards. Under Title I, each State, including the District of Columbia and Puerto Rico, was required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Academic achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;
- Be designed to provide coherent information about student attainment of State academic content standards across grades and subjects;
- Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited English proficient (LEP) students;
- Be aligned with the State's academic content and student academic achievement standards;
- Express student results in terms of the State's student academic achievement standards;
- Be valid, reliable, and of adequate technical quality for the purposes for which they are used and be consistent with nationally recognized professional and technical standards;
- Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
- Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
- Enable results to be disaggregated by gender, each major racial and ethnic group, migrant status, students with disabilities, English proficiency status, and economically disadvantaged students;
- Provide individual student reports; and
- Enable itemized score analyses.

20 U.S.C. 6311(b)(3); 34 CFR 200.2.

In addition to a general assessment, States were required to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. 34 CFR 200.6(a)(2). An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

B. The General Education Provisions Act

The General Education Provisions Act (GEPA) provides a number of options when the Assistant Secretary determines a recipient of Department funds is ''failing to comply substantially with any requirement of law applicable to such funds.'' 20 U.S.C. 1234c. In such a case, the Assistant Secretary is authorized to:

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law.

20 U.S.C. 1234c(a).

Under section 457 of GEPA, the Assistant Secretary may enter into a compliance agreement with a recipient that is failing to comply substantially with specific program requirements. 20 U.S.C. 1234f. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the

applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f(a). Before entering into a compliance agreement with a recipient, the Assistant Secretary must hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. At that hearing, the recipient has the burden of persuading the Assistant Secretary that full compliance with applicable requirements of law is not feasible until a future date. 20 U.S.C. 1234f(b)(1). If, on the basis of all the evidence presented, the Assistant Secretary determines that full compliance is genuinely not feasible until a future date, the Assistant Secretary must make written findings to that effect and must publish those findings, together with the substance of any compliance agreement, in the **Federal Register**. 20 U.S.C. 1234f(b)(2).

A compliance agreement must set forth an expiration date, not later than three years from the date of the written findings, by which time the recipient must be in full compliance with all program requirements. 20 U.S.C. 1234f(c)(1). In addition, a compliance agreement must contain the terms and conditions with which the recipient must comply during the period that agreement is in effect. 20 U.S.C. 1234f(c)(2). If the recipient fails to comply with any of the terms and conditions of the compliance agreement, the Assistant Secretary may consider the agreement to be no longer in effect, and may take any of the compliance actions set forth above. 20 U.S.C. 1234f(d).

III. Analysis

In deciding whether a compliance agreement between the Assistant Secretary and VTDOE is appropriate, the Assistant Secretary must determine whether compliance by VTDOE with the Title I standards and assessment requirements is genuinely not feasible until a future date. 20 U.S.C. 1234f(b)(2).

A. VTDOE Has Failed to Comply Substantially With Title I Standards and Assessment Requirements

In May 2007, VTDOE submitted evidence of its standards and assessment system. The Assistant Secretary submitted that evidence to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that VTDOE's standards and assessment system did not meet a number of the Title I requirements. Specifically, the Assistant Secretary determined that, to demonstrate its compliance, VTDOE had to submit the following evidence:

Academic Achievement Standards

1. Evidence of approved/adopted alternate academic achievement standards for students with the most significant cognitive disabilities in reading/language arts and mathematics for each of grades 3 through 8 and at least one grade in the 10–12 grade span.

2. Documentation of the development of academic achievement descriptors for the alternate assessment in the content area of science.

3. Evidence that the alternate academic achievement standards include for each content area:

a. At least three levels of achievement, including two levels of high achievement (*e.g.*, proficient and advanced) that determine how well students are mastering a State's academic content standards, and a third level of achievement (*e.g.*, basic) to provide information about the progress of lower-achieving students toward mastering the proficient and advanced levels of achievement;

b. Descriptions of the competencies associated with each achievement level; and

c. Assessment scores (''cut scores'') that differentiate among the achievement levels.

4. Evidence that the Board or other authority has adopted all alternate achievement standards.

5. Documentation that the State has reported separately the number and percent of those students with disabilities assessed on the alternate assessment based on alternate achievement standards, those assessed on an alternate assessment based on grade-level standards, and those included in the regular assessment (including those administered that assessment with appropriate accommodations).

6. Evidence that the State has documented the involvement of diverse stakeholders in the development of its alternate academic achievement standards.

Technical Quality

1. Evidence that the State has documented validity (in addition to the alignment of the alternate assessment with the content standards), as described in the *Standards for Educational and Psychological Testing* (AERA/APA/NCME, 1999).

2. For the alternate assessment, evidence that the State has provided documentation of the standard setting process, including a description the selection of judges, methodology employed, and final results.

3. For the alternate assessment(s), evidence that the State has considered the issue of reliability, as described in the *Standards for Educational and Psychological Testing* (AERA/APA/NCME, 1999).

4. Evidence that the State has established:

a. Clear criteria for the administration, scoring, analysis, and reporting components of its alternate assessment; and

b. A system for monitoring and improving the ongoing quality of its alternate assessment.

Alignment

1. Evidence that the Alternate Grade-Level Expectations (AGEs) and all associated tasks across grade spans submitted for the Portfolio Assessment of Alternate Grade Expectations are aligned with State academic content standards in reading and mathematics.

2. Evidence that the State has developed ongoing procedures to maintain and improve alignment between the alternate assessment and standards over time, particularly if gaps have been noted.

Reports

1. Evidence that the State will produce individual student alternate assessment reports in terms of the State's revised alternate achievement standards. With respect to such individual student reports:

a. Evidence that these individual student reports provide information for parents, teachers, and principals to help them understand and address a student's specific academic needs. This information must be displayed in a format and language that is understandable to parents, teachers, and principals, for example, through the use of descriptors that describe what students know and can do at different performance levels. The reports must be accompanied by interpretive guidance for these audiences; and

b. Evidence that the State ensures that these individual student reports will be delivered to parents, teachers, and principals as soon as possible after the alternate assessment is administered.

B. VTDOE Cannot Correct Immediately Its Noncompliance With the Title I Standards and Assessment Requirements

Under Title I, VTDOE was required to implement its final assessment system no later than the 2005–2006 school year. 20 U.S.C. 6311(b)(3). The evidence that VTDOE submitted in May 2007 indicated that, well after the statutory deadline had passed, its standards and assessment system still did not fully meet Title I requirements. In addition, substantial work is required to bring VTDOE into compliance with the Title I requirements.

At the public hearing, which was held on June 5, 2008, VTDOE presented evidence that compliance is not feasible until a future date, particularly in light of the work necessary to come into full compliance with the Title I standards and assessment requirements. In particular, Dr. Michael Hock, Vermont's Director of Educational Assessment, testified that, to bring Vermont's standards and assessment system into compliance, Vermont must document the successful completion of a number of tasks, including: Revising the State's alternate academic achievement standards for reading and mathematics to reflect an increased emphasis on academic content; using a validated standard-setting process that includes direct input from teachers or other individuals with specific expertise in the academic content areas; revising the guidelines for the collection, scoring, and reporting of student performance relative to the alternate academic achievement standards; and revising the scoring materials and procedures for the alternate assessment based on alternate academic achievement standards. Dr. Hock further testified that VTDOE intended to hold extensive training sessions for teachers on the revised frameworks for the alternate academic achievement standards. Dr. Hock stated that VTDOE needs the time afforded by a compliance agreement to bring its standards and assessment system into compliance to ensure that its alternate assessment remains an appropriate assessment for students with disabilities and that teachers are knowledgeable about the changes in the types of skills assessed as well as the types of evidence to be submitted for the portfolio assessment. Dr. Hock's testimony is consistent with the comprehensive action plan that VTDOE has

developed and that is incorporated into the compliance agreement. That action plan sets out a very specific schedule that VTDOE has agreed to meet during the next two years for completing all of the work necessary to attain compliance with the Title I standards and assessment requirements.

Due to the enormity and complexity of the work that is needed to bring VTDOE's standards and assessment system into full compliance, VTDOE cannot immediately comply with all of the Title I requirements. As a result, the Assistant Secretary finds that it is not genuinely feasible for VTDOE to come into compliance until a future date.

IV. Conclusion

For the foregoing reasons, the Assistant Secretary finds that full compliance by VTDOE with the standards and assessment requirements of Title I is genuinely not feasible until a future date. Therefore, the Assistant Secretary has determined that it is appropriate to enter into a compliance agreement with VTDOE.

Dated: Jan. 12, 2009.

_____ /s/ _____
Kerri L. Briggs, PhD
Assistant Secretary for Elementary and Secondary Education.

Appendix B

Compliance Agreement Under Title I of the Elementary and Secondary Education Act Between the United States Department of Education and the Vermont Department of Education

Title I of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Each State was required to adopt academic content and achievement standards in at least mathematics, reading/language arts, and, beginning in the 2005–2006 school year, science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic standards. By the 2005–2006 school year, States were required to administer mathematics and reading/language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;
- Be designed to provide coherent information about student attainment of State standards across grades and subjects;
- Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited-English-proficient students;
- Be aligned with the State's content and achievement standards;
- Express student results in terms of the State's student achievement standards;
- Be valid, reliable, and of adequate technical quality for the purpose for which they are used and be consistent with nationally recognized professional and technical standards;
- Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
- Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
- Enable results to be disaggregated by gender, each major racial and ethnic group, migrant status, students with disabilities, LEP students, and economically disadvantaged students;
- Provide individual student reports; and
- Enable itemized score analyses.

In addition to a general assessment, States were required to develop at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level achievement standards, alternate achievement standards, or modified achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

The Vermont Department of Education (VTDOE) failed to timely meet certain of the statutory and regulatory requirements for its standards and assessment system. In order to be eligible to continue to receive Title I funds while working to comply with the requirements, Richard Cate, Commissioner of Education, indicated VTDOE's interest in entering into a compliance agreement with the United States Department of Education (Department). On June 5, 2008, the Department conducted a public hearing regarding: (1) Whether VTDOE's full compliance with Title I is not feasible until a future date; and (2) whether VTDOE is able to come into compliance with the Title I standards and assessment requirements within three years.

Pursuant to this Compliance Agreement under 20 U.S.C. Section 1234f, VTDOE must be in full compliance with the outstanding requirements of Title I no later than three years from the date of the Assistant Secretary's written findings, a copy of which is attached to, and incorporated by reference into, this Agreement. To achieve compliance with the standards and assessment requirements, VTDOE must submit the following evidence:

Academic Achievement Standards

1. Evidence of approved/adopted alternate academic achievement standards for students with the most significant cognitive disabilities in reading/language arts and mathematics for each of grades 3 through 8 and at least one grade in the 10–12 grade span.

2. Documentation of the development of academic achievement descriptors for the alternate assessment in the content area of science.

3. Evidence that the alternate academic achievement standards include for each content area:

a. At least three levels of achievement, including two levels of high achievement (*e.g.*, proficient and advanced) that determine how well students are mastering a State's academic content standards, and a third level of achievement (*e.g.*, basic) to provide information about the progress of lower-achieving students toward mastering the proficient and advanced levels of achievement;

b. Descriptions of the competencies associated with each achievement level; and

c. Assessment scores (''cut scores'') that differentiate among the achievement levels.

4. Evidence that the Board or other authority has adopted all alternate achievement standards.

5. Documentation that the State has reported separately the number and percent of those students with disabilities assessed on the alternate assessment based on alternate achievement standards, those assessed on an alternate assessment based on grade-level standards, and those included in the regular assessment (including those administered that assessment with appropriate accommodations).

6. Evidence that the State has documented the involvement of diverse stakeholders in the development of its alternate academic achievement standards.

Technical Quality

1. Evidence that the State has documented validity (in addition to the alignment of the alternate assessment with the content standards), as described in the *Standards for Educational and Psychological Testing* (AERA/APA/NCME, 1999).

2. For the alternate assessment, evidence that the State has provided documentation of the standard setting process, including a description of the selection of judges, methodology employed, and final results.

3. For the alternate assessment(s), evidence that the State has considered the issue of reliability, as described in the *Standards for Educational and Psychological Testing* (AERA/APA/NCME, 1999).

4. Evidence that the State has established:

a. Clear criteria for the administration, scoring, analysis, and reporting components of its alternate assessment; and

b. A system for monitoring and improving the ongoing quality of its alternate assessment.

Alignment

1. Evidence that the Alternate Grade-Level Expectations (AGEs) and all associated tasks across grade spans submitted for the Portfolio Assessment of Alternate Grade Expectations are aligned with State academic content standards in reading and mathematics.

2. Evidence that the State has developed ongoing procedures to maintain and improve alignment between the alternate assessment and standards over time, particularly if gaps have been noted.

Reports

1. Evidence that the State will produce individual student alternate assessment reports in terms of the State's revised alternate achievement standards. With respect to such individual student reports:

a. Evidence that these individual student reports provide information for parents, teachers, and principals to help them understand and address a student's specific academic needs. This information must be displayed in a format and language that is understandable to parents, teachers, and principals, for example, through the use of descriptors that describe what students know and can do at different performance levels. The reports must be accompanied by interpretive guidance for these audiences; and

b. Evidence that the State ensures that these individual student reports will be delivered to parents, teachers, and principals as soon as possible after the alternate assessment is administered.

During the period that this Compliance Agreement is in effect, VTDOE is eligible to receive Title I, Part A funds if it complies with the terms and conditions of this Agreement, as well as the provisions of Title I, Part A and other applicable Federal statutory and regulatory requirements that are not specifically addressed by this Agreement. The attached action steps constitute a detailed plan and specific timeline for how VTDOE will come into compliance with the Title I standards and assessment requirements. The action steps are incorporated by reference into this Compliance Agreement as though fully set forth herein and may be amended by joint agreement of the parties, provided full compliance is still feasible by the expiration of the Agreement.

In addition to all of the terms and conditions set forth above, VTDOE agrees that its continued eligibility to receive Title I, Part A funds is predicated upon its compliance with all statutory and regulatory requirements of that program, including those that are not specifically addressed by this Agreement, including any amendments to the No Child Left Behind Act of 2001.

If VTDOE fails to comply with any of the terms and conditions of this Compliance Agreement, including the action steps attached hereto, the Department may consider the Agreement no longer in effect and may take any action authorized by law, including the withholding of funds or the issuance of a cease and desist order. 20 U.S.C. 1234f(d).

It is so agreed.

For the Vermont Department of Education.

____/s/_____

Bill Talbott,

Acting Commissioner of Education.

Date: Jan. 6, 2009.

For the United States Department of Education.

____/s/_____

Kerri L. Briggs, PhD,

Assistant Secretary, Office of Elementary and Secondary Education.

Date: Jan. 6, 2009.

Date this Compliance Agreement becomes effective: Jan. 6, 2009.

Expiration Date of this Agreement: Jan. 6, 2011.

BILLING CODE 4000–01–P

VERMONT
DEPARTMENT OF EDUCATION

WORKPLAN FOR THE REVISION OF VERMONT'S PORTFOLIO ASSESSMENT OF ALTERNATE GRADE EXPECTATIONS (PAAGE)

In order to achieve full approval of its Alternate Assessment of Alternate Achievement Standards, Vermont needs to revise the PAAGE alternate assessment system and then submit additional evidence for peer review which documents successful completion of the following broad tasks:

- Revise the alternate academic achievement standards for reading, mathematics and science to reflect an increase emphasis on academic content, using a validated standard setting process, and based on direct input from teachers and other individuals with specific expertise in the academic content areas.
- Based on the above, revise guidelines for the collection, scoring and reporting of student performance relative to alternate academic achievement standards.
- Revise scoring PAAGE scoring materials and procedures, including range-finding and selection of anchor pieces, to improve overall inter-rated reliability
- Implement procedures within the PAAGE scoring process that demonstrate alignment of PAAGE with Vermont's Framework of Standards and Grade Expectations

These broad tasks will be accomplished using the following work plan (Note: USED required additions highlighted in yellow):

Activity	2008												2009											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Send informational letter to field, including Learner Characteristics Survey (LCS)	X																							
Revise PAAGE guidelines and procedures, using LCS results	X	X	X																					
Revise PAAGE scoring rubric in preparation for distribution to field for local "1st read" (optional for 2008); create values table for scoring Task Challenge	X	X	X																					
Prepare materials and develop	X	X	X																					

Powerpoint for four regional trainings																								
Conduct 4 regional trainings covering: ▪ Local scoring procedures ▪ PAAGE revisions for 2008-09 school year ▪ Summary of LCS results and how that information informed new guidelines				X																				
Convene panels of content area teachers and special educators to develop extended grade level expectation (GLE) ranges					X																			
Activity	2008												2009											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
PAAGE submissions due from schools						X																		
Convene meeting of assessment workgroup to complete range-finding activities and select anchor pieces, calibration pieces and training pieces						X																		
Prepare training packs and other materials for scoring.						X																		
Progress Update to USED (June 30, 2008), including the following documentation: ▪ Informational Letter to Field requesting completion of Learner Characteristics Survey ▪ Results of Learner Characteristics Survey ▪ Revised Page Guidelines and Procedures ▪ New Scoring Rubric with information on Self-Scoring Pilot ▪ Regional Training						X																		

Powerpoint ▪ Initial Drafts of PAAGE Core Grade Expectations																								
Pilot-test revised training packets, calibration methods, scoring procedures and rubrics. Implement read-behind and re-training procedures, and gather resulting scorer reliability data. Analyze inter-scorer agreement data related to local scoring.							X																	
During scoring institute, gather input and feedback on from scorers on new scoring rubrics and scoring procedures, including materials developed through range-finding.							X																	
Gather and analyze data on inter-rater reliability, including reliability of local scoring.							X																	
Develop Achievement Level Descriptors and interim achievement standards with input from Department content specialists and special education consultants							X	X																
Using information and exemplary student work samples gathered during PAAGE scoring, expand the pilot edition of the *Teacher's Resource Guide to PAAGE Assessment Options and Learning Opportunities.*							X	X																
Develop report shells based on revised rubric and addition of third content area (Science/Inquiry)								X																
Activity	**2008**												**2009**											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Progress Update to USED (August 31, 2008), including the following documentation: ▪ Agenda and other materials								X																

from range-finding meeting ▪ Training Packs and other scoring materials ▪ Revised Achievement Level Descriptors ▪ Sample Report Shells ▪ Scorer Feedback from scoring institute ▪ Reliability Data from scoring institute ▪ Draft of Portfolio Development Manual ▪ Interim Standard Setting Plan ▪ Most Current Drafts of Prioritized Grade Expectations (core standards) for Literacy, Numeracy and Inquiry																								
Begin work on a web-based, dynamic teacher resource to be called *Teacher's Resource Guide to PAAGE Assessment Options and Learning Opportunities.* Develop templates for on-line environment. Create system for gathering permissions to use student work samples								X	X															
Reports Sent to Schools									X															
Launch *Teacher's Resource Guide to PAAGE Assessment Options and Learning Opportunities* using the Department's Riverdeep internet platform									X															
Provide Training on Revised PAAGE Guidelines and Procedures, with focus on the *Teacher's Resource Guide to PAAGE Assessment Options and Learning Opportunities* using the Learning									X															

Activity	2008												2009											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Network of Vermont (LVN). If supported by pilot data, introduce concept of mandatory local scoring procedures.																								
Schools implement all revisions of PAAGE Guidelines, Procedures and support materials. Revisions include: ▪ Portfolios focused on 3 content areas: Reading (literacy), Math (numeracy) and science (inquiry). ▪ Portfolios with include a local scoring component.									X	X	X	X	X	X	X	X	X							
Portfolio Revisions (continued) ▪ Portfolios developed around new sets of core grade expectations for each content area, centering on learning progressions and Webb's expanded Depth of Knowledge descriptors ▪ School Teams "declare" which grade expectations will be measured in mid-November																								
Progress Update to USED (October 31, 2008), including the following documentation: ▪ Screen Shots from PAAGE Web ▪ Agendas, Powerpoint and other materials from field-based trainings ▪ Copy of Mailing, including information on Learner Characteristics Survey										X														
Schools submit Documentations of											X													

Eligibility, Learner Characteristic Survey and Declaration of Target Learning Outcomes (AGE) to DOE																								
Meet with TAC to discuss and develop procedures which can be integrated into PAAGE scoring that will provide on-going documentation of PAAGE alignment with *Vermont Framework of Standards and Grade Expectations.* This would possibly take the place of an external alignment study, perhaps with an external audit after the first year scoring. (We are interested in the approach used by Massachusetts but would like to pursue other ideas TAC members might have). Discuss validity study options and prepare a plan for conducting the studies												X												
Progress Update to USED (December 31, 2008), including the following documentation: ▪ Learner Characteristics Survey Results ▪ Notes from TAC discussion ▪ Copy of Mailing, including information on Learner Characteristics Survey ▪ Validity Study Plan and Timelines ▪ Plan for embedded alignment review including plan for conducting an independent review of the procedures during the first year of implementation												X												
Activity	2008												2009											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Work with Center for Assessment												X	X											

(Brian Gong and Charlie DePascale) to develop and evaluate approaches to improve inter-scorer reliability, using analysis from 2008 scoring institute.																							
Progress Update to USED (February 31, 2009), including the following documentation: ▪ Plans to improve scorer reliability													X										
Progress Update to USED (April 30, 2009)															X								
PAAGE submissions due from schools																	X						
Convene assessment workgroup for range-finding selecting anchor, calibration and training pieces																	X						
Prepare training packs and other materials for scoring. Integrate process for assessing alignment of PAAGE submissions with *Vermont Framework of Standards and Grade Expectations.*																	X						
Progress Update to USED (June 30, 2009), including the following documentation: ▪ Agenda and other materials from range-finding meeting ▪ Training Packs and other scoring materials ▪ Description of embedded alignment process and procedures																	X						
Work with consultants to identify appropriate standard setting models.																	X	X					
Score PAAGE submissions using final scoring procedures and materials. Gather and Analyze reliability data. Gather and analyze embedded alignment data. Gather																		X					

and analyze feedback from scorers																								
Conduct Validity Studies																			X	X	X			
Revise and Update the *PAAGE Alternate Assessment Technical Manual* to reflect results of revisions.																			X	X	X	X	X	
Progress Update to USED (August 30, 2009), including the following documentation: ▪ Sample report shells ▪ Notes and findings from discussions with scorers regarding rubrics, scoring procedures, and embedded alignment ▪ Reliability data from scoring																				X				
Activity	2008												2009											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Update *Teacher's Guide to PAAGE Assessment Options and Learning Opportunities* using exemplary selections from recent PAAGE submissions																				X	X			
Assemble panels of content area teachers, special educators, and constituent group members to refine achievement level descriptors and set achievement level standards																					X			
Produce and disseminate student and school level reports																					X	X		
Progress Update to USED (October 31, 2009), including the following documentation: ▪ Documents and Materials from Standard-setting, including revised Achievement Level Descriptors ▪ Standard-setting report																						X		

(may be in draft form)																							
Submit *PAAGE Alternate Assessment Technical Manual* and related reports and materials (including standard-setting report) to the United States Department of Education for Peer Review. Also include Portfolio Development Manual with annotations noting revisions since September 2008.																							X

[FR Doc. E9–1548 Filed 1–23–09; 8:45 am]

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DEPARTMENT OF EDUCATION

[CFDA Nos. 84.938R]

Higher Education Disaster Relief

ACTION: Correction; notice correcting the deadline date.

SUMMARY: On January 16, 2009, we published a notice in the **Federal Register** (74 FR 3005–3009) inviting applications for new awards for fiscal year (FY) 2009 under the Higher Education Disaster Relief program. We listed the incorrect dates for the *Deadline for Transmittal of Pre-Applications* and the *Deadline for Transmittal of Applications* in that notice.

SUPPLEMENTARY INFORMATION: We are making the following corrections:

On page 3005, second column, and page 3006, third column, the *Deadline for Transmittal of Pre-Applications* is corrected to read: February 4, 2009.

On page 3005, second column, and page 3006, third column, the *Deadline for Transmittal of Applications* is corrected to read: March 19, 2009.

Finally, on page 3006, second column, third paragraph, last sentence, the date is corrected to read: March 19, 2009.

FOR FURTHER INFORMATION CONTACT: Cassandra Courtney, Fund for the Improvement of Postsecondary Education, U.S. Department of Education, 1990 K Street, NW., room 6166, Washington, DC 20006–8544. Telephone: (202) 502–7506 or by e-mail: *HEDR@ed.gov* or *Cassandra.Courtney@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF), on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF, you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: January 16, 2009.

Vickie L. Schray,

Acting Deputy Assistant Secretary for Higher Education Programs.

[FR Doc. E9–1550 Filed 1–23–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–348]

Application To Export Electric Energy; FPL Energy Power Marketing, Inc.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: FPL Energy Power Marketing, Inc. (PMI) has applied for authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests, or requests to intervene must be submitted on or before February 10, 2009.

ADDRESSES: Comments, protests, or requests to intervene should be addressed as follows: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–586–8008).

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C.824a(e)).

On December 16, 2008, DOE received an application from PMI for authority to transmit electric energy from the United States to Canada. PMI does not own any electric transmission facilities nor does it hold a franchised service area. The electric energy which PMI proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. PMI has requested an electricity export authorization with a 5-year term.

PMI will arrange for the delivery of exports to Canada over the international transmission facilities owned by Bangor Hydro-Electric Company, Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Co., Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power, Inc., Minnkota Power Cooperative, Inc., New York Power Authority, Niagara Mohawk Power Corp., Northern States Power Company, Vermont Electric Power Company, and Vermont Electric Transmission Co.

The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by PMI has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

As a result of a processing delay by DOE, the public comment period has been shortened to 15 days.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the PMI application to export electric energy to Canada should be clearly marked with Docket No. EA–348. Additional copies are to be filed directly with Marty Jo Rogers, Senior Attorney, FPL Energy Power Marketing, Inc., 1000 Louisiana Street, Suite 6900, Houston, TX 77002 and Gunnar Birgisson, Senior Attorney, FPL Energy, 801 Pennsylvania Avenue, NW., Washington, DC 20004. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://www.oe.energy.gov/permits_pending.htm*, or by e-mailing Odessa Hopkins at *Odessa.hopkins@hq.doe.gov*.

Issued in Washington, DC, on January 16, 2009.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E9–1559 Filed 1–23–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Gtherm, Inc.; Notice of Intent To Grant Exclusive Patent License

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of intent to grant exclusive patent license.

SUMMARY: Notice is hereby given with an intent to grant to Gtherm, Inc. of Weston, Connecticut, an exclusive license to practice the inventions described in U.S. Patent No. 6,251,179, entitled ''Thermally Conductive Cementitious Grout for Geothermal Heat Pump Systems.'' The inventions are owned by the United States of America, as represented by the U.S. Department of Energy (DOE).

DATE: Written comments or nonexclusive license applications are to be received at the address listed below no later than February 10, 2009.

ADDRESSES: Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Annette R. Reimers, Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Forrestal Building, Room 6F–067, 1000 Independence Ave., SW., Washington, DC 20585; Telephone (202) 586–3815.

SUPPLEMENTARY INFORMATION: 35 U.S.C. 209 provides federal agencies with authority to grant exclusive licenses in federally-owned inventions, if, among other things, the agency finds that the public will be served by the granting of the license. The statute requires that no exclusive license may be granted unless public notice of the intent to grant the license has been provided, and the agency has considered all comments received in response to that public notice before the end of the comment period.

Gtherm, Inc. of Weston, Connecticut has applied for an exclusive license to practice the inventions embodied in U.S. Patent No. 6,251,179 and has plans for commercialization of the inventions. The exclusive license will be subject to a license and other rights retained by the U.S. Government and other terms and conditions to be negotiated. DOE intends to negotiate to grant the license, unless, within 15 days of this notice, the Assistant General Counsel for Technology Transfer and Intellectual Property, Department of Energy, Washington, DC 20585, receives in writing any of the following, together with supporting documents:

(i) A statement from any person setting forth reason why it would not be in the best interests of the United States to grant the proposed license; or

(ii) An application for a nonexclusive license to the invention in which applicant states that it already has brought the invention to practical application or is likely to bring the invention to practical application expeditiously.

The Department will review all timely written responses to this notice and will proceed with negotiating the license if, after consideration of written responses to this notice, a finding is made that the license is in the public interest.

Issued in Washington, DC on January 12, 2009.

Paul A. Gottlieb,

Assistant General Counsel for Technology Transfer and Intellectual Property.

[FR Doc. E9–1561 Filed 1–23–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Questions Concerning Technology Transfer Practices at Department of Energy (DOE) Laboratories

AGENCY: Department of Energy.

ACTION: Notice of extension of comment period.

SUMMARY: The DOE published on November 26, 2008, in the **Federal Register**, a notice of inquiry concerning technology practices at DOE laboratories. The DOE invited comments to published questions concerning technology transfer practices at DOE laboratories. The comment period was to continue for 60 days from the date of the publication of the **Federal Register** notice (till January 26, 2009). This **Federal Register** notice extends the comment period till March 26, 2009, to allow additional time for the public to respond to the questions raised in the Notice of Inquiry.

DATES: The comment period has been extended to March 26, 2009.

ADDRESSES: Comments may be submitted electronically at: *GC-62@hq.doe.gov;* or by mail at: Office of the Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. ATTN: TECHNOLOGY TRANSFER QUESTIONS.

FOR FURTHER INFORMATION CONTACT: Paul A. Gottlieb, Assistant General Counsel for Technology Transfer and Intellectual Property, U.S. Department of Energy, Forrestal Building, Room 6F–067, 1000 Independence Ave., SW., Washington, DC 20585; Telephone: (202) 586–3439.

Issued in Washington, DC, on January 16, 2009.

Devon Streit,

Office of Science.

[FR Doc. E9–1562 Filed 1–23–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. IC09–65–001, IC09–65A–001, IC09–65B–001]

Commission Information Collection Activities; Comment Request; Submitted for OMB Review

January 15, 2009.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collections described below to the Office of Management and Budget (OMB) for review of these information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to earlier **Federal Register** notices [1] and has made this notation in its submissions to OMB.

DATES: Comments on the collections of information are due by February 19, 2009.

ADDRESSES: Address comments on the collections of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory

[1] Notices for: FERC–65 (in Docket No. IC09–65), October 16, 2008, 73 FR 61414; FERC–65A (in Docket No. IC09–65A), October 15, 2008, 73 FR 61103; and FERC–65B (in Docket No. IC09–65B), October 16, 2008, 73 FR 61415.

Commission Desk Officer. Comments to OMB should be filed electronically, c/o *oira_submission@omb.eop.gov* and include the appropriate OMB Control Number(s) (1902–0218 for FERC–65, 1902–0216 for FERC–65A, and 1902–0217 for FERC–65B) as a point of reference. The Desk Officer may be reached by telephone at 202–395–7345.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission and should refer to Docket Nos. IC09–65–001, IC09–65A–001, and IC09–65B–001. Comments may be filed either electronically or in paper format. Those persons filing electronically do not need to make a paper filing. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help/submission-guide/electronic-media.asp.* To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (*http://www.ferc.gov/docs-filing/efiling.asp*), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

For paper filings, an original and 2 copies of the comments should be submitted to the Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426, and should refer to Docket Nos. IC09–65–001, IC09–65A–001, and IC09–65B–001.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the ''eLibrary'' link. For user assistance, contact *fercolinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202)502–8415, by fax at (202)273–0873, and by e-mail at *michael.miller@ferc.gov.*

SUPPLEMENTARY INFORMATION:

FERC–65. The information collected under the requirements of FERC–65 ''Notification of Holding Company Status'' (OMB No. 1902–0218) is used by the Commission to implement the statutory provisions of the Public Utility Holding Company Act of 2005 (PUHCA 2005). Among other things, PUHCA 2005 was intended to give the Commission access to books and records relevant to costs incurred by a public utility or natural gas company which are necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. For the Commission to carry out its rate regulation responsibilities, it must know who the entities are that are holding companies of jurisdictional public utilities and natural gas companies. The Commission obtains this information through the FERC–65 filings.

The FERC–65 is a one-time informational filing set out in the Commission's regulations (18 CFR 366.4) that must be submitted within 30 days of becoming a holding company. The information is required in no specific format and consists of the identities of: the holding company, the public utilities and natural gas companies in the holding company system, the service companies, including special-purpose subsidiaries providing non-power goods and services, and all affiliates and subsidiaries and their corporate relationship to each other. Filings may be submitted in hardcopy or electronically through the Commission's eFiling system.

FERC–65A. The information collected under the requirements of FERC–65A ''Exemption Notification of Holding Company Status'' (OMB No. 1902–0216) is also used by the Commission to implement the statutory provisions of PUHCA 2005. The Commission has allowed for an exemption if the books, accounts, memoranda, and other records of any person are not relevant to the jurisdictional rates of a public utility or natural gas company; or if any class of transactions is not relevant to the jurisdictional rates of a public utility or natural gas company. Commission regulations in 18 CFR 366.3 describe the criteria in more specificity, and 18 CFR 366.4 designates the use of FERC–65A for exemption requests. Filings may be submitted in hardcopy or electronically through the Commission's Web site.

FERC–65B. The information collected under the requirements of FERC–65B ''Waiver Notification'' (OMB No. 1902–0217) is also used by the Commission to implement the statutory provisions of PUHCA 2005. (This intention was made clear in Section 1264 of the Energy Policy Act of 2005, 42 U.S.C. 16452.) However, in 18 CFR 366.3(c), the Commission has allowed for waivers from related requirements for any holding company with respect to one or more of the following: (1) Single-state holding company systems; (2) holding companies that own generating facilities that total 100 MW or less in size, and are used fundamentally for their own load or for sales to affiliated end-users; or (3) investors in independent transmission-only companies.

Entities meeting these criteria may file a FERC–65B pursuant to the notification procedures contained in 18 CFR 366.4 to obtain a waiver. Filings may be made in hardcopy or electronically through the Commission's Web site.

Action: The Commission is requesting three-year extensions of the current expiration dates, with no changes to the existing collections of data.

Burden Statement: Public reporting burden for these collections are estimated as:

FERC Data collection	Number of respondents annually (1)	Number of responses per respondent (2)	Average burden hours per response (3)	Total annual burden hours (1)×(2)×(3)
FERC–65 (Notification)	30	1	3	90
FERC–65A (Exemption)	10	1	1	10
FERC–65B (Waiver)	10	1	1	10

Estimated costs to respondents are:

1. For FERC–65, $5,468. [90 hours divided by 2080 hours [2] per year, times $126,384 [3] equals $5,468.54]. The average cost per respondent is $182.28.

2. For FERC–65A, $607.62. [10 hours divided by 2080 hours [2] per year, times $126,384 [3] equals $607.62]. The average cost per respondent is $60.76.

3. For FERC–65B, $607.62. [10 hours divided by 2080 hours [2] per year, times $126,384 [3] equals $607.62]. The average cost per respondent is $60.76.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

Comments are invited on: (1) Whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

[2] Number of hours an employee works each year.

[3] Average annual salary per employee.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1470 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 3701–089]

Tieton Hydropower, LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

January 15, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Amendment of license to delete certain non-jurisdictional transmission facilities from license.

b. *Project No:* 3701–089.

c. *Date Filed:* November 17, 2008.

d. *Applicant:* Tieton Hydropower, LLC.

e. *Name of Project:* Tieton Hydroelectric Project.

f. *Location:* The project is located at the U.S. Bureau of Reclamation's Tieton Dam and Reservoir on the Tieton River in Yakima County, Washington.

g. *Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Chad Ross, Tieton Hydropower, LLC, 925 N Fairgrounds Road, Goldendale, Washington 98206. Tel: (509) 773–4900.

i. *FERC Contact:* Any questions on this notice should be addressed to Ms. Kelly Houff at (202) 502–6393, or e-mail address: *Kelly.Houff@ferc.gov.*

j. *Deadline for filing comments and or motions:* February 17, 2009.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings. Please include the project number P–3701–089 on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Tieton Hydropower, LLC proposes to delete from the license, a 21-mile-long 115–kV transmission line extending from the Tieton Project to the PacifiCorp Tieton Substation, and the substation originally included in the Tieton Project description. According to the licensee, the line and substation will no longer be primary transmission facilities transmitting power solely for the Tieton Project, but will be used for the transmission of non-Tieton Project power.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must

be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1469 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

January 15, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–47–000.
Applicants: Longview Power.
Description: Joint Application for Approval under Section 203 of the FPA and Requests for Expedited Review and Confidential Treatment.
Filed Date: 01/09/2009.
Accession Number: 20090109–5053.
Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–3001–022; ER03–647–013.
Applicants: New York Independent System Operator, Inc.
Description: Compliance Filing of New York Independent System Operator, Inc.
Filed Date: 01/15/2009.
Accession Number: 20090115–5038.
Comment Date: 5 p.m. Eastern Time on Thursday, February 5, 2009.

Docket Numbers: ER07–188–005.
Applicants: Duke Energy Carolinas, LLC.
Description: Duke Energy Carolinas, LLC submits additional information pertaining to the Simultaneous Import Limitation study, in response to FERC's 12/23/08 request.
Filed Date: 01/13/2009.
Accession Number: 20090115–0079.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER09–90–001.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc submits revised pages to its Open Access Transmission Tariff, pursuant to Commission's 12/16/08 Order.
Filed Date: 01/13/2009.
Accession Number: 20090114–0184.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER09–249–000
Applicants: Public Service Electric and Gas Company.
Description: Public Service Electric and Gas Company submits response to the Commission Staff's request for additional information dated 1/2/08.
Filed Date: 01/12/2009.
Accession Number: 20090113–0354.
Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Docket Numbers: ER09–354–001.
Applicants: CAM Energy Trading LLC.
Description: CAM Energy Trading, LLC submits correction to Notice of Cancellation of market based rate tariff for CET, revised tariff sheet under ER09–354.
Filed Date: 01/09/2009.
Accession Number: 20090112–0176.
Comment Date: 5 p.m. Eastern Time on Friday, January 23, 2009.

Docket Numbers: ER09–370–001.
Applicants: EPCOR USA North Carolina LLC.
Description: EPCOR USA North Carolina, LLC submits supplements to its Notice of Name Change and Succession filed on 12/1/08.
Filed Date: 01/13/2009.
Accession Number: 20090114–0185.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER09–474–002.
Applicants: PowerSmith Cogeneration Project Limited.
Description: PowerSmith Cogeneration Project, Limited Partnership submits Substitute Original Sheet 1 and 2 to FERC Electric Tariff, Original Volume 1.
Filed Date: 01/13/2009.
Accession Number: 20090114–0186.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER09–535–000.
Applicants: Commonwealth Edison Company and Commonwealth.
Description: Commonwealth Edison Company of Indiana, Inc. submits revised Attachment H–13 (Network Integration Transmission Service for the ComEd Zone) of the PJM Interconnection, LLC Open Access Transmission Tariff.
Filed Date: 01/13/2009.
Accession Number: 20090114–0187.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER09–536–000.
Applicants: Osceola Windpower, LLC.
Description: Osceola Windpower, LLC submits Shared Facilities Agreement with Osceola Windpower II, LLC dated as of 9/30/08 designated as Rate Schedule FERC 1 pursuant to the requirements of Order 888 *et al.*
Filed Date: 01/13/2009.
Accession Number: 20090114–0188.
Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–67–004.
Applicants: Progress Energy, Inc.
Description: Progress Energy, Inc. submits Amendment to Order 890–A Compliance Filing.
Filed Date: 01/08/2009.
Accession Number: 20090108–5084.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be

listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–1475 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

January 14, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER91–569–043; ER01–666–011; ER02–862–011.

Applicants: Entergy Services, Inc.; EWO Marketing, LP; Entergy Power Ventures, L.P.

Description: Entergy Affiliates submits their response to the FERC's December 23, 2008 letter which constitutes an amendment to the updated market power analysis originally filed on 8/29/08 pursuant to Order 697–A.

Filed Date: 01/13/2009.

Accession Number: 20090114–0097.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 3, 2009.

Docket Numbers: ER98–4159–011; ER98–4159–013; ER98–4159–014; ER07–157–003; ER04–268–008; ER04–268–010; ER04–268–011; ER06–398–005; ER06–398–007; ER06–398–008; ER06–399–005; ER06–399–007; ER06–398–008.

Applicants: Duquesne Light Company; Macquarie Cook Power Inc.; Duquesne Power, LLC; Duquesne Keystone, LLC; Duquesne Conemaugh, LLC.

Description: Duquesne Light Company (Duquesne Companies) respond to FERC's request for additional information re an updated market power analysis and notices of change in status etc.

Filed Date: 01/08/2009.

Accession Number: 20090113–0289.

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER05–168–012; EL05–19–013.

Applicants: New Mexico Cooperatives.

Description: Joint Motion of New Mexico Cooperative for Approval of Payment of Agreed-Upon Base Rate Refund under, *et al.*

Filed Date: 12/31/2008.

Accession Number: 20081231–5096.

Comment Date: 5 p.m. Eastern Time on Monday, January 26, 2009.

Docket Numbers: ER08–513–002.

Applicants: Entergy Services Inc.

Description: Software Development Progress Report of Entergy Services, Inc.

Filed Date: 01/12/2009.

Accession Number: 20090112–5178.

Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Docket Numbers: ER09–331–001.

Applicants: Xcel Energy Services Inc.

Description: Xcel Energy Service Inc. on behalf of Southwestern Public Service Company submits an Amendment to their Notices of Cancellation.

Filed Date: 01/12/2009.

Accession Number: 20090114–0005.

Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Docket Numbers: ER09–382–001.

Applicants: Hay Canyon Wind LLC.

Description: Hay Canyon Wind LLC submits supplemental application with narrative descriptions of its energy-related affiliates and their operations.

Filed Date: 01/12/2009.

Accession Number: 20090114–0006.

Comment Date: 5 p.m. Eastern Time on Thursday, January 22, 2009.

Docket Numbers: ER09–533–000.

Applicants: Portland General Electric Company.

Description: Portland General Electric Co. submits its First Revised Rate Schedule 160, the Colstrip Project Transmission Agreement with Montana Power Company *et al.* in compliance with the Commission's Letter Order issued on 7/16/08.

Filed Date: 01/12/2009.

Accession Number: 20090113–0296.

Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA09–16–000.

Applicants: Northeast Utilities Service Company.

Description: NU Companies submits Third Revised Sheet 3212 *et al.* to FERC Electric Tariff 3 to amend Schedule 21–NU under Section II of the ISO New England Inc Transmission Markets and Services Tariff etc. under OA09–16.

Filed Date: 01/12/2009.

Accession Number: 20090114–0013.

Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that

enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–1476 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

January 13, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–22–000.
Applicants: Penascal Wind Power LLC.
Description: Penascal Wind Power LLC Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 01/12/2009.
Accession Number: 20090112–5085.
Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–2329–007.
Applicants: Central Vermont Public Service Corp.
Description: Central Vermont Public Service Corp submits an affirmative statement that it has not erected any barriers to entry into the Northeast Region and will not erect any barriers to entry into the Northeast Region & request Waiver of Order 697.
Filed Date: 01/07/2009.
Accession Number: 20090112–0051.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER00–136–005; ER03–775–006.
Applicants: FortisUS Energy Corporation; FortisOntario Inc.
Description: FortisOntario Inc. and FortisUS Energy Corp submit Second Revised Sheet No. 1 et al. to FERC Electric Tariff, Original Volume No. 1, effective 9/18/07.
Filed Date: 01/08/2009.
Accession Number: 20090109–0161.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER03–9–015; ER98–2157–016.
Applicants: Westar Energy, Inc.; Kansas Gas and Electric Company.
Description: Change in Status Notification of Westar Energy, Inc.
Filed Date: 01/12/2009.
Accession Number: 20090112–5024.
Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Docket Numbers: ER03–114–005; ER04–183–004.
Applicants: Great Bay Power Marketing, Inc.; Great Bay Hydro Corporation.
Description: Great Bay Power Marketing and Great Bay Hydro Corp submits updated versions of their Substitute First Revised Sheets to Original Rate Schedule FERC 1.
Filed Date: 01/08/2009.
Accession Number: 20090109–0204.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER03–719–012; ER03–721–011; ER98–830–021.
Applicants: New Athens Generating Company, LLC; New Harquahala Generating Company, LLC; Millennium Power Partners, L.P.
Description: Notice of New Athens Generating Company, LLC, *et al.* for Non-material Change in Status.
Filed Date: 01/12/2009.
Accession Number: 20090112–5177.
Comment Date: 5 p.m. Eastern Time on Monday, February 2, 2009.

Docket Numbers: ER03–198–009.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Co. submits a Notice of Non-Material Change in Status.
Filed Date: 01/05/2009.
Accession Number: 20090108–0108.
Comment Date: 5 p.m. Eastern Time on Monday, January 26, 2009.

Docket Numbers: ER09–219–001; ER09–220–001.
Applicants: Duke Energy Carolinas, LLC.
Description: Duke Energy Carolinas, LLC submits Attachment A, Substitute Sixth Revised Service Agreement 208, *et al.*
Filed Date: 01/07/2009.
Accession Number: 20090108–0200.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–459–000.
Applicants: American Transmission Systems, Incorpora.
Description: Amendment to Application of American Transmission Systems, Incorporated for Wholesale Distribution Service Agreement with Borough of Wampum, PA.
Filed Date: 01/08/2009.
Accession Number: 20090108–5068.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER09–503–000.
Applicants: BC Landfill Energy LLC.
Description: BC Landfill Energy, LLC submits for filing its Petition for Acceptance of Electric Tariff, Waivers and Blanket Authorization.
Filed Date: 01/07/2009.
Accession Number: 20090108–0373.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–504–000.
Applicants: AC Landfill Energy, LLC.
Description: AC Landfill Energy, LLC submits for filing its Petition for Acceptance of Electric Tariff, Waivers and Blanket Authorization.
Filed Date: 01/07/2009
Accession Number: 20090108–0372.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–505–000.
Applicants: WC Landfill Energy, LLC.
Description: WC Landfill Energy, LLC submits for filing its Petition for Acceptance of Electric Tariff, Waivers and Blanket Authorization.
Filed Date: 01/07/2009.
Accession Number: 20090108–0371.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–513–000
Applicants: Cygnus Energy Partners, LLC.
Description: Cygnus Energy Futures, LLC submits the Petition for Acceptance of Initial Tariff and Waivers.
Filed Date: 01/08/2009.
Accession Number: 20090109–0198.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009

Docket Numbers: ER09–514–000.
Applicants: Cygnus Energy Futures, LLC.
Description: Cygnus Energy Futures, LLC submits the Petition for Acceptance of Initial Tariff and Waivers.
Filed Date: 01/08/2009.
Accession Number: 20090109–0197.
Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER09–515–000.
Applicants: Ameren Services Company.
Description: Ameren Services Company on behalf of Union Electric Company submits for filing their Wholesale Distribution Service Agreement.
Filed Date: 01/07/2009.
Accession Number: 20090108–0365.
Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–516–000.
Applicants: Ameren Services Company.
Description: Ameren Services Company on behalf of Central Illinois Public Service Company submits for

filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0366.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–517–000.

Applicants: Ameren Services Company.

Description: Ameren Services Company on behalf of Central Illinois Public Service Company submits for filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0367.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–518–000.

Applicants: Ameren Services Company.

Description: Ameren Services Company on behalf of Union Electric Company submits for filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0368.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–519–000.

Applicants: Ameren Services Company.

Description: Ameren Services Company on behalf of Union Electric Company submits for filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0369.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–520–000.

Applicants: Ameren Services Company.

Description: Ameren Services Company on behalf of Union Electric Company submits for filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0370.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–521–000.

Applicants: Ameren Services Company.

Description: Ameren Services Company on behalf of Union Electric Company submits for filing their Wholesale Distribution Service Agreement.

Filed Date: 01/07/2009.

Accession Number: 20090108–0364.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 28, 2009.

Docket Numbers: ER09–522–000.

Applicants: Alliant Energy Corporate Services, Inc.

Description: Alliant Energy Corporate Services, Inc submits Notice of Cancellation of AECS's Interstate Electric Corporation FERC Electric Tariff, Original Volume 2.

Filed Date: 01/05/2009.

Accession Number: 20090108–0199.

Comment Date: 5 p.m. Eastern Time on Monday, January 26, 2009.

Docket Numbers: ER09–524–000.

Applicants: Idaho Power Company.

Description: Idaho Power Co submits FERC Electric Tariff No. 8 for the Sale, Assignment or Transfer of Bonneville Power Administration Rights.

Filed Date: 01/08/2009.

Accession Number: 20090109–0160.

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER09–525–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits its Seventh Revised Volume No. 11 Open Access Transmission Tariff.

Filed Date: 01/08/2009.

Accession Number: 20090109–0159

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER09–526–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy, Inc submits First Revised Sheet No. 9 of a Control Area Services Agreement with Missouri Joint Municipal Electric Utility Commission.

Filed Date: 01/08/2009.

Accession Number: 20090109–0162.

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: ER09–527–000.

Applicants: PJM Interconnection L.L.C.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement among PJM, Indian River Power and Delmarva Power and Light Company.

Filed Date: 01/09/2009.

Accession Number: 20090112–0203.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: ER09–528–000.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy, Inc submits FERC Electric Transmission Reassignment Tariff, Original Volume 449.

Filed Date: 01/09/2009.

Accession Number: 20090112–0204.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: ER09–529–000.

Applicants: Virginia Electric & Power Company.

Description: Virginia Electric and Power Company *et al* submits a revised Generator Interconnection and Operating Agreement between Dominion and Fauquier Landfill Gas, LLC revising the rates associated with Dominion provision etc.

Filed Date: 01/09/2009.

Accession Number: 20090112–0177.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: ER09–530–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits jurisdictional agreement *et al.*

Filed Date: 01/09/2009.

Accession Number: 20090112–0175.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: ER09–531–000.

Applicants: Virginia Electric & Power Company.

Description: Virginia Electric and Power Company *et al.* submits a revised and executed Mutual Operating Agreement between Dominion and Old Dominion Electric Cooperative providing for a wires-to-wires operating between the two entities.

Filed Date: 01/09/2009.

Accession Number: 20090112–0174.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: ER09–532–000.

Applicants: Entergy Services, Inc.

Description: Entergy Operating Companies submits two executed Network Integration Transmission Service Agreements and Network Operating Agreements between ESI and American Electric Power Service Corporation etc.

Filed Date: 01/09/2009.

Accession Number: 20090112–0178.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH09–6–000.

Applicants: Ecofin Holdings Limited.

Description: FERC–65A Notice of Material Change in Facts of Ecofin Holdings Limited.

Filed Date: 01/09/2009.

Accession Number: 20090109–5049.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–7–000.

Applicants: The Capital Group Companies, Inc.

Description: FERC–65A Notice of Material Change in Facts of The Capital Group Companies, Inc.

Filed Date: 01/09/2009.

Accession Number: 20090109–5052.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–8–000.

Applicants: Goldman Sachs Group, Inc.

Description: Notice of Material Change in Facts—Goldman Sachs Group Inc.

Filed Date: 01/08/2009.

Accession Number: 20090108–5070.

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: PH09–9–000.

Applicants: ArcLight Capital Holdings, LLC.

Description: Notice of Change in Facts of ArcLight Capital Holdings, LLC.

Filed Date: 01/08/2009.

Accession Number: 20090108–5069.

Comment Date: 5 p.m. Eastern Time on Thursday, January 29, 2009.

Docket Numbers: PH09–10–000.

Applicants: BayCorp Holdings, Ltd.

Description: Report of BayCorp Holdings, Ltd. under PH06–30; Material Change in Facts pursuant to 18 CFR 366.4(b) and FERC–65A Exemption Notification.

Filed Date: 01/09/2009.

Accession Number: 20090109–5173.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–11–000.

Applicants: FPL Group, Inc.

Description: Notification of Update to Petition for Waiver of FPL Group, Inc. (FERC Form 65B).

Filed Date: 01/09/2009.

Accession Number: 20090109–5175.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–12–000.

Applicants: AES Corporation.

Description: FERC–65B Notice of Material Change in Facts of AES Corporation.

Filed Date: 01/09/2009.

Accession Number: 20090109–5223.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–13–000.

Applicants: Freeport McMoran Copper & Gold, Inc., Freeport McMoRan Corp.

Description: Freeport McMoRan Copper & Gold, Inc. and Freeport McMoRan Corp. Notification of Material Change in Facts Not Affecting PUHCA 2005 Exemption.

Filed Date: 01/09/2009.

Accession Number: 20090109–5226.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Docket Numbers: PH09–14–000.

Applicants: Brookfield Asset Management Inc.

Description: Brookfield Asset Management Inc. FERC Form 65 PUHCA.

Filed Date: 01/09/2009.

Accession Number: 20090109–5229.

Comment Date: 5 p.m. Eastern Time on Friday, January 30, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–1477 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN09–10–000]

National Fuel Marketing Company, LLC; NFM Midstream, LLC; NFM Texas Pipeline, LLC; NFM Texas Gathering, LLC; Notice of Designation of Commission Staff as Non-Decisional

January 15, 2009.

With respect to an order issued by the Commission today in the above-captioned docket, with the exceptions noted below, the staff of the Office of Enforcement's Division of Investigations (DOI) and Jerome Pederson, Acting Deputy Director, Office of Enforcement, are designated as non-decisional in deliberations by the Commission in this docket. Accordingly, pursuant to 18 CFR 385.2202 (2008), they will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2008), they are prohibited from communicating with advisory staff concerning any deliberations in this docket. Exceptions in DOI to this designation are: Robert E. Pease, Todd Mullins, Suzanne McNamara, Tegan Flynn, Lauren Rosenblatt, John Hutchings, Renee Thorne.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1471 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN09–9–000]

Seminole Energy Services, LLC; Seminole Gas Company, LLC; Seminole High Plains, LLC; Lakeshore Energy Services, LLC; Vanguard Energy Services, LLC; Notice of Designation of Commission Staff as Non-Decisional

January 15, 2009.

With respect to an order issued by the Commission today in the above-captioned docket, with the exceptions noted below, the staff of the Office of Enforcement's Division of Investigations (DOI) and Jerome Pederson, Acting Deputy Director, Office of Enforcement, are designated as non-decisional in deliberations by the Commission in this docket. Accordingly, pursuant to 18 CFR 385.2202 (2008), they will not serve

as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2008), they are prohibited from communicating with advisory staff concerning any deliberations in this docket. Exceptions in DOI to this designation are: Robert E. Pease, Todd Mullins, Suzanne McNamara, Tegan Flynn, Lauren Rosenblatt, John Hutchings, Renee Thorne.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1472 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA08–62–000]

California Independent System Operator Corporation; Notice of FERC Staff Attendance

January 15, 2009.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on January 16, 2009 members of its staff will participate in a teleconference to be conducted by the California Independent System Operator (CAISO) regarding the CAISO's 2009 transmission plan. Further information and documents for the teleconference can be obtained at: *http://www.caiso.com*.

Sponsored by the CAISO, this teleconference is open to all market participants, and Commission staff's participation is part of the Commission's ongoing outreach efforts. This meeting may discuss matters at issue in the above captioned docket.

For further information, contact Saeed Farrokhpay at *saeed.farrokhpay@ferc.gov*; (916) 294–0233 or Maury Kruth at *maury.kruth@ferc.gov*, (916) 294–0275.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1473 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–28–000]

City of Pasadena, CA; Notice of Filing

January 2, 2009.

Take notice that on December 23, 2008, the City of Pasadena, California filed its fourth annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective January 1, 2009.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 22, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1478 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–27–000]

City of Riverside, CA; Notice of Filing

January 2, 2009.

Take notice that on December 23, 2008, the City of Riverside, California filed its sixth annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective January 1, 2009.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 22, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1479 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–29–000]

Centerpoint Energy Gas Transmission Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Carthage to Perryville Project—Phase IV and Request for Comments on Environmental Issues

January 15, 2009.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will address the environmental impacts of the Carthage to Perryville Project—Phase IV involving construction and operation of facilities by Centerpoint Energy Gas Transmission Company (Centerpoint) in Red River and Jackson Parishes, LA.[1] The Commission will use the EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice explains the scoping process we [2] will use to gather environmental input from the public and interested agencies on the projects. Your input will help the Commission determine the issues that need to be evaluated in the EA. Please note that the scoping period will close on February 17, 2009. Details on how to submit comments are provided in the ''Public Participation'' section of this notice.

This notice is being sent to affected landowners; Federal, State, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this proposed project and to encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about survey permission and/or the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement for its project. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need To Know?'' is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*). This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the FERC's proceedings.

Summary of the Proposed Project

The purpose of the project is to increase the capacity of Line CP in meeting producer and shipper demand for Haynesville Shale natural gas in northwestern Louisiana that is planned for development. The proposed facilities would increase the capacity of Line CP by 274,000 dekatherms per day to a total capacity of 1.87 Billion cubic feet per day. Centerpoint specifically proposes to:

- Install one 15,000-horsepower compressor unit, 11 air-cooled heat exchanger units, and minor yard and station piping at its existing Westdale Compressor Station in Red River Parish, LA; and
- Install one 15,000-horsepower compressor unit, 11 air-cooled heat exchanger units, and minor yard and station piping at its existing Vernon Compressor Station in Jackson Parish, LA.

Centerpoint plans to begin constructing the project in June 2009, and to place the project in service in time for the winter 2009–2010 heating season.

Land Requirements for Construction

All proposed facilities would be constructed entirely within the existing fenced-in 6.1-acre Vernon Compressor Station and 12.2-acre Westdale Compressor Station. All temporary work areas within the compressor stations disturbed for the project would be restored to a vegetative, gravel, or paved cover following construction. Centerpoint may require the use of contractor/pipe yards outside of the compressor stations. Contractor/pipeyards would be located on commercial or industrial property and there would be no below-ground disturbance.

The general location of the proposed facilities is shown in appendix 1.[3]

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission staff requests public comments on the scope of the issues to address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and Soils.
- Water Resources, Fisheries and Wetlands.
- Vegetation and Wildlife.
- Threatened and Endangered Species.
- Land Use and Visual Quality.
- Cultural Resources.
- Air Quality and Noise.
- Reliability and Safety.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be presented in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, local libraries and newspapers, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the

[1] On December 5, 2008, Centerpoint filed its application with the Commission under section 7 of the Natural Gas Act and Part 157 of the Commission's regulations. The Commission issued its Notice of Application on December 17, 2008

[2] 2 ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

[3] *The appendices referenced in this notice are not being printed in the* **Federal Register**. Copies of all appendices are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary refer to the ''Additional Information'' section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Centerpoint.

Commission. To ensure your comments are received and considered, please carefully follow the instructions in the ''Public Participation'' section below.

Currently Identified Environmental Issues

We have already identified two issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Centerpoint. This preliminary list of issues may be changed based on your comments and our analysis.

- Potential impacts on air quality and noise emissions may occur.
- Potential water quality impacts on two streams adjacent to the Vernon Compressor Station.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the Carthage to Perryville Project—Phase IV. Your comments should focus on the potential environmental effects of the proposal, reasonable alternatives, and measures to avoid or lessen the environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before February 17, 2009.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number CP09–29–000 with your submission. The docket number can be found on the front of this notice. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at (202) 502–8258 or *eFiling@ferc.gov.*

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* A Quick Comment is an easy method for interested persons to submit text-only comments on a project.

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings.* eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''*Sign up*'' or ''*eRegiste*r''. You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing.''

(3) You may file your comments via mail to the Commission by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;

Label one copy of the comments for the attention of Gas Branch 2, PJ11.2.

Environmental Mailing List

An effort is being made to send this notice to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. This includes all landowners who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within distances defined in the Commission's regulations of certain aboveground facilities.

If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (Appendix 2). If you do not return the Information Request, you will be taken off the mailing list.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor,'' which is an official party to the proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in a Commission proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–1474 Filed 1–23–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0085; FRL–8767–1]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Radionuclides (Renewal); EPA ICR No. 1100.13, OMB Control No. 2060–0191

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before February 25, 2009.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2003–0085, to (1) EPA online using *http://www.regulations.gov* (our preferred method), by e-mail to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket, Mail Code 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB by

mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Brian Littleton, Radiation Protection Division, Office of Radiation and Indoor Air, Mail Code 6608J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 343–9216; fax number: (202) 343–2304; e-mail address: *littleton.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On September 18, 2008 (73 FR 54156), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2003–0085, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Air and Radiation 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 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Radionuclides (Renewal).

ICR numbers: EPA ICR No. 1100.13, OMB Control No. 2060–0191.

ICR Status: This ICR is scheduled to expire on January 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In the context of the Clean Air Act (42 U.S.C. 1857), Section 114 authorizes the Administrator of EPA to require any person who owns or operates any emission source or who is subject to any requirements of the Act to: (1) Establish and maintain records, (2) make reports, install, use, and maintain monitoring equipment or method, (3) sample emissions in accordance with EPA-prescribed locations, intervals and methods, and (4) provide information as may be requested. EPA's regional offices use the information collected to ensure that public health continues to be protected from the hazards of radionuclides by compliance with health based standards. This information is required for those facilities meeting the definition of each Subpart. EPA's compliance monitoring activities vary widely. EPA could issue a letter requesting information about compliance or could conduct a full scale investigation, including on-site inspections. The information required to be submitted is not confidential in nature.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 148 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: The NAICS Codes of facilities associated with the activity of the respondents are: Elemental Phosphorous—325188, Phosphogypsum Stacks—212392, Underground Uranium Mines—212291, and Uranium Mill Tailings—212291.

Estimated Number of Respondents: 62.

Frequency of Response: Initially, Annually, Occasionally.

Estimated Total Annual Hour Burden: 9,196.

Estimated Total Annual Cost: $1,262,386, includes $808,650 annualized O&M costs.

Changes in the Estimates: There is an increase of 5,164 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase reflects an increase in the number of facilities affected due to both renewed interest in uranium mining and phosphogypsum usage.

Dated: January 16, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–1606 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0291; FRL–8767–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Existing Other Solid Waste Incineration Units (Renewal), EPA ICR Number 2164.03, OMB Control Number 2060–0562

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before February 25, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0291, to (1) EPA online using *www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attention:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; *telephone number:* (202) 564–4113; *fax number:* (202) 564–0050; *e-mail address: williams.learia@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0291, which is available for public viewing either online at *http://www.regulations.gov* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NSPS for Existing Other Solid Waste Incineration Units (Renewal).

ICR Numbers: EPA ICR Number 2164.03, OMB Control Number 2060–0562.

ICR Status: This ICR is scheduled to expire on March 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: NSPS for Existing Other Solid Waste Incineration Units were promulgated on December 16, 2005 (70 FR 74892) and amended on November 24, 2006 (71 FR 67806). This standard applies to any air quality program in either a State or United States protectorate with one or more existing other solid waste incineration (OSWI) units or air curtain incinerators that commenced construction on or before December 9, 2004. This subpart does not directly affect incineration unit owners and operators; however, they must comply with the State's plan that has been developed by the air quality program administrator to implement the emission guidelines.

Owners or operators of the affected facilities must make a one-time-only report, initial notification, and performance tests. They are also required to perform other activities, such as emissions testing operator training, monitoring of operating parameters, annual operator training and annual reporting. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction, or any period during which the monitoring system is inoperative. Performance tests are the Agency's records of a source's initial capability to comply with emissions standards and not the operating conditions under which compliance was to achieve.

Any owner or operator subject to the provisions of this subpart must maintain a file of these measurements, and retain the file for at least five years following the collection of such measurements, maintenance reports, and records.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart FFFF, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

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 Number for EPA regulations listed in 40 CFR part 9 and 48 CFR chapter 15, are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 237 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose and 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. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners and operators of existing other solid waste incineration units.

Estimated Number of Respondents: 248.

Frequency of Response: Initially, annually and semiannually.

Estimated Total Annual Hour Burden: 176,576.

Estimated Total Annual Cost: $17,181,351, includes $15,941,351 in Labor costs, $1,240,000 in O&M costs, and zero capital/startup costs.

Changes in the Estimates: There is an adjustment increase in the total estimated burden as currently identified in the OMB Inventory of Approved Burdens. This increase is not due to any program changes. The increase in the labor hour burden estimates has occurred due to compliance with all of the provisions in the standard by the affected entities. The previous ICR only included burden associated with achieving compliance. In addition, compliance was achieved over several years.

There is an increase in operating and maintenance (O&M) costs associated with this ICR, as compared with the previous ICR. This is attributed to the fact that the affected entities have transitioned from initial compliance to continuing compliance.

Dated: January 15, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–1611 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0428; FRL–8767–2]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards (Renewal), EPA ICR Number 1871.05, OMB Control Number 2060–0420

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR that is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before February 25, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0428, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov*, or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: John Schaefer, Office of Air Quality Planning and Standards, Sector Policies and Programs Division (D243–05), Measurement Policy Group, Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0296; fax number: (919) 541–3207; e-mail address: *schaefer.john@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0428, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744 and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov*, as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NESHAP for Source Categories: Generic Maximum Achievable Control Technology Standards (Renewal).

ICR Numbers: EPA ICR Number 1871.05, OMB Control Number 2060–0420.

ICR Status: This ICR is scheduled to expire on March 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories: Generic Maximum Achievable Control Technology (hereafter, this subpart is referred to as the ''Generic MACT'') were proposed on October 14, 1998 (63 FR 55178) and promulgated on June 29, 1999 (64 FR 34854). These regulations apply to hazardous air pollutant (HAP) emission sources in four categories including: Polycarbonates (PC) Production, Acrylic and Modacrylic Fibers (AMF) Production, Acetal Resins (AR) Production and Hydrogen Fluoride (HF) Production.

In general, all NESHAP standards require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. The specific monitoring and recordkeeping requirements vary for each source category depending on the types of emissions control equipment and monitoring equipment used to comply with the Generic MACT standards for their category. These notifications, reports, and records are essential in determining compliance,

and are required of all sources subject to NESHAP.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 133 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Polycarbonate, acrylic and modacrylic fiber, acetal resin, and hydrogen fluoride production facilities.

Estimated Number of Respondents: 10.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 4,004.

Estimated Total Annual Cost: $438,560, which includes: $331,146 in annual labor costs and $107,414 in annualized O&M costs; and no annualized capital/startup costs.

Changes in the Estimates: The annual non-labor cost burden was increased by $414 due to an omission in the previous ICR renewal.

Dated: January 15, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–1613 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0295; FRL–8767–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Grain Elevators (Renewal), EPA ICR Number 1130.09, OMB Control Number 2060–0082

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before February 25, 2009.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0295, to: (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov;* (2) or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2223A, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; e-mail address: *williams.learia@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0295, which is available for public viewing either online at *http://www.regulations.gov,* or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov*.

Title: NSPS for Grain Elevators (Renewal).

ICR Numbers: EPA ICR Number 1130.09, OMB Control Number 2060–0082.

ICR Status: This ICR is schedule to expire on March 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The New Source Performance Standards (NSPS) for grain elevators were proposed on January 18, 1977 (40 CFR part 60, subpart DD), promulgated on August 3, 1978, and amended on October 17, 2000 (65 FR 61759). These standards apply to each affected facility at any grain terminal elevator or any grain storage elevator. The facilities are each truck unloading station, truck loading station, barge and ship loading station, railcar loading station, railcar unloading station, grain dryer and all grain handling operations that commenced construction, modification or reconstruction after August 3, 1978.

Owners or operators of the affected facilities must make a one-time-only report of the date of construction or reconstruction, notification of the actual date of startup, notification of any physical or operational change to existing facility that may increase the rate of emission of the regulated pollutant, notification of initial performance test; and results of initial performance test. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction, or any period during which the monitoring system is inoperative. Performance tests are the Agency's records of a source's initial capability to comply with emissions standards and not the operating conditions under which compliance was to achieve. An annual summary report is also required.

Any owner or operator subject to the provisions of this subpart must maintain a file of these measurements, and retain the file for at least two years following the collection of such measurements, maintenance reports, and records.

All reports are sent to the delegated state or local authority. In the event that there is no such delegated authority, the reports are sent directly to the EPA regional office. This information is being collected to assure compliance with 40 CFR part 60, subpart DD, as authorized in sections 112 and 114(a) of the Clean Air Act. The required information consists of emissions data and other information that have been determined to be private.

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 Number for EPA regulations listed in 40 CFR part 9 and 48 CFR chapter 15, are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information estimated to average 10 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose and 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. All existing ways will have to adjust to comply with any previously applicable instructions and requirements that have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners and operators of grain elevators.

Estimated Number of Respondents: 200.

Frequency of Response: On occasion, initially and annually.

Estimated Total Annual Hour Burden: 2,070.

Estimated Total Annual Cost: $167,108, which is comprised of labor costs inclusively, with neither capital/startup costs nor O&M costs.

Changes in the Estimates: There is no change in the labor cost in this ICR compared to the previous ICR. This is due to two considerations. First, the regulations have not changed over the past three years and are not anticipated to change over the next three years. Secondly, the growth rate for the industry is very low, negative or non-existent, so there is no significant change in the overall burden.

Since there are no changes in the regulatory requirements and there is no significant industry growth, the labor hours and cost figures in the previous ICR was used in this ICR, and there is no change in the burden to industry.

Dated: January 15, 2009.

John Moses,

Acting Director, Collection Strategies Division.

[FR Doc. E9–1621 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8766–7]

Proposed Settlement Agreement, Clean Air Petition for Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Settlement Agreement; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or ''Act''), 42 U.S.C. 7413(g), notice is hereby given of a proposed settlement agreement to address petitions for review filed by the Sierra Club, Desert Citizens Against Pollution, Downwinders At Risk, Friends of Hudson, Huron Environmental Activist League, Montanans Against Toxic Burning, the Portland Cement Association, the State of New York, the State of Connecticut, the State of Delaware, the State of Illinois, the State of Maryland, the Commonwealth of Massachusetts, the State of Michigan Department of Environmental Quality, the State of New Jersey, and the Commonwealth of Pennsylvania Department of Environmental Protection (collectively ''Petitioners'') in the U.S. Court of Appeals for the District of Columbia Circuit. *Portland Cement Association* v. *United States Environmental Protection Agency*, No. 07–1046 and consolidated Nos. 07–1048, 07–1049, and 07–1052. The various petitions for review challenge an EPA rule entitled ''National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry,'' published at 71 FR 76518 (Dec. 20, 2006) (''2006 Rule''). EPA has negotiated a proposed settlement agreement with the petitioners. Under the terms of the proposed settlement agreement, EPA has agreed to sign a notice of proposed rulemaking described in paragraph 1 of the agreement no later than March 31, 2009. EPA has agreed to take final action concerning the notice of proposed rulemaking described in paragraph 1 of the agreement no later than March 31, 2010.

DATES: Written comments on the proposed settlement agreement must be received by February 25, 2009.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2009–0026, online at *http://www.regulations.gov* (EPA's preferred method); by e-mail to *oei.docket@epa.gov*; by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Steven Silverman, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: (202) 564–5523; fax number (202) 564–5653; e-mail address: *silverman.steven@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Settlement Agreement

On December 20, 2006, EPA issued the 2006 Rule which establishes emission standards pursuant to section 112(d) of the Act for mercury and total hydrocarbons from new and existing Portland cement kilns. The 2006 Rule does not establish further controls for hydrogen chloride (''HCI'') emissions because EPA concluded that present controls on Portland cement kilns' emissions of HCI are already protective of human health with an ample margin of safety. Petitions for review of this rule were filed in the District of Columbia Circuit by a large number of entities including representatives of the regulated industry, States, and environmental groups. These petitions have been consolidated for purposes of judicial review but further litigation has been held in abeyance by court order.

In March 2007, EPA granted Sierra Club's administrative petition to reconsider the standards for mercury and total hydrocarbons, the decision that no further controls for *HCI* are required, and the decision not to set beyond-the-floor standards for mercury or for total hydrocarbons. EPA had itself already granted reconsideration *sua sponte* of the new source standard for mercury. 71 FR 76553 (Dec. 20, 2006).

EPA has negotiated a proposed settlement agreement with the various petitioners. Under the proposed settlement agreement, EPA agrees that it will prepare a notice of proposed rulemaking which will address all the issues raised in Sierra Club's petition for reconsideration. This notice is to be signed no later than March 31, 2009, EPA is to take final action concerning the notice of proposed rulemaking no later than March 31, 2010. The sole remedy under the proposed settlement agreement should EPA fail to propose or take final action by these dates is for any of the petitioners to withdraw their consent to any order of the DC Circuit Court of Appeals holding the litigation in abeyance and to move the court to vacate any such order.

For a period of thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the proposed settlement agreement from persons who are not parties or intervenors to the litigation. EPA or the Department of Justice may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines, based on any comment which may be submitted, that consent to the settlement agreement should be withdrawn, the terms of the agreement will be affirmed.

II. Additional Information About Commenting on the Proposed Settlement Agreement

A. How Can I Get a Copy of the Settlement Agreement?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2009–0026) contains a copy of the proposed settlement agreement. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *http://www.regulations.gov*. You may use the *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *http://www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to Whom Do I Submit Comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (e-mail) system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through *http://www.regulations.gov*, your e-mail address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: January 16, 2009.

Richard B. Ossias,

Associate General Counsel.

[FR Doc. E9–1592 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8766–8]

Science Advisory Board Staff Office Notification of a Public Teleconference of the Science Advisory Board Environmental Economics Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA's Science Advisory Board (SAB) Staff Office is announcing a public teleconference of the SAB Environmental Economics Advisory Committee (EEAC) to discuss its draft Advisory on EPA's draft Guidelines for Preparing Economic Analyses.

DATES: The teleconference will be held from 2 p.m. to 5 p.m. (Eastern Time) on March 4, 2009.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information regarding the public teleconference and call-in numbers may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), U.S. EPA Science Advisory Board Staff Office by telephone/voice mail at (202) 343–9867, or via e-mail at *stallworth.holly@epa.gov*. The SAB mailing address is: U.S. EPA, Science Advisory Board (1400F), 1200 Pennsylvania Avenue, NW., Washington, DC 20460. General information about the SAB, as well as any updates concerning the meeting announced in this notice, may be found in the SAB Web site at *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the SAB Environmental Economics Advisory Committee will hold a public teleconference to consider its draft Advisory on EPA's draft *Guidelines for Preparing Economic Analyses* as well as public comments. The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: The mission of the EEAC, an SAB Standing Committee, is to provide independent advice to the EPA Administrator, through the chartered SAB, regarding the use of economics in EPA's decision-making. As discussed in 73 FR 57621, EPA's National Center for Environmental Economics (NCEE) issued the *Guidelines for Preparing Economic Analyses* in September 2000 and updated those *Guidelines* in 2008. The SAB EEAC met on October 23—24, 2008 to discuss charge questions related to the updated *Guidelines*. On the March 4, 2009 teleconference, the SAB EEAC will discuss its draft Advisory as well as public comments submitted to the SAB EEAC.

Availability of Meeting Materials: All materials in support of this meeting, an agenda, public comments and a draft Advisory will be placed on the SAB Web site at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Guidelines%20Review?OpenDocument* prior to the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the SAB to consider during the advisory process.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to five minutes per speaker, with no more than a total of one hour for all speakers. Interested parties should contact Dr. Stallworth, DFO, at the contact information noted above, to be placed on the public speaker list for the March 4, 2009 teleconference. *Written Statements:* Written statements should be received in the SAB Staff Office by February 27, 2009 so that the information may be made available to the SAB for their consideration prior to this teleconference. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail to *stallworth.holly@epa.gov* (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format). Submitters are asked to provide versions of each document submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Meeting Access: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at (202) 343–9867 or *stallworth.holly@epa.gov*. To request accommodation of a disability, please contact Dr. Stallworth, preferably at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

Dated: January 15, 2009.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E9–1615 Filed 1–23–09; 8:45 am]

BILLING CODE 6560–50–P

EXECUTIVE OFFICE OF THE PRESIDENT

The White House Office

Memorandum for the Heads of Executive Departments and Agencies

January 20, 2009, Washington, DC.

From: Rahm Emanuel, Assistant to the President and Chief of Staff

Subject: Regulatory Review

President Obama has asked me to communicate to each of you his plan for managing the Federal regulatory process at the beginning of his Administration. It is important that President Obama's appointees and designees have the opportunity to review and approve any new or pending regulations. Therefore, at the direction of the President, I am requesting that you immediately take the following steps:

1. Subject to any exceptions the Director or Acting Director of the Office of Management and Budget (the ''OMB Director'') allows for emergency situations or other urgent circumstances relating to health, safety, environmental, financial, or national security matters, or otherwise, no proposed or final regulation should be sent to the Office of the Federal Register (the ''OFR'') for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009, or in the case of the Department of Defense, the Secretary of Defense. The department or agency head may delegate this review and approval power to any other person so appointed or designated by the President, consistent with applicable law.

2. Withdraw from the OFR all proposed or final regulations that have not been published in the **Federal Register** so that they can be reviewed and approved by a department or agency head as described in paragraph 1. This withdrawal is subject to the exceptions described in paragraph 1 and must be conducted consistent with OFR procedures.

3. Consider extending for 60 days the effective date of regulations that have been published in the **Federal Register** but not yet taken effect, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of law and policy raised by those

regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and-comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules. Following the 60-day extension:

a. For those rules that raise no substantial questions of law or policy, no further action needs to be taken; and

b. For those rules that raise substantial questions of law or policy, agencies should notify the OMB Director and take appropriate further action.

4. The requested actions set forth in paragraphs 1–3 do not apply to any regulations subject to statutory or judicial deadlines. Please immediately notify the OMB Director of any such regulations.

5. Notify the OMB Director promptly of any regulations that you believe should not be subject to the directives in paragraphs 1–3 because they affect critical health, safety, environmental, financial, or national security functions of the department or agency, or for some other reason. The OMB Director will review all such notifications and determine whether an exception is appropriate.

6. Continue in all instances to comply with any applicable Executive Orders concerning regulatory management.

As used in this memorandum, ''regulation'' has the meaning set forth in section 3(e) of Executive Order 12866 of September 30, 1993, as amended; this memorandum covers ''any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.''

This regulatory review will be implemented by the OMB Director, and communications regarding any matters pertaining to this review should be addressed to that official.

The OMB Director is authorized and directed to publish this memorandum in the **Federal Register**.

[FR Doc. E9–1639 Filed 1–23–09; 8:45 am]

BILLING CODE 3110–01–P

EXPORT-IMPORT BANK OF THE UNITED STATES

Sunshine Act Meeting

ACTION: Notice of a Partially Open Meeting of the Board of Directors of the Export-Import Bank of the United States.

TIME AND PLACE: Thursday, January 22, 2009 at 9:30 a.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

OPEN AGENDA ITEMS: Item No. 1: Ex-Im Bank Sub-Saharan Africa Advisory Committee for 2009.

PUBLIC PARTICIPATION: The meeting will be open to public participation for Item No. 1 only.

FOR FURTHER INFORMATION CONTACT: For further information, contact: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Tele. No. 202–565–3957).

Kamil P. Cook,

Deputy General Counsel.

[FR Doc. E9–1433 Filed 1–23–09; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Public Hearing

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory committee Act (Pub. L. No. 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) will hold a public hearing on February 25th 2009, to hear testimony from respondents to two recently published exposure drafts, Reporting Comprehensive Long-Term Fiscal Projections for the U.S. Government and Accounting for Social Insurance, Revised. Those interested in testifying should contact Eileen Parlow, Assistant Director, no later than February. Please indicate whether you wish to provide testimony on one or both exposure drafts. Also, please provide a short biography and a separate statement summarizing your written response to each exposure draft on which you wish to testify. Ms. Parlow can be reached at 202–512–7356 or via e-mail at *parlowe@fasab.gov.* The exposure drafts are available on the FASAB Web site *http://www.fasab.gov/exposure.html.*

Any interested person may attend the meetings as an observer. GAO Building Security requires advance notice of your attendance. Please notify FASAB of your planned attendance by calling 202–512–7350 at least one day prior to the respective meeting.

FOR FURTHER INFORMATION CONTACT: Wendy M. Payne, Executive Director, 441 G St., NW., Mail Stop 6K17V, Washington, DC 20548, or call (202) 512–7350.

Authority: Federal Advisory Committee Act. Pub. L. No. 92–463.

Dated: January 16, 2009.

Charles Jackson,

Federal Register Liaison Officer.

[FR Doc. E9–1413 Filed 1–23–09; 8:45 am]

BILLING CODE 1610–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

January 16, 2009.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB 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 that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before March 27, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Submit your comments by e-mail to *PRA@fcc.gov.* Include in the e-mail the OMB control number of the collection. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) or to obtain a copy of the collection send an e-mail to PRA@fcc.gov and include the collection's OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below, or call Leslie F. Smith at (202) 418–0217.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 3060–0584.

Title: Administration of U.S. Certified Accounting Authorities in Maritime Mobile and Maritime Mobile-Satellite Radio Services, FCC Forms 44 and 45.

Form Number: FCC 44 and 45.

Type of Review: Extension without change of a currently approved collection.

Respondents: Businesses or other for-profit.

Number of Respondents and Responses: 25 respondents; 100 responses.

Estimated Time per Response: 1–3 hours.

Frequency of Response: Recordkeeping; On occasion, semi-annual, and annual reporting requirements; Third party disclosure.

Obligation To Respond: Mandatory, see 47 U.S.C. 154(i) and 303(r).

Total Annual Burden: 150 hours.

Annual Cost Burden: $375,000.00.

Privacy Act Impact Assessment: No impacts.

Nature and Extent of Confidentiality: There is no need for confidentiality. However, respondents may request materials or information submitted to the Commission be withheld from public inspection under 47 CFR Section 0.459 of the FCC's rules.

Needs and Uses: The FCC has standards for accounting authorities in the maritime mobile and maritime-satellite radio services under 47 CFR part 3. The Commission uses these standards to determine the eligibility of applicants for certification as a U.S. accounting authority, to ensure compliance with the maritime mobile and maritime-satellite radio services, and to identify accounting authorities to the International Telecommunications Union (ITU). Respondents are entities seeking certification or those already certified to be accounting authorities.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–1625 Filed 1–23–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

January 16, 2009.

SUMMARY: The Federal Communications Commissions (Commission or FCC), 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, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 27, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: You may submit your PRA comments to Nicholas F. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167 and to Cathy Williams, Federal Communications Commission, via Internet at *PRA@fcc.gov.* Include in the e-mail the OMB control number of the collection or if there is no OMB control number, the Title shown in the **SUPPLEMENTARY INFORMATION** section below. If you cannot submit your comment by e-mail contact the person listed below to make alternate arrangements.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Cable Subscribership Survey.

Form Number: Not applicable.

Type of Review: New Information Collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents: 6,600.

Number of Responses: 13,200.

Estimated Time per Response: 2 hours per response.

Frequency of Response: One time reporting requirement.

Total Annual Burden: 26,400 hours.

Total Annual Cost: $1,320,000.

Obligation To Respond: Mandatory. The statutory authority for this information collection is contained in section 612(g) of the Communications Act of 1934, as amended, 47 U.S.C. 532(g).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information. However, the Commission made special provisions for operators that would like to withhold their information from public inspection. Operators who wish to request that their information be withheld from public inspection must submit the request pursuant to 47 CFR 0.459 in a letter addressed to the Secretary, and state the fields to which the request applies. They also should provide a complete explanation of why such treatment is appropriate, pursuant to 47 CFR 0.459(c), as casual requests will not be considered.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 612(g) of the Communications Act, 47 CFR 532(g), states that: (1) ''At such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States'' and (2) ''are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.'' Although there is no disagreement that the first prong of the 70/70 test has been met, the question of whether the second prong has been met is less clear. One data source that the Commission has traditionally relied on shows that the second prong of the 70/70 test has been met. However, other data sources do not demonstrate that the second prong has been met. The available data sources have some limitations because the reported cable penetration rates are not

calculated from a complete census of cable systems. The only way to accurately conclude that the 70/70 test has been met is to have the entire cable industry provide to the Commission the data for all cable systems. Specifically, we will require each cable operator to provide for 2006 and 2007 for each cable system on a zip code basis: (1) The total number of homes the cable operator currently passes; (2) the total number of homes the cable operator currently passes with 36 or more activated channels; (3) the total number of actual subscribers, including all subscribers in multiple dwelling units (MDUs); and (4) the total number of subscribers to systems with 36 or more activated channels. The submitted information will allow the Commission to calculate the 70/70 test for the entire universe of cable systems, which will be more accurate than relying on the available sample statistics.

A cable operator may certify to the Commission that it does not possess the requested information for calendar year 2006 and that it is not possible for the operator to compile such data for calendar year 2006. The Commission will provide cable operators that do not possess 2006 data with a certification form to be signed, dated, and returned to the Commission. This form will not impose any additional burden on cable operators.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–1626 Filed 1–23–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics; Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital and Health Statistics (NCVHS) Standards Subcommittee.

Time and Date: February 24, 2008 9 a.m.–5 p.m.

Place: Hubert Humphrey Building, 200 Independence Ave, SW., Room 505A, Washington, DC 20201.

Status: Open.

Purpose: The purpose of this meeting is to gather a better understanding of the issues, requirements, and plans to modify HIT standards processes to meet the needs of health care, personal health, and population health, as all of these health environments move rapidly into the information age. This meeting will be the first of several meetings on this topic that will be scheduled during 2009 by the Standards Subcommittee of the NCVHS.

For More Information Contact: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Denise Buenning, lead staff for Standards Subcommittee, NCVHS, Centers for Medicare and Medicaid Services, Office of E-Health Standards and Services, 7500 Security Boulevard, Room S2–26–17, Baltimore, Maryland, 21244, telephone (410) 786–6711 or Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statistics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/*, where further information including an agenda will be posted when available.

Should you require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: January 12, 2009.

James Scanlon,

Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. E9–1450 Filed 1–23–09; 8:45 am]

BILLING CODE 4151–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–09–0776]

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) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Economic Analysis of the National Breast and Cervical Cancer Early Detection Program (NBCCEDP) (OMB No. 0920–0776 exp. 4/30/2009)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCDDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC-funded National Breast and Cervical Cancer Early Detection Program (NBCCEDP) is the largest organized cancer screening program in the United States. The NBCCEDP provides critical breast and cervical cancer screening services to underserved women through grants to 50 states, the District of Columbia, 4 U.S. territories, and 13 American Indian/Alaska Native organizations. In the past decade, the NBCCEDP has provided over 7.8 million breast and cervical cancer screening and diagnostic exams to over 3.2 million low-income women. Women diagnosed with cancer through the program are eligible for Medicaid coverage through the Breast and Cervical Cancer Prevention and Treatment Act passed by Congress in 2000.

In 2008, CDC obtained OMB approval to collect one year of activity-based cost information from all 68 NBCCEDP grantees. With this revision request, CDC proposes to collect two additional, consecutive years of information and to implement a minor change to the data collection instrument, the Cost Assessment Tool (CAT), regarding screening activities supported through non-Federal funds. The additional information will allow CDC to calculate averages over time that reduce year-to-year fluctuations and provide better estimates of activity-based costs.

The information is being collected to support activity-based analysis of the costs and cost-effectiveness of the NBCCEDP. The information will be used to assess the costs of various program components, identify factors that impact average cost, perform cost-effectiveness analysis, and to develop a resource allocation tool for ensuring the most appropriate use of limited program resources. The information required to perform an activity-based cost analysis includes: staff and consultant salaries, screening costs, contracts and material costs, provider payments, in-kind contributions, administrative costs, allocation of funds, and staff time devoted to specific program activities. Data will be collected electronically.

NBCCEDP grantees currently report information on screening and diagnosis volumes (the effectiveness measures for the program) as part of the Minimum Data Elements (MDE) for the NBCCEDP (OMB 0920–0571, exp. 1/31/2010). Cost information to be collected through the CAT will complement information currently collected through the MDE project.

There are no costs to respondents other than their time. The total

estimated annualized burden hours are 1,496.

Estimated Annualized Burden Hours:

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
NBCCEDP Grantees	68	1	22

Dated: January 8, 2009.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E9–1616 Filed 1–23–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2274–CN]

RIN 0938–AP09

Medicaid Program; Fiscal Year Disproportionate Share Hospital Allotments and Disproportionate Share Hospital Institutions for Mental Disease Limits

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

ACTION: Correction of notice.

SUMMARY: This document corrects a technical error that appeared in the notice published in the **Federal Register** on December 19, 2008 entitled, ''Medicaid Program; Fiscal Year Disproportionate Share Hospital Allotments and Disproportionate Share Hospital Institutions for Mental Disease Limits.''

DATES: *Effective Date:* This notice is effective on February 20, 2009.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. E8–30267 of December 19, 2008 (73 FR 77704), a technical error was identified and corrected in the Correction of Errors section below. The correction in this notice is effective as if it had been included in the document published December 19, 2008. Accordingly, the correction is effective on February 20, 2009.

II. Summary of Errors

As published on page 77712 of the December 19, 2008 **Federal Register**, Chart 2 Preliminary DSH Allotment For Fiscal Year 2009, we erroneously omitted Column J and Column K. This correction notice republishes that chart with all of the Columns A through K included.

III. Correction of Errors

In FR Doc. E8–30267 of December 19, 2008 (73 FR 77704), on page 77712, Chart 2—Preliminary DSH Allotment For Fiscal Year 2009, is being republished in its entirety. The revised chart reads as follows:

BILLING CODE 4000–01–P

CHART 2 - PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2009

A	B	C	D	E	F	G	H	I	J	K
STATE	1923(H)(3)(D) Test Met /1	FY 2009 FMAPS	FY 2008 DSH Allotment For States Meeting Test /2	FY 2008 Allotments x CPIU Increase: 1.04	FY 2009 TC MAP Exp. Incl. DSH	FY 2009 TC DSH Expenditures	FY 2009 TC MAP Exp. Net of DSH Col F - G	"12% AMOUNT" =COL H x .12/(1-.12/COL C)* (In TS)	FY 2008 Allotment or 12% Limit (MAX of D or I)	FY 2009 DSH Allotment =FY 04 ALLOT or MIN Col J, Col E
ALABAMA	YES	67.98%	$289,640,400	$301,226,016	$4,252,915,000	$423,714,000	$3,829,201,000	$558,004,467	$558,004,467	$301,226,016
ARIZONA	YES	65.77%	$95,369,400	$99,184,176	$8,329,359,000	$144,062,000	$8,185,297,000	$1,201,443,891	$1,201,443,891	$99,184,176
CALIFORNIA	YES	50.00%	$1,032,579,800	$1,073,882,992	$41,386,718,000	$2,065,160,000	$39,321,558,000	$6,208,667,053	$6,208,667,053	$1,073,882,992
COLORADO	YES	50.00%	$87,127,600	$90,612,704	$3,565,940,000	$174,029,000	$3,391,911,000	$535,564,895	$535,564,895	$90,612,704
CONNECTICUT	YES	50.00%	$188,384,000	$195,919,360	$4,831,467,000	$276,134,000	$4,555,333,000	$719,263,105	$719,263,105	$195,919,360
DISTRICT OF COLUMBIA /3	YES	70.00%	$57,692,600	$60,000,304	$1,682,372,000	$69,556,000	$1,612,816,000	$233,580,248	$233,580,248	$60,000,304
FLORIDA	YES	55.40%	$188,384,000	$195,919,360	$14,406,092,000	$347,243,000	$14,058,849,000	$2,153,530,603	$2,153,530,603	$195,919,360
GEORGIA	YES	64.49%	$253,141,000	$263,266,640	$7,655,991,000	$408,490,000	$7,257,501,000	$1,070,000,929	$1,070,000,929	$263,266,640
HAWAII* /4	NA	NA	NA	NA	NA	NA	NA	NA	NA	$10,000,000
ILLINOIS	YES	50.32%	$202,512,800	$210,613,312	$10,969,905,000	$212,557,000	$10,757,348,000	$1,695,124,482	$1,695,124,482	$210,613,312
INDIANA	YES	64.26%	$201,335,400	$209,388,816	$5,945,360,000	$246,969,000	$5,698,391,000	$840,823,434	$840,823,434	$209,388,816
KANSAS	YES	60.08%	$38,854,200	$40,408,368	$2,336,706,000	$66,713,000	$2,269,993,000	$340,385,639	$340,385,639	$40,408,368
KENTUCKY	YES	70.13%	$136,578,400	$142,041,536	$5,069,126,000	$194,833,000	$4,874,293,000	$705,661,451	$705,661,451	$142,041,536
LOUISIANA	NOT MET	NA	NA	NA	NA	NA	NA	NA	NA	$731,960,000
MAINE	YES	64.41%	$98,901,600	$102,857,664	$2,385,294,000	$149,714,000	$2,235,580,000	$329,693,664	$329,693,664	$102,857,664
MARYLAND	YES	50.00%	$71,821,400	$74,694,256	$6,646,611,000	$111,241,000	$6,535,370,000	$1,031,900,526	$1,031,900,526	$74,694,256
MASSACHUSETTS	YES	50.00%	$287,285,600	$298,777,024	$12,177,805,000	$0	$12,177,805,000	$1,922,811,316	$1,922,811,316	$298,777,024
MICHIGAN	YES	60.27%	$245,608,800	$259,593,152	$9,964,289,000	$427,404,000	$9,536,885,000	$1,428,932,403	$1,428,932,403	$259,593,152
MISSISSIPPI	YES	75.84%	$143,642,800	$149,388,512	$3,966,262,000	$189,735,000	$3,776,527,000	$538,368,060	$538,368,060	$149,388,512
MISSOURI	YES	63.19%	$446,234,600	$464,083,984	$7,859,273,000	$699,636,000	$7,159,637,000	$1,060,560,567	$1,060,560,567	$464,083,984
NEVADA	YES	50.00%	$43,563,800	$45,306,352	$1,390,056,000	$78,926,000	$1,311,130,000	$207,020,526	$207,020,526	$45,306,352
NEW HAMPSHIRE	YES	50.00%	$150,800,000	$156,832,000	$1,370,274,000	$245,774,000	$1,124,500,000	$177,552,632	$177,552,632	$156,832,000
NEW JERSEY	YES	50.00%	$606,361,000	$630,615,440	$10,311,519,000	$1,212,722,000	$9,098,797,000	$1,436,652,158	$1,436,652,158	$630,615,440
NEW YORK	YES	50.00%	$1,512,959,000	$1,573,477,360	$52,028,036,000	$2,738,161,000	$49,289,875,000	$7,782,611,842	$7,782,611,842	$1,573,477,360
NORTH CAROLINA	YES	64.60%	$277,866,400	$288,981,056	$10,818,763,000	$452,093,000	$10,366,670,000	$1,527,802,773	$1,527,802,773	$288,981,056
OHIO	YES	62.14%	$382,655,000	$397,961,200	$14,288,405,000	$641,393,000	$13,647,012,000	$2,029,577,963	$2,029,577,963	$397,961,200
PENNSYLVANIA	YES	54.52%	$528,652,600	$549,798,704	$17,401,213,000	$753,449,000	$16,647,764,000	$2,561,531,778	$2,561,531,778	$549,798,704
RHODE ISLAND	YES	52.59%	$61,224,800	$63,673,792	$1,962,587,000	$119,038,000	$1,843,549,000	$286,628,949	$286,628,949	$63,673,792
SOUTH CAROLINA	YES	70.07%	$308,478,800	$320,817,952	$4,414,900,000	$440,244,000	$3,974,656,000	$575,520,880	$575,520,880	$320,817,952
TENNESSEE /4	NA	NA	NA	NA	NA	NA	NA	NA	NA	$305,451,928
TEXAS	YES	59.44%	$900,711,000	$936,739,440	$23,585,002,000	$1,515,330,000	$22,069,672,000	$3,318,266,367	$3,318,266,367	$936,739,440
VERMONT	YES	59.45%	$21,193,200	$22,040,928	$1,174,271,000	$35,649,000	$1,138,622,000	$171,189,238	$171,189,238	$22,040,928
VIRGINIA	YES	50.00%	$82,519,327	$85,820,100	$5,866,487,000	$189,669,000	$5,676,818,000	$896,339,684	$896,339,684	$85,820,100
WASHINGTON	YES	50.94%	$174,255,200	$181,225,408	$7,025,160,000	$317,280,000	$6,707,880,000	$1,053,002,796	$1,053,002,796	$181,225,408
WEST VIRGINIA	YES	73.73%	$63,579,600	$66,122,784	$2,451,058,000	$86,233,000	$2,364,825,000	$338,944,203	$338,944,203	$66,122,784
TOTAL			$9,183,914,127	$9,551,270,692	$307,529,216,000	$15,033,151,000	$292,496,065,000	$44,936,558,522	$44,936,558,522	$10,598,682,620
LOW DSH STATES		FY 2009 FMAPS	Prior FY 2008 Allotments	FY 2008 Allotment x CPIU Increase: 1.04						
ALASKA		50.53%	$19,186,622	$19,954,087	$1,173,025,000	$30,269,000	$1,142,756,000	$179,839,483	$179,839,483	$19,954,087
ARKANSAS		72.81%	$40,632,340	$42,257,634	$3,744,944,000	$53,939,000	$3,690,105,000	$530,195,452	$530,195,452	$42,257,634
DELAWARE		50.00%	$8,527,387	$8,868,482	$1,279,645,000	$6,011,000	$1,273,634,000	$201,100,105	$201,100,105	$8,868,482
IDAHO		69.77%	$15,482,811	$16,102,123	$1,290,110,000	$25,742,000	$1,264,368,000	$183,240,343	$183,240,343	$16,102,123
IOWA		62.62%	$37,093,883	$38,577,638	$2,979,088,000	$49,189,000	$2,929,899,000	$434,935,461	$434,935,461	$38,577,638
MINNESOTA		50.00%	$70,350,945	$73,164,983	$7,342,070,000	$149,520,000	$7,192,550,000	$1,135,665,789	$1,135,665,789	$73,164,983
MONTANA		68.04%	$10,691,523	$11,119,184	$676,424,000	$17,947,000	$658,477,000	$125,076,606	$125,076,606	$11,119,184
NEBRASKA		59.54%	$26,654,661	$27,720,847	$1,742,297,000	$30,046,000	$1,712,251,000	$267,334,685	$267,334,685	$27,720,847
NEW MEXICO		70.88%	$19,186,622	$19,954,087	$3,259,863,000	$26,012,000	$3,233,851,000	$467,150,867	$467,150,867	$19,954,087
NORTH DAKOTA		63.15%	$8,997,202	$9,357,090	$603,495,000	$1,611,000	$601,884,000	$89,170,615	$89,170,615	$9,357,090
OKLAHOMA		65.90%	$34,109,548	$35,473,930	$3,905,897,000	$49,678,000	$3,856,219,000	$565,769,571	$565,769,571	$35,473,930
OREGON		62.45%	$42,636,936	$44,342,413	$3,604,019,000	$48,441,000	$3,555,578,000	$528,156,621	$528,156,621	$44,342,413
SOUTH DAKOTA		62.55%	$10,403,173	$10,819,300	$680,378,000	$1,201,000	$679,177,000	$100,848,715	$100,848,715	$10,819,300
UTAH		70.71%	$18,478,571	$19,217,714	$1,641,765,000	$27,847,000	$1,613,918,000	$233,255,272	$233,255,272	$19,217,714
WISCONSIN		59.38%	$89,042,355	$92,604,049	$5,605,973,000	$65,086,000	$5,540,885,000	$833,307,939	$833,307,939	$92,604,049
WYOMING		50.00%	$213,184	$221,711	$564,710,000	$110,000	$564,600,000	$89,147,368	$89,147,368	$221,711
TOTAL LOW DSH STATES			$451,687,763	$469,755,274	$40,292,803,000	$582,651,000	$39,710,152,000	$5,954,194,894	$5,954,194,894	$469,755,272
TOTAL			$9,635,601,890	$10,021,025,966	$347,822,019,000	$15,615,802,000	$332,206,217,000	$50,891,153,417	$50,891,153,417	$11,068,437,892

FOOTNOTES:

/1 "YES": If FY 2009 or prior fiscal year is the "Fiscal Year Specified", as determined under section 1923(H)(3)(D) of the Social Security Act; "NOT MET": If Fiscal Year Specified has not occurred, and "NA" for States that this provision is not applicable.

/2 For Non-Low DSH States, entries in Columns C through Column K are only for States meeting the "Fiscal Year Specified" test ("YES" in Column B). The entry in Column D is the actual prior year (FY 2008) DSH allotment, and for States that FY 2009 is the Fiscal Year Specified, the prior FY 2008 DSH allotment was equal to the FY 2004 allotment.

/3 The actual FY 2004 D.C DSH allotment was $37,676,000. However, under section 6054 of DRA, for purposes of establishing the actual FY 2006 DSH allotment for D.C., the FY 2004 DSH allotment for D.C. was recalculated as $57,692,600 .

/4 Hawaii and Tennessee DSH allotments determined under section 1923(K)(6) of the Act; under this section, Tennessee's DSH payments are limited to 30% of DSH allotment.

BILLING CODE 4000–01–C

IV. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice.

Section 553(d) of the APA ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. This notice merely corrects a typographical error. Therefore, we find good cause to waive the delay in the effective date.

This correction notice is being republished with the same effective date as if the correction contained herein was published in the **Federal Register** on December 19, 2008, the publication date of the previous notice which this notice corrects.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: January 16, 2009.

Ann C. Agnew,

Executive Secretary to the Department.

[FR Doc. E9–1535 Filed 1–23–09; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Health, Behavior, and Context Subcommittee.

Date: February 23–24, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Michele C. Hindi-Alexander, PhD, Division of Scientific Review, National Institutes of Health, Eunice Kennedy Shriver National Institute For Child Health & Development, 6100 Executive Boulevard, Room 5b01, Bethesda, MD 20812–7510, (301) 435–8382, *hindialm@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: January 15, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–1520 Filed 1–23–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Small Grants for Lung Tissue Research.

Date: February 11, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: YingYing Li-Smerin, MD, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Patient Oriented Research (K23,24, and 25's) Career Enhancement Awards.

Date: February 17–18, 2009.

Time: 8 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Marriott Crystal City, 2899 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Mark Roltsch, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892–7924, 301–435–0287,

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Research Projects in Lung Physiology and Immune Function.

Date: February 18, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: YingYing Li-Smerin, MD, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov*.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Mentored Clinical Scientist Research Career Development Awards (K08s).

Date: February 18–19, 2009.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Marriott, 2899 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Rina Das, PhD, Scientific Review Administrator, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7200, Bethesda, MD 20892–7924, 301–435–0297, *dasr2@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 15, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–1532 Filed 1–23–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Interventions to Remediate Age-Related Cognitive Decline.

Date: February 19, 2009.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Elaine Lewis, PhD, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Building, Suite 2C212, MSC–9205, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7707, *elainelewis@nia.nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel, Medicare Expenditures.

Date: February 24, 2009.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20814. (Telephone Conference Call).

Contact Person: Alicja L. Markowska, PhD., DSC, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel, Neural and Behavioral Profiles of Cognitive Aging.

Date: February 26–27, 2009.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Elaine Lewis, PhD., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, Gateway Building, Suite 2C212, MSC–9205, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7707, *elainelewis@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 15, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–1528 Filed 1–23–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Initial Review Group; Behavior and Social Science of Aging Review Committee.

Date: March 5–6, 2009.

Time: 4 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Jeannette L Johnson, PhD, Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2c–212, Bethesda, MD 20892, 301–402–7705.

Name of Committee: National Institute on Aging Initial Review Group; Clinical Aging Review Committee.

Date: March 5–6, 2009.

Time: 6 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Alicja L. Markowska, PhD, DSC, National Institute on Aging, National Institutes of Health, Gateway Building 2c212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–496–9666, *markowsa@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 15, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–1533 Filed 1–23–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel; NINR Core Center Grants Review.

Date: February 24–25, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Plaza Hotel, Ten Thomas Circle, Washington, DC 20005.

Contact Person: Mario Rinaudo, MD, Scientific Review Administrator, Office of Review, National Inst of Nursing Research, National Institutes of Health, 6701 Democracy Blvd (DEM 1), Suite 710, Bethesda, MD 20892, 301–594–5973, *mrinaudo@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 15, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–1540 Filed 1–23–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

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

Proposed Project: Cross-Site Evaluation of the National Child Traumatic Stress Initiative (NCTSI)—(OMB No. 0930–0276)—Revision

The Substance Abuse and Mental Health Services Administration's (SAMHSA), Center for Mental Health Services (CMHS) will conduct the Cross-Site Evaluation of the National Child Traumatic Stress Initiative (NCTSI). The data collected will describe the children and families served by the National Child Traumatic Stress Network (NCTSN) and their outcomes, assess the development and dissemination of effective treatments and services, evaluate intra-network collaboration, and assess the Network's impact beyond the NCTSN.

Data will be collected from caregivers, youth, NCTSN staff (e.g., project directors, researchers, and providers), mental health providers outside of the NCTSN, and non-mental health service providers who provide services to children outside of the NCTSN. Data collection will take place in all Community Treatment and Services Programs (CTS) and Treatment and Service Adaptation Centers (TSA) active during the three-year approval period, and 2 National Centers for Child Traumatic Stress (NCCTS). Currently, there are 37 CTS centers and 13 TSA centers active, though this number could drop to 18 CTS centers and 5 TSA centers in 2009 depending on the number of new centers funded in that year. Throughout, burden estimates are calculated for an average of 44 centers in each year.

The Cross-site Evaluation is composed of eight distinct study components, seven of which involve data collection and are described below.

Descriptive and Clinical Outcomes

In order to describe the children served, their trauma histories and their clinical and functional outcomes, five instruments will be used to collect data from youth ages 7–18 who are receiving services in the NCTSN, and from caregivers of all children who are receiving NCTSN services. Data will be collected when the child/youth enters services and during subsequent follow-up sessions at three-month intervals over the course of one year. This study relies upon the use of data already being collected as a part of the Network's Core Data Set, and includes the following five instruments:

- The Core Clinical Characteristics Form, which collects demographic, psychosocial and clinical information about the child being served including information about the child's domestic environment and insurance status, indicators of the severity of the child's problems, behaviors and symptoms, and use of non-Network services;
- The Trauma Information/Detail Form, which collects information on the history of trauma(s) experienced by the child being served in the NCTSN including the type of trauma experienced, the age at which the trauma was experienced, type of exposure, whether or not the trauma is chronic, and the setting and perpetrator(s) associated with the traumatic experience;
- The Child Behavior Checklist (CBCL) 1.5–5 and 6–18, which measure symptoms in such domains such as emotionally reactive, anxious/depressed, somatic complaints, withdrawn, attention problems, aggressive behavior, sleep problems, rule-breaking behavior, social problems, thought problems, and withdrawn/depressed;
- The UCLA PTSD Short Form, which screens for exposure to traumatic events and for all DSM–IV PTSD symptoms in children who report traumatic stress experiences; and the
- Trauma Symptoms Checklist for Children, which evaluates acute and chronic posttraumatic stress symptoms in children's responses to unspecified traumatic events across several symptom domains.

Approximately 2,500 youth and 3,300 caregivers will participate in the descriptive and clinical outcomes study, with caregivers responding to four instruments, and youth responding to one.

Consumer Satisfaction

In order to assess the level of satisfaction with services received by NCTSN centers, caregivers participating in the descriptive and clinical outcomes study are also given the opportunity to report satisfaction using the Youth Services Survey for Families (YSS–F) instrument. Caregivers complete this survey, via mail or phone, once upon completion of services, or after six months of services, whichever comes first. The survey assesses perceptions of service across five domains: Access, participation in treatment, cultural sensitivity, satisfaction, and outcomes. Approximately 3,300 caregivers will participate in the consumer satisfaction study. This study utilizes a single instrument, the YSS–F.

Adoption of Methods and Practices

This study is designed to evaluate the extent to which trauma-related practices, knowledge, methods, and products, particularly products created or disseminated by the NCTSN, are being adopted by Network centers and non-Network partners, and involves data collection using two distinct instruments. The General Adoption and Assessment Survey (GAAS) is used to ascertain the degree to which the various products and practices developed by network members are being adopted by each of the grantee sites. Question areas include the experience and role of the respondent; which products are being adopted; the stage of adoption process; the fidelity of the adoption implementation; the methods employed to bring the product into use; the facilitators of the adoption process; and the barriers to adoption. The GAAS will be administered to approximately 17,550 service providers, 44 project directors, and 44 researchers/evaluators once per year throughout the course of the evaluation. The Adoption and Implementation Factors Interview (AIFI) is a follow-up interview on product adoption that will be conducted with 150 network providers, 45 project directors/principal investigators, and 30 researchers/evaluators. The AIFI obtains information leading to an assessment of successful adoption and implementation processes and an understanding of the characteristics of the centers that result in adoption of network supported methods and practices. This study utilizes two instruments, the GAAS and the AIFI.

Network Collaboration

The network collaboration study also utilizes two separate data collection activities. The Network Survey utilizes network analysis techniques to measure the extent to which each NCTSN center interacts with every other center on selected key Network activities (governance/decisionmaking, information sharing, coordination of activities, product development, product dissemination and adoption, and training and technical assistance). The survey is administered to 80 current or former project directors/principal investigators, and to 80 other NCTSN staff members. The Child Trauma Partnership Tool assesses the activities and impact of the NCTSN collaboration structures (Work Groups, Committees, Consortia) in terms of membership activities, vision, formalization, leadership, management, communication, decisionmaking, resource allocation, understanding/valuing, and accomplishments. It is administered approximately 200 NCTSN staff members who make up the formal Network workgroups. The two surveys associated with this data collection, the Network Survey and the

Child Trauma Partnership Tool, will be administered in alternating years of the evaluation.

Provider Knowledge and Use of Trauma-Informed Services

This study assesses the extent to which funded Network centers enhance the trauma-informed service knowledge base and use among service providers affiliated with the Network through training and outreach activities. The Trauma-Informed Services (TIS) Survey, which collects data on respondent characteristics, knowledge acquisition, predicted knowledge utilization, and overall training satisfaction, is administered to providers following Network center-sponsored training events. TIS Survey data will be collected from approximately 58,500 providers over the next three years of the evaluation. This study utilizes a single instrument, the TIS Survey.

Product Development and Dissemination

This study identifies and describes the products developed and disseminated to Network and non-Network partners. Three methods of data collection are used in this study: The Product/Innovation Development and Dissemination Survey (PDDS), telephone interviews with existing NCTSN collaborative workgroup leaders (chairpersons), and case studies. The PDDS is included and completed as part of centers' quarterly progress reports, and is gathered quarterly from 44 project directors/principal investigators. More detailed information on product development and dissemination will be collected as a part of 10 case studies (5 in each alternating year) to be conducted in the next three years of the evaluation (with 10 caregivers, 20 researchers/evaluators from the network, and 20 non-network product developers). These case studies each focus on the development and dissemination of specific Network products/innovations, and include as respondents key informants who are knowledgeable about the development and dissemination of each of these products. In addition, interviews will be conducted with approximately 15 workgroup leaders. The workgroup leader telephone interviews examine the role and impact of the Network's collaborative workgroups in the development and dissemination of products and innovations, and occur in alternating years, opposite the case studies. This study utilizes the three instruments discussed above: The PDDS, the case study interview guide, and the workgroup leader interview guide.

National Impact

This study examines the extent to which the existence of the NCTSN has impacted trauma-informed services information, knowledge, policy, and practices among mental health and non-mental health child-serving agencies external to the Network. The National Impact Survey collects data about these agencies' knowledge and awareness of childhood trauma and practices, about their knowledge and connections to the NCTSN centers, and about their policies, practices, and programs targeted to children and adolescents who have been exposed to traumatic experiences. The survey is administered to 1,600 mental health and 1,600 non-mental health service providers from outside the NCTSN. These mental health agency and non-mental health agency data will be collected in alternating years over the course of the evaluation. This study includes a single instrument, the National Impact Survey.

This revision to the currently approved information collection activities includes the extension of Cross-site Evaluation information collection activities for an additional three years beyond the initial three-year approval period. This revision also addresses the following programmatic changes:

- The Trauma-Informed Services Survey was shortened to reduce burden in response to NCTSN center feedback, removing four pages from the original 11-page survey. The dropped items focused primarily on the overall content of the training, including types of trauma addressed in the training and specific topics covered in the training.
- The Product Development and Dissemination Survey data is now gathered from an existing quarterly report rather than from a stand-alone instrument,
- GAAS provider respondents are now recruited from the pool of TIS Survey respondents who indicate a willingness to participate in future surveys. In the past, these respondents were recruited using a stand-alone invitation distributed at training events.

The average annual respondent burden is estimated below.

Instrument	Number of respondents	Total avg. number of responses per respondent	Hours per response	Total burden hours	3 yr. avg. annual burden hours
Caregivers					
Child Behavior Checklist 1.5–⅚–18 (CBCL 1.5–⅚–18)	3,300	5	0.3	5,445	1,815
Trauma Information/Detail Form	3,300	5	0.2	3,630	1,210
Core Clinical Characteristics Form	3,300	5	0.4	6,600	2,200
Youth Services Survey for Families (YSS–F)	3,300	1	0.1	264	88
UCLA–PTSD Short Form (UCLA–PTSD)	3,300	5	0.2	2,805	935
Case Study Interviews	10	1	1.5	15	5
Youth					
Trauma Symptoms Checklist for Children-Abbreviated (TSCC–A)	2,508	5	0.3	4,138	1,379.33
Service Providers					
Provider Trauma-Informed Service Survey (TIS)	58,500	1	0.2	11,700	3,900
General Adoption Assessment Survey (GAAS) Providers	17,550	1	0.5	8,775	2,925
Adoption and Implementation Factors Interview (AIFI) Provider Assessment & Clinical Components	150	1	1.0	150	50

Instrument	Number of respondents	Total avg. number of responses per respondent	Hours per response	Total burden hours	3 yr. avg. annual burden hours
Project Directors/Principal Investigators					
Product/Innovations Development and Dissemination Survey (PDDS)	44	12	1.0	528	176
General Adoption Assessment Survey (GAAS) Administrators	44	3	0.5	66	22
Adoption and Implementation Factors Interview (AIFI) Administrator Assessment & Clinical Components	45	1	1.0	45	15
Network Survey	80	1	1.0	80	26.67
Other Network Staff					
Workgroup/Taskforce Coordinator Interview	15	1	1.5	22.5	7.5
Case Study Interviews	20	1	2.0	40	13.33
General Adoption Assessment Survey (GAAS)	44	3	0.5	66	22
Adoption and Implementation Factors Interview (AIFI)	30	1	1.0	30	10
Network Survey	80	1	1.0	80	26.67
Child Trauma Partnership Tool (CTPT)	200	2	0.8	320	106.67
Non-Network Mental Health Professionals					
National Impact Survey	1,600	1	0.5	800	266.67
Non-Network Non-Mental Health Professionals					
National Impact Survey	1,600	2	0.5	1,600	533.33
Non-Network Product Developers					
Case Study Interviews	20	1	1.5	30	10
Total Summary	99,040	60			47,230
Total Annual Summary	33,013	20			15,743

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 7–1044, 1 Choke Cherry Road, Rockville, MD 20850. Written comments should be received by March 27, 2009.

Dated: January 16, 2009.

Elaine Parry,

Director, Office of Program Services.

[FR Doc. E9–1633 Filed 1–23–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Citizenship and Immigration Services Ombudsman; DHS CIS Ombudsman Case Problem Submission

AGENCY: Office of the Citizenship and Immigration Services Ombudsman, DHS.

ACTION: 30-Day Notice and request for comments; Extension of an existing information collection 1601–0004, DHS Form 7001.

SUMMARY: The Department of Homeland Security, Office of the Citizenship and Immigration Services Ombudsman, submits this extension for the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). The Office of the Citizenship and Immigration Services Ombudsman is soliciting comments concerning an extension to an existing information collection, DHS CIS Ombudsman Case Problem Submission, DHS Form 7001. DHS previously published this information collection request (ICR) in the **Federal Register** on November 10, 2008 at 73 FR 66654, for a 60-day public comment period. No comments were received by DHS. The purpose of this notice is to allow an additional 30-days for public comments.

DATES: Comments are encouraged and will be accepted until February 25, 2009. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, Department of Homeland Security, Office of the Citizenship and Immigration Services Ombudsman, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

The Office of Management and Budget 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 submissions of responses.

FOR FURTHER INFORMATION CONTACT: If additional information is required contact: the Department of Homeland

Security (DHS), Office of the CIS Ombudsman, Director of Communications, Mail Stop 1225, Washington, DC 20528–1225, 202–357–8100.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security, Office of the Deputy Secretary, Office of the Citizenship and Immigration Services Ombudsman (CISOMB), collects information to receive and process correspondence received from individuals, employers, and their designated representatives to: (1) Assist individuals and employers in resolving problems during interactions with U.S. Citizenship and Immigration Services (USCIS); (2) identify areas in which individuals and employers have problems in dealing with USCIS; and (3) and to the extent possible, propose changes to mitigate problems as mandated by the Homeland Security Act of 2002, Section 452.

Agency: Department of Homeland Security, Office of the Citizenship and Immigration Services Ombudsman.

Title: DHS CIS Ombudsman Case Problem Submission.

OMB Number: 1601–0004.

Frequency: One-time response.

Affected Public: Individuals or Households. This information collection is necessary for CISOMB to identify problem areas, propose changes, and assist individuals experiencing problems during adjudication of an immigrant benefit with USCIS.

Number of Respondents: 2,600 respondents.

Estimated Time per Respondent: 1 hour per response.

Total Burden Hours: 2,600 annual burden hours.

Total Burden Cost (capital/startup): $0.00.

Total Burden Cost (operating/maintaining): $0.00.

Dated: January 13, 2009.

Richard Mangogna,

Chief Information Officer.

[FR Doc. E9–1565 Filed 1–23–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–90, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day notice of information collection under review: Form I–90, Application To Replace Permanent Resident Card; OMB Control No. 1615–0082.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 27, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail please add the OMB Control Number 1615–0082 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I–90. Should USCIS decide to revise the Form I–90 it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form I–90.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application To Replace Permanent Resident Card.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–90. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This form will be used by USCIS to determine eligibility for a Lawful Permanent Resident Card.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 410,799 responses at 55 minutes (.916) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 376,292 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/.* We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210, telephone number 202–272–8377.

Dated: January 15, 2009.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E9–1596 Filed 1–23–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: I–612, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day notice of information collection under review: Form I–612, Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act; OMB Control No. 1615–0030.

The Department of Homeland Security, U.S. Citizenship and

Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days until March 27, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, add the OMB Control Number 1615–0030 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I–612. Should USCIS decide to revise the Form I–612 it will advise the public when it publishes the 30-day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form I–612.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–612. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This form is used by the USCIS to determine eligibility for a waiver.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,300 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 433 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210, telephone number 202–272–8377.

Dated: January 21, 2009.

Sunday Aigbe,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E9–1598 Filed 1–23–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–905, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 60-Day notice of information collection under review: Form I–905, Application for Authorization To Issue Certification for Health Care Workers and Related Requirements; OMB Control No. 1615–0086.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for 60 days until March 27, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please add the OMB Control Number 1615–0086 in the subject box.

During this 60-day period USCIS will be evaluating whether to revise the Form I–905. Should USCIS decide to revise the Form I–905 it will advise the public when it publishes the 30 day notice in the **Federal Register** in accordance with the Paperwork Reduction Act. The public will then have 30 days to comment on any revisions to the Form I–905.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of an existing information collection.

(2) *Title of the Form/Collection:* Application for authorization to Issue Certification for Health Care Workers and Related Requirements.

(3) *Agency form number, if any, and the applicable component of the*

Department of Homeland Security sponsoring the collection: Form I–905. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. This form will be used by USCIS to permit an organization to apply for authorization to issue certificates to health care workers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

- Request to issue Certificates: 10 responses at 4 hours per response.
- Credential Organization: 14,000 responses at 2 hours per response.
- Applicants: 14,000 responses at 1 hour and 40 minutes (1.66) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 51,280 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit: *http://www.regulations.gov/*.

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210, telephone number 202–272–8377.

Dated: January 21, 2009.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E9–1602 Filed 1–23–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form G–28, and Form G–28I, Revision of an Existing Information Collection Request; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, and Form G–28I, Notice of Entry of Appearance of Foreign Attorney. OMB Control No. 1615–0105.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on November 20, 2008, at 73 FR 70361, allowing for a 60-day public comment period. USCIS received one comment for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until February 25, 2009. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *oira_submission@omb.eop.gov*.

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0105 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

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

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Notice of Entry of Appearance as Attorney or Accredited Representative, and Notice of Entry of Appearance of Foreign Attorney.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–28, and Form G–28I. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The data collected on Forms G–28 and G–28I are used by DHS to determine eligibility of the individual to appear as a representative.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 2,479,000 responses at 20 minutes (.333) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 825,507 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit the USCIS Web site at: *http://www.regulations.gov/search/index.jsp.*

If additional information is required contact: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529, (202) 272–8377.

Dated: January 21, 2009.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E9–1614 Filed 1–23–09; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5283–N–01]

Notice of Proposed Information Collection: Comment Request; Implementation of the Housing for Older Persons Act of 1995 (HOPA)

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement established under the Housing for Older Persons Act of 1995 (HOPA) will be submitted to the Office of Management and Budget (OMB) for review, as required by the

Paperwork Reduction Act of 1995. HUD is soliciting public comments on the subject proposal.

DATES: Comment Due Date: March 27, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed information collection requirement. Comments should refer to the proposal by name and/or OMB Control Number, and should be sent to: Lillian L. Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW.; Washington, DC 20410–2000; e-mail *Lillian.L.Deitzer@hud.gov* or telephone (202) 402–8048.

FOR FURTHER INFORMATION CONTACT: Turner Russell, Director, Enforcement Support Division, Office of Enforcement, Department of Housing and Urban Development, 451 7th Street, SW., Room 5210; Washington, DC 20410–2000; telephone: (202) 402–6995 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at: (800) 877–8399.

SUPPLEMENTARY INFORMATION: HUD is submitting this proposed information collection requirement to the OMB for review, as required under the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35, as amended].

This notice is soliciting comments from members of the public and affected agencies concerning the proposed information collection in order to: (1) Evaluate whether the proposed information collection is necessary for the proper performance of HUD's program functions; (2) Evaluate the accuracy of HUD's assessment of the paperwork burden that may result from the proposed information collection; (3) Enhance the quality, utility and clarity of the information which must be collected; and (4) Minimize the burden of the information collection on responders, including the use of appropriate automated collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: Implementation of the Housing for Older Persons Act of 1995 (HOPA).

Office: Fair Housing and Equal Opportunity.

OMB Control Number: 2529–0046.

Description of the need for the information and proposed use: The Fair Housing Act [42 U.S.C.3601 et seq.], prohibits discrimination in the sale, rental, occupancy, advertising, insuring, or financing of residential dwellings based on *familial status* (individuals living in households with one or more children under 18 years of age). However, under § 3607(b)(2) of the Act, Congress exempted three (3) categories of ''*housing for older persons*'' from liability for familial status discrimination: (1) Housing provided under any State or Federal program which the Secretary of HUD determines is ''*specifically designed and operated to assist elderly persons (as defined in the State or Federal program)*''; (2) housing ''*intended for, and solely occupied by persons 62 years of age or older*''; and (3) housing ''*intended and operated for occupancy by at least one person 55 years of age or older per unit* ['55 or older' housing]''. In December 1995, Congress passed the Housing for Older Persons Act of 1995 (HOPA) [Pub. L. 104–76, 109 STAT. 787] as an amendment to the Fair Housing Act. The HOPA modified the ''55 or older'' housing exemption provided under § 3607(b)(2)(C) of the Fair Housing Act by eliminating the requirement that a housing provider must offer ''*significant facilities and services specifically designed to meet the physical or social needs of older persons.*'' In order to qualify for the HOPA exemption, a housing community or facility must meet each of the following criteria: (1) *At least 80 percent of the occupied units* in the community or facility must be occupied by at least one person who is 55 years of age of older; (2) the housing provider must publish and adhere to policies and procedures that demonstrate the *intent* to operate housing for persons 55 years of age or older; and (3) the housing provider must demonstrate compliance with ''*rules issued by the Secretary for verification of occupancy, which shall * * * provide for* [age*] verification by reliable surveys and affidavits.*''

The HOPA did not significantly increase the record-keeping burden for the ''55 or older'' housing exemption. It describes in greater detail the documentary evidence which HUD will consider when determining, in the course of a familial status discrimination complaint investigation, whether or not a housing facility or community qualified for the ''55 or older'' housing exemption as of the date of the alleged Fair Housing Act violation.

The HOPA information collection requirements are necessary to demonstrate a housing provider's eligibility to claim the ''55 or older'' housing exemption as an affirmative defense to a familial status discrimination complaint filed with HUD under the Fair Housing Act. The information will be collected in the normal course of business in connection with the sale, rental or occupancy of dwelling units situated in qualified senior housing facilities or communities. The HOPA's requirement that a housing provider must demonstrate the intent to operate a ''55 or older'' housing community or facility by publishing, and consistently enforcing, age verification rules, policies and procedures for current and prospective occupants reflects the usual and customary practice of the senior housing industry. Under the HOPA, a ''55 or older'' housing provider should conduct an initial occupancy survey of the housing community or facility to verify compliance with the HOPA's '80 percent' occupancy requirement, and should maintain such compliance by periodically reviewing and updating existing age verification records for each occupied dwelling unit at least once every two years. The creation and maintenance of such occupancy/age verification records should occur in the normal course of individual sale or rental housing transactions, and should require minimal preparation time. Further, a senior housing provider's operating rules, policies and procedures are not privileged or confidential in nature, because such information must be disclosed to current and prospective residents, and to residential real estate professionals.

The HOPA exemption also requires that a summary of the occupancy survey results must be made available for public inspection. This summary need not contain confidential information about individual residents; it may simply indicate the total number of dwelling units actually occupied by persons 55 years of age or older. While the supporting age verification records may contain confidential information about individual occupants, such information would be protected from disclosure unless the housing provider claims the ''55 or older'' housing exemption as an affirmative defense to a jurisdictional familial status discrimination complaint filed with HUD under the Fair Housing Act. HUD's Office of Fair Housing and Equal Opportunity will only require a housing provider to disclose such confidential information to HUD if and when HUD investigates a jurisdictional familial status discrimination complaint filed against the housing provider under the Fair Housing Act, and if and when the housing provider claims the ''55 or

older'' housing exemption as an affirmative defense to the complaint.

Agency form number(s), if applicable: None.

Members of affected public: The HOPA requires that small businesses and other small entities that operate housing intended for occupancy by persons 55 years of age or older must routinely collect and update reliable age verification information necessary to meet the eligibility criteria for the HOPA exemption. The record keeping requirements are the responsibility of the housing provider that seeks to qualify for the HOPA exemption.

Estimation of the total numbers of hours needed to prepare the information collection, including the number of respondents, frequency of response, and hours of response: The HOPA information collection requirements are the responsibility of the individual housing facility or community that claims eligibility for the HOPA's ''55 or older'' housing exemption. The HOPA does not authorize HUD to require submission of this information by individual housing providers as a means of certifying that their housing communities or facilities qualify for the exemption. Further, since the HOPA has no mandatory registration requirement, HUD cannot ascertain the actual number of housing facilities and communities that are currently collecting this information with the intention of qualifying for the HOPA exemption. Accordingly, HUD has estimated that approximately 1,000 housing facilities or communities would seek to qualify for the HOPA exemption. HUD has estimated that the occupancy/age verification data would require routine updating with each new housing transaction within the facility or community, and that the number of such transactions per year might vary significantly depending on the size and nature of the facility or community. HUD also estimated the average number of housing transactions per year at ten (10) transactions per community. HUD concluded that the publication of policies and procedures is likely to be a one-time event and in most cases will require no additional burden beyond what is done in the normal course of business. The estimated total annual burden hours are 5,500 hours.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: January 15, 2009.

Cheryl L. Ziegler,

Deputy Assistant Secretary for Enforcement and Programs.

[FR Doc. E9–1551 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–07]

Continuum of Care Homeless Assistance Grant Application-Technical Submission

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Technical submission for applicants awarded conditional funding for new projects during the Continuum of Care Homeless Assistance Competition to ensure that technical requirements are met prior to executing of grant agreement.

DATES: *Comments Due Date:* February 25, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–NEW) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Continuum of Care Homeless Assistance Grant Application—Technical Submission.

OMB Approval Number: 2506—NEW.

Form Numbers: HUD–40090–3a, HUD–40090–3b.

Description of the Need for the Information and its Proposed Use:

Technical submission for applicants awarded conditional funding for new projects during the Continuum of Care Homeless Assistance Competition to ensure that technical requirements are met prior to executing of grant agreement.

Frequency of Submission: On occasion.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	500	1		9.04		4,520

Total Estimated Burden Hours: 4,520.

Status: New Collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1549 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–02]

Contract's Requisition—Project Mortgages

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Contracts submit a monthly application for distribution of insured mortgage proceeds for construction costs. Multifamily HUD Centers ensure that the work is actually completed satisfactorily. The prevailing wage certification ensures compliance with prevailing wage rate.

DATES: *Comments Due Date: February 25, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0028) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Contract's Requisition—Project Mortgages.

OMB Approval Number: 2502–0028.

Form Numbers: HUD–92448.

Description of the Need for the Information and its Proposed Use: Contracts submit a monthly application for distribution of insured mortgage proceeds for construction costs. Multifamily HUD Centers ensure that the work is actually completed satisfactorily. The prevailing wage certification ensures compliance with prevailing wage rate.

Frequency of Submission: Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	1300	12		6		93,600

Total Estimated Burden Hours: 93,600.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1553 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–05]

Manufactured Home Construction and Safety Standards Act Reporting Requirements

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Federal Standards and Procedural Regulations require manufactured home producers to place labels and notices in and on manufactured homes and mandate State and Private agencies participating in the Federal program to issue reports. These Standards will protect the HUD's interests by requiring certain features of design and construction. In addition, some information collected assists both HUD and State Agencies in locating manufactured homes with defects, which then would create the need for notification and/or correction by the manufacturer.

DATES: *Comments Due Date: February 25, 2009.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0253) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh

Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Manufactured Home Construction and Safety Standards Act Reporting Requirements.

OMB Approval Number: 2502–0253.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: The Federal Standards and Procedural Regulations require manufactured home producers to place labels and notices in and on manufactured homes and mandate State and Private agencies participating in the Federal program to issue reports. These Standards will protect the HUD's interests by requiring certain features of design and construction. In addition, some information collected assists both HUD and State Agencies in locating manufactured homes with defects, which then would create the need for notification and/or correction by the manufacturer.

Frequency of Submission: On occasion, Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	330	2,354		0.245		191,012

Total Estimated Burden Hours: 191,012.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1558 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–06]

Rehabilitation Mortgage Insurance Underwriting Program Section 203(K)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information collected implements recommendations to mitigate program abuses that were cited in an Audit Report of HUD's Office of Inspector General. The information collection focuses on the loan origination process and requires (1) certifications and disclosures conserving identity-of-interest borrowers and program participants, and (2) proficiency testing of home inspectors/consultants. Periodic reporting of the collected information is not required.

DATES: *Comments Due Date:* February 25, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0527) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposal: Rehabilitation Mortgage Insurance Underwriting Program Section 203(K).

OMB Approval Number: 2502–0527.

Form Numbers: HUD–92700, HUD–92700–A, HUD–9746–A.

Description of the Need for the Information and its Proposed Use: The information collected implements recommendations to mitigate program abuses that were cited in an Audit Report of HUD's Office of Inspector General. The information collection focuses on the loan origination process and requires (1) certifications and disclosures conserving identity-of-interest borrowers and program participants, and (2) proficiency testing

of home inspectors/consultants. Periodic reporting of the collected information is not required.

Frequency of Submission: On Occasion, Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	8,225	17.56		2.36		341,910

Total Estimated Burden Hours: 341,910.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1569 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–04]

Requisition for Disbursement of Sections 202 & 811 Capital Advance/Loan Funds

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Owner entities submit requisitions periodically (generally monthly) to HUD during construction to obtain Section 202/811 capital advance/loan funds. This collection identifies the owner, project, type of disbursement, items covered, name of the depository, and account number.

DATES: *Comments Due Date:* February 25, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0187) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *fax:* 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Requisition for Disbursement of Sections 202 & 811 Capital Advance/Loan Funds.

OMB Approval Number: 2502–0187.

Form Numbers: HUD–92403–CA, and HUD–92403–EH.

Description of the Need for the Information and Its Proposed Use: Owner entities submit requisitions periodically (generally monthly) to HUD during construction to obtain Section 202/811 capital advance/loan funds. This collection identifies the owner, project, type of disbursement, items covered, name of the depository, and account number.

Frequency of Submission: On occasion, Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	266	9.24		0.5		1,230

Total Estimated Burden Hours: 1,230.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1556 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5281–N–03]

Single Family Premium Collection Subsystem-Periodic (SFPCS–P)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The SFPCS–P is used to collect monthly mortgage insurance premiums (MIP) from mortgagees. FHA reports case level mortgage insurance payment information for each endorsement. Mortgagees are required to pay monthly MIP's and 24 CFR 203.269 requires that the MIP's be remitted electronically.

DATES: *Comments Due Date:* February 25, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0536) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L_Deitzer@HUD.gov* or telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Single Family Premium Collection Subsystem-Periodic (SFPCS–P).

OMB Approval Number: 2502–0536.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use:

The SFPCS–P is used to collect monthly mortgage insurance premiums (MIP) from mortgagees. FHA reports case level mortgage insurance payment information for each endorsement. Mortgagees are required to pay monthly MIP's and 24 CFR 203.269 requires that the MIP's be remitted electronically.

Frequency of Submission: On occasion, Monthly.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	1,200	12		0.15		2,160

Total Estimated Burden Hours: 2160.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 15, 2009.

Lillian L. Deitzer,

Departmental Paperwork Reduction Act Officer, Office of the Chief Information Officer.

[FR Doc. E9–1555 Filed 1–23–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2009–N0014; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We invite the public to comment on the following applications to conduct certain activities with endangered species.

DATES: Comments on these permit applications must be received on or before February 25, 2009.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist, see **ADDRESSES** (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). The U.S. Fish and Wildlife Service (''we'') solicits review and comment from local, State, and Federal agencies, and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–203081

Applicant: John P. LaBonte, Santa Barbara, California

The applicant requests a permit to take (survey by pursuit) the El Segundo Blue butterfly (*Euphilotes battoides allyni*), and take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–031913

Applicant: Morgan L. Ball, Lompoc, California

The applicant requests an amendment to take (survey by pursuit) the El Segundo Blue butterfly (*Euphilotes battoides allyni*), and take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in

conjunction with surveys throughout the range of each species in California for the purpose of enhancing their survival.

Permit No. TE–203835

Applicant: Rachel M. Posten, Long Beach, California

The applicant requests a permit to take (harass by survey and monitor nests) the southwestern willow flycatcher (*Empidonax trailli extimus*) and take (monitor nests) the least Bell's vireo (*Vireo bellii pusillus*) in conjunction with surveys and monitoring activities throughout the range of the species in California for the purpose of enhancing its survival.

Permit No. TE–148554

Applicant: Amber S. Oneal, Costa Mesa, California

The applicant requests an amendment to take (harass by survey) the southwestern willow flycatcher (*Empidonax trailli extimus*) in conjunction with surveys throughout the range of the species in California, Nevada, Arizona, New Mexico, and Utah for the purpose of enhancing its survival.

Permit No. TE–809232

Applicant: Bio-West Incorporated, Logan, Utah

The applicant requests an amendment to remove/remove to possession the *Nitrophila mohavensis* (Amargosa Niterwort) from federal lands in conjunction with genetic research sampling for the purpose of enhancing their survival.

Permit No. TE–204452

Applicant: Bureau of Land Management, Hollister, California

The applicant requests a permit to remove/remove to possession the *Caulanthus californicus* (California jewelflower) and *Monolopia congdonii* (San Joaquin wooly-threads) from federal lands in conjunction with a seed bank collection and viability analysis for the purpose of enhancing their survival.

Permit No. TE–204436

Applicant: Johanna M. Kisner, Orcutt, California

The applicant requests a permit to take (survey, capture, and release) the tidewater goby (*Eucyclogobius newberryi*), in conjunction with surveys and population monitoring throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–204468

Applicant: Michael J. Walgren, Woodland Hills, California

The applicant requests a permit to take (harass by survey and handle) the Morro shoulderband snail (*Helminthoglypta waleriana*) in conjunction with surveys throughout the range of the species in California, for the purpose of enhancing its survival.

We solicit public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Dated: January 16, 2009.

Amedee Brickey,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. E9–1599 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2008–N0342; 14420–1113–1SPB–F3]

Endangered and Threatened Wildlife and Plants; Permit Application; Safe Harbor Agreement for Northern Idaho Ground Squirrel, Adams County, ID

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Receipt of application; notice of availability.

SUMMARY: The Fish and Wildlife Service (Service) announces the receipt of an application for an enhancement of survival permit (Permit) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The Permit application includes a proposed Safe Harbor Agreement (SHA) for the threatened northern Idaho ground squirrel (*Spermophilus brunneus brunneus*) between Hixon Properties Incorporated (applicant) and the Service. The term of the proposed SHA is 10 years, and the requested term of the permit is 15 years. The Service has made a preliminary determination that the proposed SHA and Permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). The basis for this preliminary determination is contained in an Environmental Action Statement. The Service is accepting comments on the Permit application, the proposed SHA, and the Environmental Action Statement.

DATES: We will accept comments received on or before February 25, 2009.

ADDRESSES: Written comments concerning this notice should be addressed to Kendra Womack, Snake River Fish and Wildlife Office, 1387 S Vinnell Way, Room 368, Boise, ID 83709. You may also submit written comments by facsimile, at 208–378–5262, or by electronic mail to *fw1srbocomment@fws.gov*.

FOR FURTHER INFORMATION CONTACT: Kendra Womack at 208–378–5243. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Document Availability

Copies of the Permit application, the draft SHA, and the Environmental Action Statement are available for public inspection, by appointment, at the Snake River Fish and Wildlife Office (see **ADDRESSES**), or they may be viewed on the internet at the following address: *http://www.fws.gov/idaho*. The Service is furnishing this notice to provide the public, other State and Federal agencies, and interested Tribes an opportunity to review and comment on the draft SHA, Permit application, and Environmental Action Statement.

Background

Under Safe Harbor Agreements, participating property owners voluntarily undertake management activities on their properties to enhance, restore, or maintain habitat benefitting species listed under the Act (16 U.S.C. 1531 *et seq.*). Safe Harbor Agreements encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners they will not be subjected to increased property use restrictions if their efforts attract listed species to their property or increase the numbers or distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through Safe Harbor Agreements can be found in 50 CFR 17.22(c).

The area to be covered under the proposed SHA (Covered Area) is approximately 7,783 acres (ac) (3,150 hectares (ha)) and is located just north of Bear, Adams County, Idaho. Northern Idaho ground squirrels currently occupy approximately 714-ac (289-ha) of the 7,783-ac (3,150-ha) Covered Area. Due to normal population fluctuations and the difficulty of identifying current

population levels, the agreed upon baseline for the property is 714 acres and the applicant would be allowed to return his property to this baseline condition at the end of the permit term.

This proposed SHA is intended to result in a net conservation benefit by maintaining northern Idaho ground squirrel habitat within a 714-ac (289-ha) baseline area, allowing access to researchers affiliated with the Service or Idaho Department of Fish and Game (IDFG); requiring notification of the Service and IDFG prior to activities that will result in ''take'' of the species so that they may capture and relocate affected individuals if appropriate; allowing the Service and IDFG personnel access to the property to conduct ground squirrel conservation activities approved by the applicant such as habitat maintenance and enhancement, ground squirrel surveys, and translocation of ground squirrels; and establishing some limits on the conduct of chemical rodent control in the squirrel management area. In addition, the applicant may also work with the Service and others to implement timber-related habitat enhancement measures that will potentially increase habitat for squirrels within the covered area.

The biological goal of ground squirrel conservation measures in the SHA is to expand the northern Idaho ground squirrel population at this site within and beyond the 714-ac (289-ha) baseline area by reducing threats and enhancing habitat for the species. The proposed SHA is intended to contribute to the recovery of the northern Idaho ground squirrel by reducing threats, expanding and increasing the viability of the ground squirrel population at this site, improving habitat conditions, and potentially facilitating translocation of ground squirrels to other sites in need of population supplementation, as appropriate.

Consistent with the Service's Safe Harbor policy, under the proposed SHA and the proposed Permit, we would authorize incidental take of northern Idaho ground squirrels as a result of the following covered activities within the Covered Area provided they are carried out in accordance with the terms of the SHA: livestock husbandry; farming operations; logging; recreation; construction of buildings and roads that does not diminish the baseline area; existing residential use; and fire management activities.

We provide this notice pursuant to section 10(c) of the Act and the implementing regulations for NEPA (40 CFR 1506.6). We will evaluate the Permit application, associated documents, and comments submitted thereon to determine whether the Permit application meets the requirements of section 10(a) of the Act and to ensure adequate NEPA compliance. If we determine that all of these requirements are met, we will sign the proposed SHA and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to the applicant for take of northern Idaho ground squirrels incidental to otherwise lawful activities in accordance with the terms of the SHA. We will not make our final decision until after the end of the 30-day public comment period and will fully consider all comments received during the public comment period.

Dated: December 19, 2008.

Jeffery L. Foss,

Field Supervisor, Snake River Fish and Wildlife Office, Boise, Idaho.

[FR Doc. E9–1604 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Notice of an Open Meeting of the Advisory Committee on Water Information (ACWI)

SUMMARY: Notice is hereby given of a meeting of the ACWI. This meeting is to discuss broad policy-related topics relating to national water initiatives, and the development and dissemination of water information, through reports from ACWI subgroups. The agenda will include status of a proposal from the ACWI Subcommittee on Ground Water; discussion of a new Extreme Storms subgroup proposed within the Subcommittee on Hydrology; status of the National Monitoring Network for U.S. Coastal Waters and their Tributaries; request for ACWI approval of an update to the Water Quality Data Elements User Guide that would include physical habitat elements; discussion of ACWI participation in the National Environmental Status and Trends indicators project; and updates on recent activities of the Methods and Data Comparability Board.

The ACWI was established under the authority of the Office of Management and Budget Memorandum M92–01 and the Federal Advisory Committee Act. The purpose of the ACWI is to provide a forum for water information users and professionals to advise the Federal Government on activities and plans that may improve the effectiveness of meeting the Nation's water information needs. Member organizations help to foster communications between the Federal and non-Federal sectors on sharing water information.

Membership, limited to 35 organizations, represents a wide range of water resources interests and functions. Representation on the ACWI includes all levels of government, academia, private industry, and professional and technical societies. For more information on the ACWI, its membership, subgroups, meetings and activities, please see the Web site at: *http://ACWI.gov*.

DATES: The formal meeting will convene at 9 a.m. on February 10, 2009, and will adjourn at 12 noon on February 11, 2009. The meeting will be followed by a public forum on the National Environmental Status and Trends Indicators project, which will begin at 1 p.m. on February 11, 2009 and adjourn at 12 noon on February 12, 2009.

ADDRESSES: The meeting will be held in the Reston, Virginia, area, within a few miles of Dulles International Airport. Information on the exact location can be obtained from Ms. Wendy E. Norton, ACWI Executive Secretary, whose contact information is shown below.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy E. Norton, ACWI Executive Secretary and Chief, Water Information Coordination Program, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 417, Reston, VA 20192. *Telephone:* 703–648–6810; *Fax:* 703–648–5644; e-mail: *wenorton@usgs.gov*.

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Up to a half hour will be set aside for public comment. Persons wishing to make a brief presentation (up to 5 minutes) are asked to provide a written request with a description of the general subject to Ms. Norton at the above address no later than February 3, 2009. It is requested that 65 copies of a written statement be submitted at the time of the meeting for distribution to members of the ACWI and placement in the official file. Any member of the public may submit written information and (or) comments to Ms. Norton for distribution at the ACWI meeting.

Dated: January 16, 2009.

Katherine Lins,

Chief, Office of Water Information.

[FR Doc. E9–1624 Filed 1–23–09; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–10384, AA–10426, AA–9481, AA–9485, AA–10312, AA–10377, AA–10376, AA–10365, AK–962–1410–HY–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Calista Corporation for lands located in the vicinity of Platinum, Alaska. Notice of the decision will also be published four times in the Anchorage Daily News.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until February 25, 2009 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Judy A. Kelley,

Land Law Examiner, Resolution Branch (962).

[FR Doc. E9–1583 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–020–1010–PO]

Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior, Montana, Billings and Miles City Field Offices.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Eastern Montana Resource Advisory Council (RAC), will meet as indicated below.

DATES: The next regular meeting of the Eastern Montana Resource Advisory Council will be held on March 4, 2009 in Billings, MT. The meetings will start at 8 a.m. and adjourn at approximately 3:30 p.m. When determined, the meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Miles City Field Office, 111 Garryowen Road, Miles City, Montana, 59301. Telephone: (406) 233–2831.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior through the Bureau of Land Management on a variety of planning and management issues associated with public land management in Montana. At these meetings, topics will include: Miles City and Billings Field Office manager updates, subcommittee briefings, work sessions and other issues that the council may raise. All meetings are open to the public and the public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations should contact the BLM as provided above.

Dated: January 15, 2009.

M. Elaine Raper,

Field Manager.

[FR Doc. E9–1595 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN00000.L18200000.XZ0000]

Notice of Public Meeting: Northeast California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northeast California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Thursday and Friday, Feb. 19 and 20, 2009, in the Conference Room of the Bureau of Land Management Eagle Lake Field Office, 2950 Riverside Drive, Susanville, CA. The meeting runs from 1 to 5 p.m. Feb. 19 and from 8 a.m. to noon on Feb. 20. Time for public comment is reserved at 11 a.m. on Friday, Feb. 20.

FOR FURTHER INFORMATION CONTACT: Tim Burke, BLM Alturas Field Office manager, (530) 233–4666; or BLM Public Affairs Officer Joseph J. Fontana, (530) 252–5332.

SUPPLEMENTARY INFORMATION: The 15-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Northeast California and the northwest corner of Nevada. At this meeting, agenda topics will include a status report on the BLM wild horse and burro program, a status report on the Modoc Line, discussion on the proposed Kramer Ranch land exchange, implementation planning for northeast California resource management plans, and updates on the Bly Tunnel, Leonard Hot Springs cultural resources site and the Sand Springs cultural resources site. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and lunch. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable

accommodations, should contact the BLM as provided above.

Dated: January 12, 2009.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. E9–1610 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAN00000.L18200000.ZX0000]

Notice of Public Meeting: Northwest California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Northwest California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Thursday and Friday, March 26 and 27, 2009, at the Bureau of Land Management Redding Field Office, 355 Hemsted Dr., Redding, California. On March 26, the council convenes at 10 a.m. and departs for a field tour of recreational trails managed by the Redding Field Office. On March 27, the meeting begins at 8 a.m. in the Conference Room at the Redding Field Office. Time for public comment has been reserved for 1 p.m. on Friday, March 27.

FOR FURTHER INFORMATION CONTACT: Rich Burns, BLM Ukiah Field Office manager, (707) 468–4000; or BLM Public Affairs Officer Joseph J. Fontana, (530) 252–5332.

SUPPLEMENTARY INFORMATION: The 12-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Northwest California. At this meeting agenda topics include a planning session for the coming year's work, a discussion of areas in which the RAC can assist the BLM, and an update on management of the Sacramento River Bend Area of Critical Environmental Concern. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and lunch. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: January 12, 2009.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. E9–1607 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L14200000.BJ0000–LLNM915000–2009]

Notice of Withdrawal of Filing of Plat of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of withdrawal of filing of Plat of Survey.

SUMMARY: The plat of survey described below was scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management (BLM), Santa Fe, New Mexico, 30 calendar days from the date of the publication in the **Federal Register**, Volume 72, No. 133, dated July 12, 2007, per BLM Manual 2097, Opening Orders.

The filing was stayed pending the outcome of a protest and appeal of the survey. The dependent resurvey has been remanded back to BLM and will not be officially filed.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat of survey being readdressed represents the dependent resurvey and survey for Townships 9 and 10 North, Range 4 East, New Mexico Principal Meridian, accepted June 20, 2007, for Group 1062 NM.

Robert A. Casias,

Chief Cadastral Surveyor.

[FR Doc. E9–1612 Filed 1–23–09; 8:45 am]

BILLING CODE 4310–FB–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Hearing of the Judicial Conference Advisory Rules Committees

AGENCY: Judicial Conference of the United States Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules.

ACTION: Notice of Cancellation of Open Hearings.

SUMMARY: The following public hearings on proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, have been canceled: Evidence Rules Hearing, January 13, 2009, in San Antonio, TX; Criminal Rules Hearing, January 16, 2009, in Los Angeles, CA; Bankruptcy Rules Hearing, January 23, 2009, in New York, NY; Evidence Rules Hearing, January 26, 2008, in Atlanta, GA; Appellate Rules Hearing, January 30, 2009, in Washington, DC; and Bankruptcy Rules Hearing, February 6, 2009, in San Francisco, CA. [Original notice of hearings appeared in the **Federal Register** on July 29, 2008.]

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United State Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: January 15, 2009.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E9–1401 Filed 1–23–09; 8:45 am]

BILLING CODE 2210–55–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Appellate Procedure

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Appellate Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Appellate Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: April 16–17, 2009.

TIME: 8:30 a.m. to 5 p.m.

ADDRESSES: Hotel Phillips, 106 W. 17th Street, Kansas City, MO 64105.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts,Washington, DC 20544, telephone (202) 502–1820.

Dated: January 5, 2009.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E9–1389 Filed 1–23–09; 8:45 am]

BILLING CODE 2210–55–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Civil Procedure

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Civil Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Civil Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: April 20–21, 2009.

TIME: 8:30 a.m. to 5 p.m.

ADDRESSES: Northwestern Law School, McCormick Building, 350 East Superior Street, Room 375, Chicago, IL 60611.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: January 5, 2009.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E9–1398 Filed 1–23–09; 8:45 am]

BILLING CODE 2210–55–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Evidence

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Evidence.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Evidence will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: April 23–24, 2009.

TIME: 8:30 a.m. to 5 p.m.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20054.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: January 5, 2009.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E9–1399 Filed 1–23–09; 8:45 am]

BILLING CODE 2210–55–M

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory Committee on Rules of Criminal Procedure

AGENCY: Judicial Conference of the United States Advisory Committee on Rules of Criminal Procedure.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Criminal Procedure will hold a two-day meeting. The meeting will be open to public observation but not participation.

DATES: April 6–7, 2009.

TIME: 8:30 a.m. to 5 p.m.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20054.

FOR FURTHER INFORMATION CONTACT: John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: January 5, 2009.

John K. Rabiej,

Chief, Rules Committee Support Office.

[FR Doc. E9–1400 Filed 1–23–09; 8:45 am]

BILLING CODE 2210–55–M

DEPARTMENT OF JUSTICE

Notice of Modification to Consent Decree Pursuant to Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on January 16, 2009, a proposed modification of the consent decree in *United States* v. *General Electric Company,* Civil Action No. 05–cv–1270 (N.D.N.Y.), was executed between the United States and General Electric Company.

The proposed consent decree modification will amend the consent decree entered in this matter on November 2, 2006, with respect to certain claims of the United States under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9601, *et seq.*, relating to the release of polychlorinated biphenyls (PCBs) into the Hudson River by General Electric Company (GE). In pertinent part, the proposed modification: (1) Adds provisions to the original consent decree regarding the reimbursement by GE of certain costs of the U.S. Environmental Protection Agency (EPA) relating to (a) the design and construction of a water supply line from Troy, New York, to provide the Towns of Waterford and Halfmoon, New York (hereinafter, the ''Towns''), with an alternate water supply during the Hudson River dredging program specified in the original consent decree, and (b) the design, construction, installation and maintenance of a granulated activated carbon (GAC) system for the water supply wells of the Village of Stillwater, New York during the first phase of the Hudson River dredging program; (2) adds provisions regarding GE's reimbursement of certain costs that might be incurred by EPA for the provision of water to Waterford and Halfmoon during the second phase of the Hudson River dredging program; (3) modifies certain of the water column monitoring requirements set forth in the original consent decree's statement of work; and, (4) makes certain minor administrative changes to the original consent decree.

The following is a summary of the modification's provisions relating to the provision or treatment of drinking water. Under the modification, GE agrees to pay to the United States the lesser of $7,000,000 or all costs incurred or to be incurred by EPA relating to the design and construction of the water line and the Stillwater GAC system. In addition, if GE agrees to perform the second phase of the dredging program as provided in the original consent decree, GE will reimburse EPA for 50% of any costs paid by EPA during the dredging for water usage fees assessed upon the Towns, up to $750,000.

Prior to filing the modification with the Court, the Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed modification to the consent 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. *General Electric Company,* Civil Action No. 05–cv–1270, D.J. Ref. 90–11–2–529. During the public comment period, the proposed modification to the consent decree, may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the proposed modification to the consent 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 $11.00 (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 Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–1467 Filed 1–23–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,190]

Hafner USA, Inc.: New York, NY; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated January 1, 2009, the Department of Labor (Department) received a request for administrative reconsideration of the Department's Notice of negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm. The determination was issued on November 26, 2008. The Department's Notice of determination was published in the **Federal Register** on December 10, 2008 (73 FR 75138). The subject workers are engaged in textile distribution services for goods produced in Canada.

The negative determination was based on the Department's findings that the petitioning workers do not support a firm or appropriate subdivision that produces an article domestically.

In the request for reconsideration, a worker alleged that the subject workers' work was related to the textile manufactured in affiliated facilities in North Carolina, Virginia, New York, and related to the textile dyed and finished at an affiliated facility in Pennsylvania.

The Department has carefully reviewed the request for reconsideration, and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 13th day of January 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1490 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,127]

Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Including Leased Workers of Hightower Technology Capital, Inc., Vancouver, WA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on October 23, 2008, applicable to all workers of Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington. The notice was published in the **Federal Register** on November 10, 2008 (73 FR 66676).

In response to a petition filed by a company official of Hightower Technology Capital, Inc., Vancouver, Washington, on behalf of workers providing contract design services to Hewlett-Packard at Vancouver, Washington (TA–W–64,546), the Department reviewed the certification for workers of Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington (TA–W–64,127).

The review shows that workers of Hightower Technology Capital, Inc. worked on-site at Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington, and are sufficiently under the control of Hewlett-Packard to be considered leased workers.

The Department is amending the certification to clarify that the certification is to cover workers and former workers of Hightower Technology Capital, Inc. at Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington as well as workers and former workers of the subject firm.

The amended notice applicable to TA–W–64,127 is hereby issued as follows:

All workers of Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington, including on-site leased workers of Hightower Technology Capital, Inc., who became totally or partially separated from employment on or after September 26, 2007 through October 23, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC, this 9th day of January 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1489 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,794; TA–W–63,794A]

Norwalk Furniture Corp. Including On-Site Leased Workers From Kelly Services, Norwalk, OH, Including an Employee of Norwalk Furniture Corp, Norwalk, OH Working Out of Pembroke Pines, FL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on September 24, 2008, applicable to workers of Norwalk Furniture Corp., including on-site leased workers from Kelly Services, Norwalk, Ohio. The notice was published in the **Federal Register** on October 8, 2008 (73 FR 58981).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of upholstered furniture.

New information shows that a worker separation has occurred involving an employee (Mr. Juan De La Torre) of Norwalk Furniture Corp., Norwalk, Ohio, working out of Pembroke Pines, Florida.

Based on this finding, the Department is amending the certification to include an employee of the Norwalk, Ohio location of the subject firm working out of Pembroke Pines, Florida.

The intent of the Department's certification is to include all workers employed by Norwalk Furniture Corp., Norwalk, Ohio, who were adversely affected by increased imports of upholstered furniture.

The amended notice applicable to TA–W–63,794 is hereby issued as follows:

All workers of Norwalk Furniture Corp., including on-site leased workers from Kelly Services, Norwalk, Ohio (TA–W–63,794), including an employee of Norwalk Furniture Corp., Norwalk, Ohio, working out of Pembroke Pines, Florida (TA–W–63,794A), who became totally or partially separated from employment on or after July 23, 2007, through September 24, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 12th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1488 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,612]

Riley Creek Lumber Company, Moyie Springs Mill, Currently Known as Idaho Forest Group, LLC Including On-Site Leased Workers From Industrial Personnel Moyie Springs, ID; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on January 26, 2007, applicable to workers of Riley Creek Lumber Company, Moyie Springs Mill, including on-site leased workers from Industrial Personnel, Moyie Springs, Idaho. The notice was published in the **Federal Register** on February 14, 2007 (72 FR 7087).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of stud lumber.

The company reports that after an October 2008 merger, Riley Creek Lumber Company, Moyie Springs Mill is currently known as Idaho Forest Group.

Accordingly, the certification is being amended to include workers of the subject firm whose UI wages are reported under the successor firm, Idaho Forest Group, LLC, Moyie Springs, Idaho.

The amended notice applicable to TA–W–60,612 is hereby issued as follows:

All workers of Riley Creek Lumber, Moyie Springs Mill, currently known as Idaho Forest Group, LLC, including on-site leased workers from Industrial Personnel, Moyie Springs, Idaho, who became totally or partially separated from employment on or after December 13, 2005, through January 26, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 12th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1485 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,382; TA–W–63,382A]

Stanley-National Manufacturing Company National Sales Company and National Manufacturing Company, a Subsidiary of the Stanley Works Corporation, Sterling, IL; Including an Employee of Stanley-National Manufacturing Company National Sales Company and National Manufacturing Company, a Subsidiary of the Stanley Works Corporation Sterling, IL; Working Out of Corpus Christi, TX; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 23, 2008, applicable to workers of Stanley-National Manufacturing Company, National Sales Company, and National Sales Company, a subsidiary of The Stanley Works Corporation, Sterling, Illinois. The notice was published in the **Federal Register** on August 12, 2008 (73 FR 46923).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of builder's hardware such as hinges, hangers and rails. New information shows that a worker separation has occurred involving an employee (Mr. Dan Lewis) working out of Corpus Christi, Texas, in support of and under the control of Stanley-National Manufacturing Company, National Sales Company and National Manufacturing Company, a subsidiary of The Stanley Works Corporation, Sterling, Illinois.

Based on these findings, the Department is amending this certification to include an employee of the Sterling, Illinois location of the subject firm working out of Corpus Christi, Texas.

The intent of the Department's certification is to include all workers employed by Stanley-National Manufacturing Company, National Sales Company and National Manufacturing Company, a subsidiary of The Stanley Works Corporation, Sterling, Illinois

who were adversely affected by increased imports of builder's hardware.

The amended notice applicable to TA–W–63,382 is hereby issued as follows:

''All workers of Stanley-National Manufacturing Company, National Sales Company and National Manufacturing Company, a subsidiary of The Stanley Works Corporation, Sterling, Illinois (TA–W–63,382), including an employee of Stanley-National Manufacturing Company, National Sales Company and National Manufacturing Company, a subsidiary of The Stanley Works Corporation, Sterling, Illinois, working out of Corpus Christi, Texas (TA–W–63,382A), who became totally or partially separated from employment on or after March 2, 2008, through July 23, 2010, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.''

Signed at Washington, DC, this 13th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1487 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,347; TA–W–61,347A]

Wellman, Incorporated, Administrative Office, Fort Mill, SC, Including Employees of Wellman, Incorporated, Administrative Office, Fort Mill, SC, Working Out of New York, NY; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on May 4, 2007, applicable to workers of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina. The notice was published in the **Federal Register** on May 17, 2007 (72 FR 27853).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in providing technical and administrative support services for the firm's production of polyester and nylon fibers.

New information shows that worker separations have occurred involving employees (Mr. Michael Bermish and Ms. Gisela Katz) of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina working out of New York, New York.

Based on this finding, the Department is amending the certification to include employees of the Fort Mill, South Carolina location of the subject firm working out of New York, New York.

The intent of the Department's certification is to include all workers of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina, who qualify as secondarily trade affected workers.

The amended notice applicable to TA–W–61,347 is hereby issued as follows:

All workers of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina (TA–W–61,347), including employees of Wellman, Incorporated, Administrative Offices, Fort Mill, South Carolina, working out of New York, New York (TA–W–61,347A), who became totally or partially separated from employment on or after April 11, 2006, through May 4, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 12th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1486 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *December 29, 2008 through January 2, 2009*.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to

a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–64,599; JM Originals, Flybar/SBI Enterprises, Inc., Ellenville, NY: December 5, 2007.

TA–W–64,662; Wearbest Sil-Tex Mills, Ltd, ADP Total Source, New York, NY: December 11, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,507; Columbia Plywood Corp, Klamath Div., Express Employment, Klamath Falls, OR: November 18, 2007.

TA–W–64,704; Fostoria Industries, Inc., Fostoria, OH: December 16, 2007.

TA–W–63,989A; JLG Industries, Access Division, Bedford, PA: September 3, 2007.

TA–W–63,989B; JLG Industries, Access Division, Shippensburg, PA: September 3, 2007.

TA–W–63,989C; JLG Industries, Access Division, Orrville, OH: September 3, 2007.

TA–W–63,989D; JLG Industries, Access Division, Oakes, NC: September 3, 2007.

TA–W–63,989; JLG Industries, Access Division, Aerotek, Manpower, McConnellsburg, PA: September 3, 2007.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,460; Standard Thomson Corp, Waltham, MA: November 13, 2007.

TA–W–64,474; Dale Medical Products, Inc., Plainville, MA: November 14, 2007.

TA–W–64,480; Block Corporation, Tupelo, MS: November 17, 2007.

TA–W–64,527; LA-Z-BOY, Arkansas Division, Siloam Springs, AR: November 24, 2007.

TA–W–64,562; US Marine/Bayliner, Brunswick Corp, Roseburg, OR: November 25, 2007.

TA–W–64,606; Columbian Chemicals Company, Marshall Plant, Proctor, WV: June 9, 2008.

TA–W–64,657; Ceramaspeed, Inc., Maryville, TN: January 6, 2009.

TA–W–64,666; Kongsberg Automotive, Teleflex, Labor Finders, Arnold Group, LSI Staffing, Haysville, KS: December 9, 2007.

TA–W–64,673; Varsity Spirit Fashions and Supplies, McLenoresville, TN: December 11, 2007.

TA–W–64,675; Procter and Gamble Hair Care LLC, Procter and Gamble, Stamford, CT: December 12, 2007.

TA–W–64,689; V.I. Prewett and Sons, Inc., A Subsidiary of Gildan Activewear, Fort Payne, AL: December 15, 2007.

TA–W–64,734A; ACE Packaging Systems, Manpower, Kelly Services, Aerotech, Transforce, Brownstown, MI: December 17, 2007.

TA–W–64,734; ACE Packaging Systems, Manpower, Kelly Services, Aerotech, Transforce, Newport, MI: December 17, 2007.

TA–W–64,739; Freightliner, LLC, Mt. Holly, NC: December 18, 2007.

TA–W–64,755; Rea Magnet Wire Company, Magnet Wire Division, Las Cruces, NM: December 8, 2007.

TA–W–64,661; Parker Hannifin Veriflo Division, Carson City, NV: December 11, 2007.

TA–W–64,664; Elkay Manufacturing, Broadview, IL: December 8, 2007.

TA–W–64,682; Vishay General Semiconductors, Westbury, NY: December 11, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–64,458; Continental Structural Plastics, North Baltimore, OH: November 11, 2007.

TA–W–64,549; Bosal Industries Georgia, Lavonia, GA: November 17, 2007.

TA–W–64,602; Archer Trim, Inc., Lumberton, NC: December 4, 2007.

TA–W–64,688; Imery's, Kimberly, WI: December 10, 2007.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a

significant number of workers 50 years of age or older.

TA–W–64,599; JM Originals, Flybar/SBI Enterprises, Inc., Ellenville, NY: December 5, 2007.

TA–W–64,662; Wearbest Sil-Tex Mills, Ltd, ADP Total Source, New York, NY: December 11, 2007.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–64,522; American Axle and Manufacturing, Inc., World Headquarters, Detroit, MI.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–63,796; JAM Plastics, Inc., d/b/a Brady People ID, including many leased workers, Burlington, MA.

TA–W–64,505; SB Acquisition, LLC, d/b/a Saunders Brothers, Fryeburg, ME.

TA–W–64,519; Hitachi Metals Automotive Components USA, LLC, Hitachi Metals America, Ltd, Lawrenceville, PA.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–64,279; Tekni-Plex, Inc., db/a/ Dolco Packaging, Troy, OH.

TA–W–64,539; Nu-Mode Manufacturing Co., Inc., Taylorsville, NC.

TA–W–64,609; Local Insight Yellow Pages, Publishing Office, Erie, PA.

TA–W–64,632; Fleetwood Motor Homes, Fleetwood Enterprises, Paxinos, PA.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–64,383; International Business Machines Corp (IBM), IBM Integrated Supply Chain, Hopewell Junction, NY.

TA–W–64,497; United Airlines, Portland International Airport, Line Maintenance, Portland, OR.

TA–W–64,512; United Airlines—O'Hare, O'Hare International Airport, Line Maintenance, Chicago, IL.

TA–W–64,524A; United Airlines, Inc., John F. Kennedy Int'l Airport, Line Maintenance, New York, NY.

TA–W–64,524B; United Airlines, Inc., La Guardia Airport, Line Maintenance, New York, NY.

TA–W–64,524C; United Airlines, Inc., Newark International Airport, Line Maintenance, Newark, NJ.

TA–W–64,524; United Airlines, Inc., Dulles International Airport, Sterling, VA.

TA–W–64,586; Carlson Wagonlit Travel, Traveler and Transaction Services, Houston, TX.

TA–W–64,603; Cassens Transport, Inc., Fenton, MO.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of *December 29, 2008 through January 2, 2009.* Copies of these determinations are available for inspection in Room N–5428, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: January 12, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1484 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,756]

Air Liquide Electronics U.S. LP, Dallas, TX; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 22, 2008 in response to a petition filed by a company official on behalf of workers of Air Liquide Electronics U.S. LP, Dallas, Texas.

The petitioning group of workers is covered by an active certification (TA–W–63,747 as amended) which expires on August 20, 2010. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 13th day of January 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1498 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,808]

Fiskars Brand, Inc., Wausau, WI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on January 5, 2009, in response to a worker petition filed by a company official on behalf of workers at Fiskars Brand, Inc., Wausau, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 15th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1492 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for

adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 5, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 5, 2009.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 12th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 12/29/08 and 1/2/09]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64779	Diversified Contract Services, Inc., #639 (IBT)	Fenton, MO	12/29/08	12/10/08
64780	Bayer Clothing Group, Inc. (Comp)	Clearfield, PA	12/29/08	12/24/08
64781	Quality Synthetic Rubber, Inc. (Wkrs)	Twinsburg, OH	12/29/08	12/24/08
64782	Brunswick (Lund Crestliner) (State)	New York Mills, MN	12/29/08	12/24/08
64783	Coherent, Inc. (State)	Bloomfield, CT	12/29/08	12/26/08
64784	Kenworth Truck Co. (Wkrs)	Renton, WA	12/30/08	12/18/08
64785	Wallenius Wilhelmsen Logistics (Comp)	Woodcliff Lake, NJ	12/30/08	12/18/08
64786	Schott-Gemtron Corp (Comp)	Vincennes, IN	12/30/08	12/22/08
64787	J.I.T. Tool & Die, Inc. (Comp)	Brockport, PA	12/30/08	12/17/08
64788	Regal Manufacturing Co., Inc. (Comp)	Hickory, NC	12/30/08	12/29/08
64789	Bemis Manufacturing Co (State)	Menomonee Falls, WI	12/30/08	12/29/08
64790	Futaba Indiana of America (Wkrs)	Vincennes, IN	12/30/08	12/29/08
64791	IMI Cornelius Equipco, Inc. (Comp)	Monmouth, IL	12/30/08	12/29/08
64792	Aetrium Corporation (State)	Norh St. Paul, MN	12/31/08	12/29/08
64793	Lukas Confections, Inc. (Comp)	York, PA	12/31/08	12/23/08
64794	Standard Textile (Wkrs)	Thomaston, GA	12/31/08	12/30/08
64795	Appleton Papers, Inc. (Comp)	Appleton, WI	12/31/08	12/19/08
64796	Tracy Evans, Ltd (Wkrs)	New York, NY	12/31/08	12/15/08
64797	Whatman (Comp)	Sanford, ME	12/31/08	12/30/08
64798	Tenaris Corporation (State)	Blytheville, AR	12/31/08	12/29/08
64799	Aromatique, Inc. (State)	Mt. View, AR	12/31/08	12/29/08
64800	Flex Y Plan Industries, Inc. (Comp)	Fairview, PA	12/31/08	12/30/08
64801	Cequent Electrical Products (Comp)	Angola, IN	12/31/08	12/30/08
64802	Affiliated Computer Services (Wkrs)	Pittsburgh, PA	12/31/08	12/22/08
64803	Star Telegram (Wkrs)	Fort Worth, TX	12/31/08	12/26/08
64804	Andew, LLC (Comp)	Norcross, GA	12/31/08	12/30/08
64805	Lane Home Furnishing (Wren) (Wkrs)	Tupelo, MS	01/02/09	12/16/08
64806	Garvin Industries (Wkrs)	Adamsville, PA	01/02/09	12/30/08

[FR Doc. E9–1483 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 5, 2009.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 5, 2009.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 16th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 1/5/09 and 1/9/09]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
64807	Versa Diecast, Inc. (State)	New Hope, MN	01/05/09	12/31/08
64808	Fiskars Brands, Inc. (Comp)	Wausau, WI	01/05/09	12/29/08
64809	S & B Industry Technologies, L.P. (Comp)	Fort Worth, TX	01/05/09	01/02/09
64810	Legere Group, Ltd. dba Legere Wooodworking (State)	Avon, CT	01/05/09	12/05/08
64811	Clayton Marcus Company—Plant 1—Bethlehem (Comp)	Hickory, NC	01/06/09	12/29/08
64812	LuK USA LLC (Comp)	Wooster, OH	01/06/09	12/19/08
64813	Gerber Scientific, Inc. (State)	Tolland, CT	01/06/09	01/05/09
64814	PPM Technologies, Inc. (Wkrs)	Newberg, OR	01/06/09	12/30/08
64815	Pittsburgh Corning Corporation (Union)	Port Allegany, PA	01/06/09	01/05/09
64816	Northwest Aluminum Specialties (USW)	The Dalles, OR	01/06/09	12/19/08
64817	Boise, Inc. (AWPPW)	St. Helens, OR	01/07/09	12/17/08
64818	Concept Packaging Group (Comp)	Griffin, GA	01/07/09	01/06/09
64819	Teck-Washington, Inc. (Comp)	Metaline Falls, WA	01/07/09	01/06/09
64820	Tenneco Automotive (Comp)	Evansville, IN	01/07/09	01/06/09
64821	Cone Jacquards, LLC—An ITG Company (Comp)	Cliffside, NC	01/07/09	01/06/09
64822	Pulaski Furniture Corporation (Wkrs)	Pulaski, VA	01/07/09	01/06/08
64823	Martin Transportation Systems (Wkrs)	Huber Heights, OH	01/07/09	12/29/08
64824	IACNA (Wkrs)	Lebanon, VA	01/07/09	12/29/08
64825	Briggs-Shaffner Company (Comp)	Simpsonville, SC	01/07/09	12/22/08
64826	Thomasville Furniture Industries, Inc. (Comp)	Thomasville, NC	01/07/09	01/06/09
64827	Thomasville Furniture Industries, Ind.—Plant E (Comp)	Thomasville, NC	01/07/09	01/06/09
64828	Thomasville Furniture Industries, Ind.—Upholstery 5 (Comp).	Conover, NC	01/07/09	01/06/09
64829	Cooper Tire and Rubber Company (Comp)	Albany, GA	01/07/09	01/05/09
64830	Philips Lumileds Lighting Company (Comp)	San Jose, CA	01/08/09	01/07/09
64831	ATC Panels, Inc. (Comp)	Morrisville, NC	01/08/09	01/07/09
64832	Photronics (Comp)	Boise, ID	01/08/09	01/07/09
64833	Carrier Corporation (SMWIA)	Tyler, TX	01/08/09	01/07/09
64834	Regal Beloit (Wkrs)	West Plains, MO	01/08/09	01/05/09
64835	Logistics Services (Wkrs)	Dayton, OH	01/08/09	12/26/08
64836	Black Dot Group (Comp)	Winter Park, FL	01/08/09	01/07/09
64837	Bill Blass International (UNITE)	New York, NY	01/09/09	12/23/08
64838	Cosby National Swage (State)	Jacksonville, AR	01/09/09	01/08/09
64839	Sony Technology Center-Pittsburgh (Comp)	Mt. Pleasant, PA	01/09/09	01/09/09
64840	International Paper (AFLCIO)	Cleveland, TN	01/09/09	12/18/08
64841	MAR/TRON, Inc. (State)	Flippin, AR	01/09/09	01/08/09
64842	American & Efird, Nelson 02 Plant (Comp)	Lenoir, NC	01/09/09	01/08/09
64843	TDK Components USA, Inc. (Comp)	Peachtree City, GA	01/09/09	01/08/09
64844	Coherent, Inc. (Comp)	Auburn, CA	01/09/09	01/08/09
64845	Reach Road Manufacturing (Wkrs)	Williamsport, PA	01/09/09	12/23/08
64846	Tracker Marine (Wkrs)	Bolivar, MO	01/09/09	01/07/09
64847	Brunswick Family Boat Co., Inc. (State)	Cumberland, MD	01/09/09	01/08/09
64848	Ozark Mountain Apparel—Monett (State)	Monett, MO	01/09/09	01/08/09
64849	Ozark Mountain Apparel—Purdy (State)	Purdy, MO	01/09/09	01/08/09
64850	NCO Financial Systems (Wkrs)	Horsham, PA	01/09/09	12/05/08

[FR Doc. E9–1493 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,208]

Anchor Glass Container Corporation, Zanesville Mould Division, Zanesville, OH; Notice of Negative Determination Regarding Application for Reconsideration

By application dated December 29, 2008, United Steelworkers, Local 121 T requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA), applicable to workers and former workers of the subject firm. The denial notice was signed on November 21, 2008 and published in the **Federal Register** on December 10, 2008 (73 FR 75136).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation that resulted in a negative determination was based on the finding that imports of moulds and related glass container equipment did not contribute importantly to worker separations at the subject facility and there was no shift of production to a foreign country. The subject firm did not import moulds and related glass container equipment during the relevant period. The ''contributed importantly'' test is generally demonstrated through a survey of the workers' firm's declining

domestic customers. In this case the survey was not conducted because all moulds and related glass container equipment was used internally in the products of glassware. The subject firm did not have external customers in the relevant period and did not import moulds and related glass container equipment.

The petitioner alleged that subject firm's competitors import mould equipment, thus having an advantage over the subject firm in locating potential customers.

The impact of competitors on the domestic firms is revealed in an investigation through customer surveys. In the case at hand, in the absence of the external customers, the Department solicited information from the internal customers of the subject firm to determine if customers purchased imported moulds and related glass container equipment. The information was intended to determine if competitor imports contributed importantly to layoffs at the subject firm. The investigation revealed no imports of moulds and related glass container equipment during the relevant period. The subject firm did not import moulds and related glass container equipment nor was there a shift in production from subject firm abroad during the relevant period.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 9th day of January 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1491 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,338]

Pine Island Sportswear, Ltd, Monroe, NC; Notice of Negative Determination Regarding Application for Reconsideration

By application dated January 7, 2009, a company official requested administrative reconsideration of the Department's negative determination regarding eligibility for workers and former workers of the subject firm to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA). The denial notice was signed on December 2, 2008 and published in the **Federal Register** on December 18, 2008 (73 FR 77068).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The TAA petition filed on behalf of workers at Pine Island Sportswear, Ltd., Monroe, North Carolina was based on the finding that the worker group does not produce an article within the meaning of Section 222 of the Trade Act of 1974.

In the request for reconsideration, the petitioner stated that workers of the subject firm were previously certified eligible for Trade Adjustment Assistance. The petitioner further stated that even though production did not occur at the subject facility in the relevant period, workers of the subject firm ''should not be denied the same rights as a production employee.'' The petitioner appears to allege that because the subject firm once manufactured articles and was previously certified eligible for TAA, the workers of the subject firm should be granted another TAA certification.

The workers of Pine Island Sportswear, Ltd., Monroe, North Carolina were previously certified eligible for TAA under petition numbers TA–W–58,714, which expired on January 31, 2008. The investigation revealed that production at the subject firm ceased in February 2006.

When assessing eligibility for TAA, the Department exclusively considers production during the relevant time period (from one year prior to the date of the petition). Therefore, events occurring in 2006 are outside of the relevant period and are not considered in this investigation.

The investigation revealed that workers of the subject firm were engaged in work related to administrative and distribution during the relevant period. These functions, as described above, are not considered to be production of an article within the meaning of Section 222 of the Trade Act.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 14th day of January 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1495 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–63,976]

Stauble Machine and Tool Co., Inc.: Louisville, KY; Notice of Revised Determination on Reconsideration

On December 10, 2008, the Department issued an Affirmative Determination Regarding Application on Reconsideration applicable to workers and former workers of the subject firm. The notice was published in the **Federal Register** on December 18, 2008 (73 FR 77064).

The previous investigation initiated on September 3, 2008, resulted in a negative determination issued on November 7, 2008, was based on the finding that imports of metal stamping parts did not contribute importantly to worker separations at the subject firm and no shift in production to a foreign source occurred. The denial notice was published in the **Federal Register** on November 25, 2008 (73 FR 71696).

On reconsideration, the Department requested an additional list of customers of the subject firm and conducted a customer survey to determine whether imports of metal stamping parts negatively impacted employment at the subject firm.

The survey of the major declining customers revealed that the customers increased imports of metal stamping parts while decreasing purchases from the subject firm during January through August 2008 over the corresponding 2007 period.

In accordance with Section 246 the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor herein presents the results of its investigation regarding certification of eligibility to apply for alternative trade adjustment assistance (ATAA) for older workers.

In order for the Department to issue a certification of eligibility to apply for ATAA, the group eligibility requirements of Section 246 of the Trade Act must be met. The Department has determined in this case that the requirements of Section 246 have been met.

A significant number of workers at the firm are age 50 or over and possess skills that are not easily transferable. Competitive conditions within the industry are adverse.

Conclusion

After careful review of the additional facts obtained on reconsideration, I conclude that increased imports of articles like or directly competitive with those produced at Stauble Machine and Tool Co., Inc., Louisville, Kentucky, contributed importantly to the declines in sales or production and to the total or partial separation of workers at the subject firm. In accordance with the provisions of the Act, I make the following certification:

All workers of Stauble Machine and Tool Co., Inc., Louisville, Kentucky, who became totally or partially separated from employment on or after September 2, 2007, through two years from the date of this certification, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed in Washington, DC this 15th day of January 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1494 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,742]

American Axle & Manufacturing, Inc., Detroit Forge Plant, Detroit, MI; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 19, 2008, in response to a petition filed by a Michigan State Workforce Office on behalf of workers of American Axle & Manufacturing, Inc., Detroit Forge Plant, Detroit, Michigan.

The worker group is included in an active certification which covers all workers of American Axle & Manufacturing, Inc., Detroit Manufacturing Complex, Detroit, Michigan (TA–W–64,083, amended).

Therefore, the petitioner has requested that the petition be withdrawn and the investigation has been terminated.

Signed in Washington, DC, this 12th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1481 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,546]

Hightower Technology Capital, Inc.: Working On Site at Hewlett-Packard Company; Vancouver, WA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 26, 2008, in response to a worker petition filed by a company official on behalf of workers at Hightower Technology Capital, Inc., working on site at Hewlett-Packard Company, Vancouver, Washington.

There are two existing certifications applicable to the petitioning group of workers:

(1) Hewlett-Packard Company, Inkjet Consumer Solutions, HP Consumer Hardware Inkjet Lab, Vancouver, Washington (TA–W–64,127; certified October 23, 2008; amended January 9, 2009).

(2) Hewlett-Packard Company, Imaging and Printing Group, Edgeline Development and Light Production Systems Operations Division, Edgeline Development and Operations, Vancouver, Washington (TA–W–64,633; certified December 19, 2008).

Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 9th day of January 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1482 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,536]

Industrial Paint and Strip, Inc., Woodsfield, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 25, 2008 in response to a petition filed by a company official on behalf of workers of Industrial Paint and Strip, Inc., Woodsfield, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 15th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1496 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,805]

Lane Home Furnishing (Wren), Tupelo, MS; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an

investigation was initiated on January 2, 2009 in response to a petition filed on behalf of workers of Lane Home Furnishing (Wren), Tupelo, Mississippi.

The petitioning worker group is included in an earlier petition (TA–W–64,749) filed on December 17, 2008, that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC this 16th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1499 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,718]

TAC Automotive, Flint, MI; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 17, 2008 in response to a petition filed on behalf of workers of TAC Automotive, Flint Michigan.

The petitioners are included in amended certifications issued for on-site leased workers of TAC Automotive at Delphi Corporation, Dayton, Ohio, under petition numbers TA–W–62,273, TA–W–62,273A and TA–W–62,273B.

Consequently further investigation would serve no purpose and the petition investigation is terminated.

Signed in Washington, DC, this 13th day of January 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–1497 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice of petitions for modification of existing mandatory safety standards.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification filed by the parties listed below to modify the application of existing mandatory safety standards published in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations, and Variances on or before February 25, 2009.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: Standards-Petitions@dol.gov.*
2. *Facsimile:* 1–202–693–9441.
3. *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances.
4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209, Attention: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations, and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (E-mail), or 202–693–9441 (Telefax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that: (1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or (2) that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR §§ 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2008–054–C.

Petitioner: Parkwood Resources, Inc., 511 Railroad Avenue, Homer City, Pennsylvania 15748.

Mine: Cherry Tree Mine, MSHA I.D. No. 36–090224, located in Clearfield County, Pennsylvania.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to use battery-powered non-permissible surveying equipment, including, but not limited to, portable battery operated mine transits, total station surveying equipment, distance meters, and laptop computers, in or inby the last open crosscut. The petitioner proposes to: (1) Use non-permissible electronic surveying equipment in or inby the last open crosscut and examine the equipment prior to use to ensure that the equipment is in safe operating condition; (2) have a qualified person examine the equipment at intervals not to exceed 7 days and record the examination results in the weekly electrical equipment examination book. The examination will include: (i) Checking the instrument for any physical damage and the integrity of the case; (ii) removing the battery and inspecting for corrosion; (iii) inspecting the contact points to ensure a secure connection to the battery; (iv) reinserting the battery and powering up and shutting down to ensure proper connections; and (v) checking the battery compartment cover to ensure that it is securely fastened. In addition, the operator will also (1) have a qualified person continuously monitor for methane immediately before and during the use of non-permissible surveying equipment in or inby the last open crosscut or in the return; (2) eliminate the use of non-permissible surveying equipment if methane is detected in concentrations at or above 1.0 percent methane; (3) de-energize the equipment immediately and withdraw the equipment outby the last open crosscut when 1.0 percent or more of methane is detected while in use; (4) eliminate the use of non-permissible surveying equipment where float coal

dust is in suspension; (5) charge or change batteries contained in the surveying equipment in fresh air outby the last open crosscut; (6) provide training to qualified personnel who use the equipment to properly recognize the hazards and limitations associated with use of the equipment; (7) put the non-permissible surveying equipment into service only after MSHA has initially inspected the equipment and determined that it is in compliance with all of the terms and conditions of this petition; and (8) submit proposed revisions for the part 48 training plan to the District Manager, which will include specified initial and refresher training regarding the terms and conditions stated in the proposed decision and order. The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and the proposed alternative method would at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2008–055–C.

Petitioner: Parkwood Resources, Inc., 511 Railroad Avenue, Homer City, Pennsylvania 15748.

Mine: Cherry Tree Mine, MSHA I.D. No. 36–09224, located in Clearfield County, Pennsylvania.

Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

Modification Request: The petitioner requests a modification of the existing standard to permit an alternative method of compliance to permit the use of battery-powered non-permissible surveying equipment in return airways. The petitioner proposes to: (1) Use non-permissible electronic surveying equipment to be used in or inby the last open crosscut and examine the equipment prior to use to ensure that the equipment is in safe operating condition; (2) have a qualified person examine the equipment at intervals not to exceed 7 days and record the examination results in the weekly electrical equipment examination book. The examination will include: (i) Checking the instrument for any physical damage and the integrity of the case; (ii) removing the battery and inspecting for corrosion; (iii) inspecting the contact points to ensure a secure connection to the battery; (iv) reinserting the battery and powering up and shutting down to ensure proper connections: and (v) checking the battery compartment cover to ensure that it is securely fastened. In addition, the operator will also: (1) Have a qualified person continuously monitor for methane immediately before and during the use of non-permissible surveying equipment in or inby the last open crosscut or in the return; (2) eliminate the use of non-permissible surveying equipment if methane is detected in concentrations at or above 1.0 percent methane; (3) de-energize the equipment immediately and withdraw the equipment outby the last open crosscut when 1.0 percent or more of methane is detected while the equipment is in use; (4) eliminate the use of non-permissible surveying equipment where float coal dust is in suspension; (5) charge or change batteries contained in the surveying equipment in fresh air outby the last open crosscut; (6) provide training to qualified personnel who use the surveying equipment to properly recognize the hazards and limitations associated with the use of the equipment; (7) put the non-permissible surveying equipment in to service only after MSHA has initially inspected the equipment and determined that it is in compliance with all of the terms and conditions of this petition; and (8) submit proposed revisions for the part 48 training plan to the District Manager, which will include specified initial and refresher training regarding the terms and conditions stated in the Proposed Decision and Order. The petitioner asserts that application of the existing standard would result in a diminution of safety to the miners and the proposed alternative method would at all times guarantee no less than the same measure of protection afforded by the existing standard.

Docket Number: M–2008–056–C.

Petitioner: Midland Trail Energy, LLC, 42 Rensford Star Route, Charleston, West Virginia 25306.

Mine: Blue Creek #1 Mine, MSHA I.D. No. 46–09297 and Blue Creek #2 Mine, MSHA I.D. No. 46–09296, located in Kanawha County, West Virginia.

Regulation Affected: 30 CFR 75.900 (Low- and Medium-voltage circuits serving three-phase alternating current equipment; circuit breakers).

Modification Request: The petitioner requests a modification of the existing standard to permit the circuit breaker to be used in series with a contactor. The petitioner proposes to use the circuit breaker for short circuit protection while the contactor may be equipped to provide undervoltage, grounded phase protection, overload protection and other protective functions normally provided by the circuit breaker. The petitioner states that this would allow the use of contactors to provide undervoltage, grounded phase, overload, and monitor the grounding conductors for low and medium-voltage power circuits serving three-phase alternating current equipment located in the mine, conditioned upon compliance with the following terms and conditions: (1) The nominal voltage of the power circuit(s) will not exceed 995 volts; (2) the nominal voltage of the control circuit(s) and audible alarm units will not exceed 120 volts; (3) contactors will be built into the same enclosure as the circuit breakers; (4) contactors with associated protective relays will provide undervoltage protection for low and medium-voltage circuits serving three-phase alternating current equipment; (5) the voltage rating of the contactor(s) will be at least the maximum rms voltage of the circuit being protected, and the continuous current rating of the contactor(s) will be at least the full load current of the utilization equipment; (6) each circuit breaker installed in conjunction with a contactor will be equipped with devices to provide short-circuit protection for each piece of equipment; (7) a monthly exam will be conducted on each circuit to assure proper operation of the contactor; (8) the monthly exam will include activating undervoltage, grounded phase and ground monitor trip devices to test proper operation and results of the tests of the contactors will be recorded with the required monthly tests of the circuit breakers; (9) prior to each remote start-up of a circuit or a group of circuits, an audible alarm at each affected contactor or affected area, will be activated for at least 10 seconds; (10) circuits will be wired so that contactors can only be closed remotely when undervoltage or loss of voltage condition no longer exists, and all other conditions that cause the contactor to open will require a manual reset at the contactor; and (11) circuits providing power to portable or mobile equipment will not be designed to be remotely started; and circuits providing power to mobile equipment will not be configured to be remotely reset. The petitioner further states that the alternative method would not be implemented until all qualified persons who perform work on the equipment and circuits have received training in safe maintenance procedures, and in the terms and conditions of the Proposed Decision and Order. Persons may review a complete description of petitioner's alternative method and procedures at the MSHA address listed in this notice. The petitioner asserts that the proposed alternative method will assure a greater

measure of protection to the miners than would be provided by the existing standard.

Docket Number: M–2008–057–C.

Petitioner: Midland Trail Energy, LLC, 42 Rensford Star Route, Charleston, West Virginia 25306.

Mine: Blue Creek #1 Mine, MSHA I.D. No. 46–09297 and Blue Creek #2 Mine, MSHA I.D. No. 46–09296, located in Kanawha County, West Virginia.

Regulation Affected: 30 CFR 75.1002 (installation of electric equipment and conductors; permissibility).

Modification Request: The petitioner requests a modification of the existing standard to permit the use of Joy 12CM27 continuous miners which operate at 2,400 volts and offer the following general safety advantages over low-voltage continuous miners: (a) Excessive voltage regulation can result in motor overheating, inadequate motor torque, and excessive wear and tear which can in turn reduce the efficiency and safety of the continuous miner; and (b) safety is diminished as the limits of the available interrupting ratings of circuit breakers at 1,000 volts are encountered. The petitioner's petition addresses: voltage limitation of power circuits; voltage limitation of control circuits; ground-fault protection; circuit testing; short-circuit protection; undervoltage protection; guarding of high-voltage trailing cables; design of high-voltage trailing cables; and repairs to high-voltage trailing cables. Persons may review a complete description of petitioner's alternative method and procedures at the MSHA address listed in this notice. The petitioner asserts that the proposed alternative method will at all times guarantee no less than the same measure of protection afforded affected persons by the 1,000-volt limit imposed under 30 CFR 75.2 and 30 CFR 75.1002.

Docket Number: M–2008–058–C.

Petitioner: Timber Coal Company, Inc., P.O. Box 188, Sacramento, Pennsylvania 17968.

Mine: Genie Stripping Operation, MSHA I.D. No. 36–09098, located in Schuylkill County, Pennsylvania.

Regulation Affected: 30 CFR 77.1200(c) (Mine map).

Modification Request: The petitioner requests a modification of the existing standard to permit the use of cross-sections in lieu of contour lines at regular intervals through the area to be mined. The petitioner states that: (1) Due to the steep pitch encountered in mining anthracite coal veins, contours provide no useful information and their presence would make portions of the map illegible; (2) use of cross-sections in lieu of contour lines has been practiced since the late 1800's thereby providing critical information relative to the spacing between veins and proximity to other mine workings which fluctuate considerably; and (3) the vast majority of current surface anthracite mining involves either the mining of remnant pillars from previous mining/mine operators or the mining of veins of lower quality in proximity to inaccessible and frequently flooded abandoned mine workings which may or may not be mapped. The petitioner asserts that the proposed alternative method will in no way provide less than the same measure of protection than that afforded the miners under the existing standard.

Docket Number: M–2008–006–M.

Petitioner: Solvay Chemicals, Inc., P.O. Box 1167, 400 County Road 85, Green River, Wyoming 82935.

Mine: Solvay Chemicals—Trona Underground Mine, MSHA I.D. No. 48–01295, located in Sweetwater County, Wyoming.

Regulation Affected: 30 CFR 57.22305 (Approved equipment (III mines)).

Modification Request: The petitioner requests a modification of the existing standard to permit the use of certain non-permissible tools or their equivalent in or beyond the last open crosscut. The petitioner states that: (1) Specifically these tools are CMXA 51–IS Intrinsically Safe (IS) Portable Data Collector/FFT Analyzer; (2) methane levels would be continuously monitored during data collection use by the longwall continuous methane monitors located at the shear, headgate, and tailgate; (3) the continuous methane monitors alarm at 1% methane and de-energize the longwall mining machine at 1.5% methane; (4) methane levels will also be monitored by an appropriate continuous monitoring unit carried by the operator; and (5) methane levels would be measured within 6 inches of the CMXA 51–IS immediately prior to its use. The petitioner asserts that the proposed alternative method would guarantee the miners no less than the same measure of protection given to them by the existing standard.

Dated: January 16, 2009.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. E9–1480 Filed 1–23–09; 8:45 am]

BILLING CODE 4510–43–P

MORRIS K. UDALL SCHOLARSHIP AND EXCELLENCE IN NATIONAL ENVIRONMENTAL POLICY FOUNDATION

Availability of Solicitation for Consensus Building Leader for Missouri River Recovery Implementation Committee

AGENCY: United States Institute for Environmental Conflict Resolution, Morris K. Udall Foundation.

ACTION: Notice of available solicitation.

SUMMARY: The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) is soliciting expressions of interest, assurances of availability, statements of qualifications, and cost quotations from highly skilled individuals to provide consensus building services in the capacity of Chair of the Missouri River Recovery Implementation Committee (the Committee).

The Committee is a FACA-exempt, multi-stakeholder committee as described in Section 5018 of the Water Resources Development Act of 2007 (WRDA 2007), see *http://www.mrric.org,* composed of representatives from Federal agencies, States, tribes, and non-governmental and local governmental stakeholder interests in the basin. The Committee is a collaborative forum for providing consensus recommendations to the U.S. Army Corps of Engineers (USACE) and the U.S. Fish and Wildlife Service (USFWS) on endangered species recovery activities in the Missouri River Basin and the ''study'' outlined in WRDA 2007. The Chair will assist the Committee in consensus building efforts with support of a facilitation team contracted through the U.S. Institute.

The selected Chair will work in close partnership with the U.S. Institute and facilitation team, the Committee, and representatives from the lead agencies (USACE and USFWS) from May through December of 2009, to convene Committee meetings and support work group activities in order to provide consensus recommendations to the agencies. The work of the contracted Chair will be evaluated before the final Committee meeting of the year (November 2009). If the Committee, the U.S. Institute and the lead agencies agree, the contract will be extended for another year, contingent on the availability of funds from the lead agencies.

The solicitation may be accessed at: *http://www.ecr.gov* and at: *http://www.mrric.org.* This notice invites interested individuals to review the solicitation and provide a description of

their services and expertise as described in the solicitation. If you do not have Internet access to the above sites and wish to receive the solicitation by e-mail, fax or U.S. mail please contact Sarah Palmer at the addresses below.

DATES: Materials must be submitted on or before 5 p.m. MST February 9, 2009.

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

- *E-mail: palmer@ecr.gov.*
- *Fax:* 1–520–901–8557.
- *Mail:* U.S. Institute for Environmental Conflict Resolution; Attn: Sarah Palmer, 130 South Scott Avenue, Tucson, AZ 85701.

FOR FURTHER INFORMATION CONTACT: Sarah Palmer, Senior Program Manager, U.S. Institute for Environmental Conflict Resolution, 130 S. Scott Avenue, Tucson, AZ 85701, phone (520) 901–8556, fax (520) 901–8557, *palmer@ecr.gov.*

SUPPLEMENTARY INFORMATION: The U.S. Institute for Environmental Conflict Resolution is a Federal program established by the U.S. Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The U.S. Institute is part of the Morris K. Udall Foundation, an independent Federal agency of the executive branch overseen by a board of trustees appointed by the President. The U.S. Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties involved in such disputes, regardless of who initiates or pays for assistance. The U.S. Institute helps parties determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all the parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or to resolve the conflict. In addition, the U.S. Institute maintains a roster of qualified facilitators and mediators with substantial experience in environmental conflict resolution, and can help parties in selecting an appropriate neutral. For more information on the U.S. Institute, please visit *http://www.ecr.gov.*

Authority: 20 U.S.C. 5601 *et seq.*

Dated: January 16, 2009.

Ellen Wheeler,

Executive Director, Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation.

[FR Doc. E9–1622 Filed 1–23–09; 8:45 am]

BILLING CODE 6820–FN–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency has submitted to OMB for approval the information collections described in this notice. The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted to OMB at the address below on or before February 25, 2009 to be assured of consideration.

ADDRESSES: Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for these information collections on November 20, 2008 (73 FR 70383 and 70384). No comments were received. NARA has submitted the described information collections to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collections:

1. *Title:* Application for attendance at the Institute for the Editing of Historical Documents.

OMB number: 3095–0012.

Agency form number: None.

Type of review: Regular.

Affected public: Individuals, often already working on documentary editing projects, who wish to apply to attend the annual one-week Institute for the Editing of Historical Documents, an intensive seminar in all aspects of modern documentary editing techniques taught by visiting editors and specialists.

Estimated number of respondents: 25.

Estimated time per response: 1.5 hours.

Frequency of response: On occasion, no more than annually (when respondent wishes to apply for attendance at the Institute).

Estimated total annual burden hours: 37.5 hours.

Abstract: The application is used by the NHPRC staff to establish the applicant's qualifications and to permit selection of those individuals best qualified to attend the Institute jointly sponsored by the NHPRC, the Wisconsin Historical Society, and the University of Wisconsin. Selected applicants forms are forwarded to the resident advisors of the Institute, who use them to determine what areas of instruction would be most useful to the applicants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/forms/editing-application.pdf* to review and fill in the application.

2. *Title:* National Historical Publications and Records Commission Grant Program.

OMB number: 3095–0013.

Agency form number: None.

Type of review: Regular.

Affected public: Nonprofit organizations and institutions, state and local government agencies, Federally acknowledged or state-recognized Native American tribes or groups, and individuals who apply for NHPRC grants for support of historical documentary editions, archival preservation and planning projects, and other records projects.

Estimated number of respondents: 148 per year submit applications; approximately 100 grantees among the applicant respondents also submit semiannual narrative performance reports.

Estimated time per response: 54 hours per application; 2 hours per narrative report.

Frequency of response: On occasion for the application; semiannually for the narrative report. Currently, the NHPRC

considers grant applications 2 times per year; respondents usually submit no more than one application per year.

Estimated total annual burden hours: 8,392 hours.

Abstract: The NHPRC is changing the way it provides information about its grant program. The previously all inclusive grant guidelines booklet is being replaced by a suite of announcements where the information will be specific to the grant opportunity named. The basic information collection remains the same. The grant proposal is used by the NHPRC staff, reviewers, and the Commission to determine if the applicant and proposed project are eligible for an NHPRC grant, and whether the proposed project is methodologically sound and suitable for support. The narrative report is used by the NHPRC staff to monitor the performance of grants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/guidelines/index.html* to review the guidelines. The forms used to apply for a grant can be found at *http://www.archives.gov/nhprc/forms/.*

Dated: January 21, 2009.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E9–1572 Filed 1–23–09; 8:45 am]

BILLING CODE 7515–01–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* February 9, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Archaeology: Old World in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

2. *Date:* February 10, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Africa and Asia in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

3. *Date:* February 17, 2009.
Time: 9:00 a.m. to 5 p.m.
Room: 415.
Program: This meeting will review applications for DFG/NEH Joint Digitization Program, submitted to the Office of Digital Humanities, at the October 15, 2008 deadline.

4. *Date:* February 17, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Literature, Philosophy, Music, and History of Science in Scholarly Editions, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

5. *Date:* February 18, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Religion, Philosophy, History of Science, and Political Science in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

6. *Date:* February 19, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American, British, and Anglophone Literature in Scholarly Editions, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

7. *Date:* February 23, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Archaeology: New World in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

8. *Date:* February 24, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Europe and Latin America in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

9. *Date:* February 25, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American History in Scholarly Editions, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

10. *Date:* February 26, 2009.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American Studies in Collaborative Research, submitted to the Division of Research Programs, at the November 5, 2008 deadline.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. E9–1618 Filed 1–23–09; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL MEDIATION BOARD

Notice of Proposed Information Collection Requests

AGENCY: National Mediation Board.

SUMMARY: The Director, Office of Administration, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 14, 2009

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public

participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Office of Administration, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, *e.g.*, new, revision extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments concerning the proposed extension of the Application for Investigation of Representation Dispute and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: January 21, 2009.

June D. W. King,

Director, Office of Administration, National Mediation Board.

Application for Investigation of Representation Dispute

Type of Review: Extension.

Title: Application for Investigation of Representation Dispute.

OMB Number: 3140–0001.

Frequency: On occasion.

Affected Public: Carrier and Union Officials, and employees of railroads and airlines.

Reporting and Recordkeeping Hour Burden:

Responses: 68 annually.

Burden Hours: 17.00.

1. *Abstract:* When a dispute arises among a carrier's employees as to who will be their bargaining representative, the National Mediation Board (NMB) is required by Section 2, Ninth, to investigate the dispute, to determine who is the authorized representative, if any, and to certify such representative. The NMB's duties do not arise until its services have been invoked by a party to the dispute. The Railway Labor Act is silent as to how the invocation of a representation dispute is to be accomplished and the NMB has not promulgated regulations requiring any specific vehicle. Nonetheless, 29 CFR 1203.2, provides that applications for the services of the NMB under Section 2, Ninth, to investigate representation disputes may be made on printed forms secured from the NMB's Office of Legal Affairs or on the Internet at *http://www.nmb.gov/representation/rapply.html.* The application requires the following information: The name of the carrier involved; the name or description of the craft or class involved; the name of the petitioning organization or individual; the name of the organization currently representing the employees, if any; the names of any other organizations or representatives involved in the dispute; and the estimated number of employees in the craft or class involved. This basic information is essential in providing the NMB with the details of the dispute so that it can determine what resources will be required to conduct an investigation.

2. The application form provides necessary information to the NMB so that it can determine the amount of staff and resources required to conduct an investigation and fulfill its statutory responsibilities. Without this information, the NMB would have to delay the commencement of the investigation, which is contrary to the intent of the Railway Labor Act.

3. There is no improved technological method for obtaining this information. The burden on the parties is minimal in completing the ''Application for Investigation of Representation Dispute.''

4. There is no duplication in obtaining this information.

5. Rarely are representation elections conducted for small businesses. Carriers/employers are not permitted to request our services regarding representation investigations. The labor organizations, which are the typical requesters, are national in scope and would not qualify as small businesses. Even in situations where the invocation comes from a small labor organization, we believe the burden in completing the application form is minimal and that no reduction in burden could be made.

6. The NMB is required by Section 2, Ninth, to investigate the dispute, to determine who is the authorized representative, if any, and to certify such representative. The NMB has no ability to control the frequency, technical, or legal obstacles, which would reduce the burden.

7. The information requested by the NMB is consistent with the general information collection guidelines of CFR 1320.6. The NMB has no ability to control the data provided or timing of the invocation. The burden on the parties is minimal in completing the ''Application for Investigation of Representation Dispute.''

8. No payments or gifts have been provided by the NMB to any respondents of the form.

9. There are no questions of a sensitive nature on the form.

10. The total time burden on respondents is 17.00 hours annually—this is the time required to collect information. After consulting with a sample of people involved with the collection of this information, the time to complete this information collection is estimated to average 15 minutes per response, including gathering the data needed and completion and review of the information.

Number of respondents per year: 68.

Estimated time per respondent: 15 minutes.

Total burden hours per year: 17.

(68 × .25)

11. The total collection and mail cost burden on respondents is estimated at $365.16 annually ($340.00 time cost burden + $25.16 mail cost burden.)

a. The respondents will not incur any capital costs or start up costs for this collection.

b. Cost burden on respondents—detail:

The total time burden annual cost is $340.00.

Time burden basis: The total hourly burden per year, upon respondents, is 17.

Staff cost = $340.00.

$20.00 per hour—based on mid-level clerical salary

$20.00 × 17 hours per year = $340.00

We are estimating that a mid-level clerical person, with an average salary of $20.00 per hour, will be completing the ''Application for Investigation of Representation Dispute'' form. The total burden is estimated at 17 hours, therefore, the total time burden cost is estimated at $340.00 per year.

The total annual mailing cost to respondents is $25.16.

Number of applications mailed by respondents per year: 68.

Total estimated cost: $28.56.

(68 × .42 stamp)

The collection of this information is not mandatory; it is a voluntary request from airline and railroad carrier employees seeking to invoke an investigation of a representation

dispute. After consulting with a sample of people involved with the collection of this information, the time to complete this information collection is estimated to average 15 minutes per response, including gathering the data needed and completion and review of the information. However, the estimated hour burden costs of the respondents may vary due to the complexity of the specific question in dispute. The application form is available from the NMB's Office of Legal Affairs and is also available on the Internet at *http://www.nmb.gov/representation/rapply.html.*

12. The total annualized Federal cost is $428.01 This includes the costs of printing and mailing the forms upon request of the parties. The completed applications are maintained by the Office of Legal Affairs.

a. Printing cost: $ 80.00.

b. Mailing costs: $ 8.01.

Basis (mail cost): Forms are requested approximately 3 times per year and it takes 5 minutes to prepare the form for mail.

Postage cost = $1.26.

3 (times per year) × .42 (cost of postage)

Staff cost = $6.75.

$.45 per minute (GS 9/10 $56,371 = $27.01 per hr. ÷ 60)

$.45 × 5 minutes per mailing = $2.25

$2.25 × 3 times per year = $6.75

Total Mailing Costs = $8.01

13. Item 13—no change in annual reporting and recordkeeping hour burden.

14. The information collected by the application will not be published.

15. The NMB will display the OMB expiration date on the form.

16 (a)—the form does not reduce the burden on small entities; however, the burden is minimized and voluntary.

16 (b)—the form does not indicate the retention period for recordkeeping requirements.

196 (c)—the form is not part of a statistical survey.

Requests for copies of the proposed information collection request may be accessed from *http://www.nmb.gov* or should be addressed to Denise Murdock, NMB, 1301 K Street, NW., Suite 250 E, Washington, DC 20005 or addressed to the e-mail address *murdock@nmb.gov* or faxed to 202–692–5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to June D. W. King at 202–692–5010 or via Internet address *king@nmb.gov.* Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–1620 Filed 1–23–09; 8:45 am]

BILLING CODE 7550–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–017; NRC–2008–0149]

Virginia Electric and Power Company, D/B/A Dominion Virginia Power, and Old Dominion Electric Cooperative; Correction to Notice of Availability of the Draft Supplemental Environmental Impact Statement and Public Meeting for North Anna Power Station Unit 3 Combined License Application

AGENCY: Nuclear Regulatory Commission.

ACTION: Correction.

This document corrects a Notice of Availability of the Draft Supplemental Environmental Impact Statement (SEIS), NUREG–1917 and public meeting for North Anna Power Station Unit 3 (North Anna) combined license application published in the **Federal Register** on December 24, 2008 (73 FR 79196). This action is necessary to correctly identify the closing date of the comment period for the North Anna Unit 3 draft SEIS. In addition, this document corrects the Environmental Protection Agency's Notice of Filing for the draft SEIS published in the **Federal Register** on January 2, 2009 (74 FR 106).

As noted in the December 24, 2008 **Federal Register** Notice, the comment period for the North Anna draft SEIS, NUREG–1917 is 75 days and begins on the date of the Environmental Protection Agency's Notice of Filing. The Environmental Protection Agency's Notice of Filing for the North Anna draft SEIS was January 2, 2009; therefore, the 75-day comment period end date is March 20, 2009. The North Anna, Unit 3 draft SEIS is available for public inspection at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or from the Publicly Available Records component of the NRC's Agency-wide Documents Access and Management System (ADAMS). ADAMS is accessible at *http://www.nrc.gov/reading-rm/adams.html*, which provides access through the NRC's Electronic Reading Room link. The accession number in ADAMS for the draft SEIS, NUREG–1917, is ML083380360.

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff at 1–800–397–4209 or 301–415–4737, or by sending an e-mail to *pdr.resource@nrc.gov*. The draft SEIS may also be viewed on the Internet at: *http://www.nrc.gov/reactors/new-reactors/col/north-anna.html*. In addition, the Jefferson-Madison Regional Library in Mineral, Virginia; Hanover Branch Library in Hanover, Virginia; Orange County Library in Orange, Virginia; Salem Church Library in Fredericksburg, Virginia; and C. Melvin Snow Memorial Branch Library in Spotsylvania, Virginia have agreed to make the draft SEIS available for public inspection.

The staff will hold a public meeting to present an overview of the draft SEIS, NUREG–1917, and to accept public comments. The public meeting will be held in the Auditorium at the Louisa County High School, 757 Davis Highway, Mineral, Virginia, on Tuesday, February 3, 2009. The meeting will convene at 6 p.m. and will continue until 10 p.m., as necessary. The meeting will be transcribed and will include: (1) A presentation of the contents of the draft SEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC will host informal discussions one hour before the start of the meeting. No formal comments on the draft SEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may register to attend or present oral comments at the meeting by contacting Ms. Alicia Williamson, by telephone at 1–800–368–5642, extension 1878, or by Internet to the NRC at: *NORTHANNA.COLAEIS@nrc.gov*, no later than January 28, 2009.

Members of the public may also register to speak at the meeting within 15 minutes of the start of the meeting. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Members of the public who require special equipment or accommodations to attend or present information at the public meeting should contact Ms. Williamson no later than January 23, 2009, so that the NRC staff can determine whether the request can be accommodated.

Any interested party may submit comments on the draft SEIS for consideration by the NRC staff. Comments may be accompanied by additional relevant information or supporting data. Members of the public may send written comments on the draft SEIS for the North Anna COL, Unit 3, to the Chief, Rulemaking Directives and Editing Branch, Division of Administrative Services, Office of Administration, Mailstop TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 and should cite the publication date and page number of this **Federal Register** Notice. Electronic comments may be sent via the Internet to the NRC at *NORTHANNA.COLAEIS@nrc.gov*. To ensure that comments will be considered, comments should be received by the end of the comment period, on March 20, 2009. Written comments should be postmarked by March 20, 2009. Electronic Submissions should be sent no later than March 20, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Alicia Williamson, Environmental Project Manager, at U.S. Nuclear Regulatory Commission, Mailstop T6–D32, Washington, DC 20555–0001, or by phone at (301) 415–1878 or via e-mail at *Alicia.Williamson@nrc.gov*.

Dated at Rockville, Maryland, this 15th day of January 2009.

For the U.S. Nuclear Regulatory Commission.

Scott Flanders,

Director, Division of Site and Environmental Reviews Office of New Reactors.

[FR Doc. E9–1564 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–298; NRC–2008–0617]

Nebraska Public Power District: Cooper Nuclear Station; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

Nebraska Public Power District (NPPD) has submitted an application for renewal of Facility Operating License No. DPR–46 for an additional 20 years of operation at the Cooper Nuclear Station (CNS). CNS is located near Brownville, NE.

The operating license for CNS expires on January 18, 2014. The application for renewal, dated September 24, 2008, was submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 54. A notice of receipt and availability of the application, which included the environmental report (ER), was published in the **Federal Register** on November 17, 2008 (73 FR 67896). A notice of acceptance for docketing of the application for renewal of the facility operating license was also published in the **Federal Register** on December 30, 2008 (73 FR 79921). The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) related to the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29. In addition, as outlined in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' the NRC plans to coordinate compliance with Section 106 of the National Historic Preservation Act in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA).

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, NPPD submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Part 51 and is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://adamswebsearch.nrc.gov/dologin.htm*. The Accession Number for the ER is ML083030246. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail at *pdr@nrc.gov*. The ER may also be viewed on the Internet at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications/cooper.html*. In addition, the ER is available for public inspection near CNS at the Auburn Memorial Library, 1810 Courthouse Ave., Auburn, NE 68305, telephone (402) 274–4023.

This notice advises the public that the NRC intends to gather the information necessary to prepare a plant-specific supplement to the Commission's ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants'' (NUREG–1437), related to the review of the application for renewal of the CNS operating license for an additional 20 years. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found in 10 CFR Part 51.

The NRC will first conduct a scoping process for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action which is to be the subject of the supplement to the GEIS.

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth.

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant.

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered.

e. Identify other environmental review and consultation requirements related to the proposed action.

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule.

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies.

h. Describe how the supplement to the GEIS will be prepared, and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, Nebraska Public Power District.

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved, or that is authorized to develop and enforce relevant environmental standards.

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards.

d. Any affected Indian tribe.

e. Any person who requests or has requested an opportunity to participate in the scoping process.

f. Any person who has petitioned or intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC has decided to hold public meetings for the CNS license renewal supplement to the GEIS. The scoping meetings will be held on February 25, 2009. There will be two sessions, an afternoon and evening session, to accommodate interested parties. The first session will be held at the Brownville Concert Hall at 126 Atlantic St., Brownville, NE 68321, telephone (402) 825–3331, and will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will be held at the Auburn Senior Center at 1101 J St., Auburn, NE 68305, telephone, (402) 274–3420, and will convene at 7 p.m., with a repeat of the overview portions of the meeting and will continue until 10 p.m., as necessary. Both meetings will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the supplement to the GEIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No formal comments on the proposed scope of the supplement to the GEIS will be accepted during the informal discussions.

To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below. Persons may register to attend or present oral comments at the meetings on the scope of the NEPA review by contacting the NRC Project Managers, Mr. Tam Tran, telephone at 1–800–368–5642, extension 3617, or by e-mail to the NRC at *tam.tran@nrc.gov* or Mr. Emmanuel Sayoc, by telephone at 1–800–368–5642, extension 1924, or by e-mail to the NRC at *emmanuel.sayoc@nrc.gov*, no later than February 18, 2009. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Public comments will be considered in the scoping process for the supplement to the GEIS. Mr. Tam Tran or Mr. Sayoc will need to be contacted no later than February 18, 2009, if special equipment or accommodations are needed to attend or present information at the public meeting, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the environmental scope of the KPS license renewal review to: Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, Mailstop TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. To be considered in the scoping process, written comments should be postmarked by March 23, 2009. Electronic comments may be sent by e-mail to the NRC at *CooperEIS@nrc.gov*, and should be sent no later than March 23, 2009, to be considered in the scoping process. Comments will be available electronically and accessible through ADAMS at *http://adamswebsearch.nrc.gov/dologin.htm*.

Participation in the scoping process for the supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Notice of opportunity for a hearing regarding the renewal application was previously included in the **Federal Register** dated December 30, 2008 (73 FR 79921). Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process. The summary will also be available for inspection in ADAMS at *http://adamswebsearch.nrc.gov/dologin.htm.* The staff will then prepare and issue for comment the draft supplement to the GEIS, which will be the subject of separate notices and separate public meetings. Copies will be available for public inspection at the above-mentioned addresses, and one copy per request will be provided free of charge. After receipt and consideration of the comments, the NRC will prepare a final supplement to the GEIS, which will also be available for public inspection.

Information about the proposed action, the supplement to the GEIS, and the scoping process may be obtained from the Project Managers Mr. Sayoc and Mr. Tran at the aforementioned telephone number or e-mail addresses.

Dated at Rockville, Maryland, this 15th day of January 2009.

For the Nuclear Regulatory Commission.

David L. Pelton,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E9–1563 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 63–001–HLW; ASLBP Nos. 09–876–HLW–CAB01, 09–877–HLW–CAB02, 09–878–HLW–CAB03]

Department of Energy; Establishment of Atomic Safety and Licensing Boards

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and the Commission's regulations, *see* 10 CFR 2.300 *et seq.*, 2.1000 *et seq.*, notice is hereby given that Atomic Safety and Licensing Boards are being established to preside over the Petitions to Intervene and the Requests to Participate in the following proceeding, and to perform all other duties as the Chief Administrative Judge may assign: U.S. Department of Energy, High-Level Waste Repository, Construction Authorization Application.

This proceeding concerns Petitions to Intervene from (1) Caliente Hot Springs Resort LLC; (2) State of California; (3) Clark County, Nevada; (4) Churchill, Esmeralda, Lander and Mineral Counties, Nevada; (5) Inyo County, California; (6) Native Community Action Council; (7) State of Nevada; (8) Nuclear Energy Institute; (9) Nye County, Nevada; (10) Timbisha Shoshone Tribe; (11) Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit; and (12) White Pine County, Nevada. Additionally, Requests to Participate as an Interested Government Body have been received from: (1) Eureka County, Nevada; and (2) Lincoln County, Nevada. The Petitions and Requests, which were submitted in response to an October 22, 2008 Notice of Hearing and Opportunity To Petition for Leave To Intervene (73 FR 63,029), challenge the June 3, 2008 application filed by the Department of Energy seeking authorization to construct a geologic repository at Yucca Mountain in Nye County, Nevada.

The Licensing Boards, which shall also be referred to as Construction Authorization Boards (CABs), are comprised of the following Administrative Judges:

CAB 01

William J. Froehlich, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Thomas S. Moore, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Richard E. Wardwell, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

CAB 02

Michael M. Gibson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Lawrence G. McDade, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

CAB 03

Paul S. Ryerson, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Michael C. Farrar, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Mark O. Barnett, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

The allocation among the CABs of the Petitions to Intervene and/or the proffered contentions, as well as the Requests to Participate, will be announced at a later date. Until further order, all pleadings, correspondence, documents, and other materials shall be filed with all three CABs in accordance with 10 CFR 2.1013(c).

Issued at Rockville, Maryland, this 16th day of January 2009.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E9–1577 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–282–LR and 50–306–LR; ASLBP No. 08–871–01–LR]

Atomic Safety and Licensing Board; Before Administrative Judges: William J. Froehlich, Chairman, Dr. Gary S. Arnold, Dr. Thomas J. Hirons; In the Matter of: Northern States Power Co. (Formerly Nuclear Management Company, LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2); Notice of Hearing (Application for 20-Year License Renewal)

January 16, 2009.

This proceeding concerns the application filed April 11, 2008 by Nuclear Management Company, LLC [1] to renew Operating License Nos. DPR–042 and DPR–060 for the Prairie Island Nuclear Generating Plant (PINGP), Units 1 and 2, for an additional 20 years.[2] The PINGP is located near the city of Red Wing, in Goodhue County, Minnesota. The current licenses expire on August 9, 2013 for Unit 1 and on October 29, 2014 for Unit 2.

On June 17, 2008, the Nuclear Regulatory Commission (NRC or Commission) published a notice of opportunity for hearing regarding this license renewal application (Application or LRA).[3] The hearing notice permitted any person whose interest might be affected by the license renewal to file a request for hearing and petition for leave to intervene within 60 days of the hearing notice. On August 18, 2008, PIIC filed a petition to intervene containing eleven proposed contentions and requesting an adjudicatory hearing.[4] The Board heard oral arguments on Petitioner's standing and contentions as well as on a motion to strike on October 29, 2008 in Hastings, Minnesota.[5]

On December 5, 2008, the Licensing Board issued a Memorandum and Order,[6] which granted PIIC party status and admitted seven contentions. The admitted contentions are as follows:

1. Contention 1—The ER in the LRA does not provide an adequate analysis of historical and archaeological resources that may be affected by the proposed license renewal. The LRA does not include information concerning pitfalls that could adversely affect the plan to avoid damage to Historical and Archaeological Resources.

2. Contention 2—The SAMA analysis in the LRA does not accurately reflect the site restoration costs for the area surrounding the PINGP, including the PIIC and its associated Treasure Island complex. The Site Restoration Study methodology should be used to develop more appropriate input for the analysis.

3. Contention 5—Applicant's environmental report contains a seriously flawed environmental justice analysis that does not adequately assess the impacts of the PINGP on the adjacent minority population.

4. Contention 6—The LRA does not include an adequate plan to monitor and manage the effects of aging for containment coatings, whose integrity is directly related to plant safety and the performance of the emergency core cooling systems.

5. Contention 7—The LRA does not contain an adequate plan to monitor and manage the effects of aging due to embrittlement of the reactor vessel internals.

6. Contention 8—Section B2.1.27 of the LRA does not contain an adequate plan to monitor the effects of primary water stress corrosion cracking of nickel-alloy components.

7. Contention 11—The LRA fails to supply sufficient details of the aging management program for flow accelerated corrosion to demonstrate that its effects will be adequately managed.

The Board also ruled that the procedures of Subpart L shall be used for these admitted contentions.[7] On December 15, 2008, Northern States Power Company (Applicant) filed a motion for reconsideration of LBP–08–26 regarding Contention 5 or in the alternative, for referral to the Commission. The Board denied this motion on January 16, 2009.

In light of the foregoing, please take notice that a hearing will be conducted in this proceeding. The Board may conduct an oral argument,[8] may hold pre-hearing conferences,[9] and may conduct evidentiary hearings.[10] In that

[1] Since the Application was filed, the NRC has approved the transfer of operating authority over Prairie Island Nuclear Generating Station, Units 1 and 2, from Nuclear Management Company, LLC (NMC) to Northern States Power Company. Order Approving Transfer of License and Conforming Amendment (Sept. 15, 2008) (ADAMS Accession No. ML082521182).

[2] Application for Renewed Operating Licenses (Apr. 2008) (ADAMS Accession No. ML081130673).

[3] 73 FR 34,335 (June 17, 2008).

[4] Prairie Island Indian Community Notice of Intent to Participate and Petition to Intervene (Aug. 18, 2008).

[5] *See* Tr. at 1–162.

[6] Northern States Power Co. (Prairie Island Nuclear Generating Plant), LBP–08–26, 68 NRC__(Dec. 5, 2008).

[7] *Id*__. at (slip op. at 61); *see also* 10 CFR 2.1200–.1213.

[8] 10 CFR 2.331.

[9] *Id.* § 2.329.

[10] *Id.* § 2.1207.

regard, the parties to this proceeding will be contacted in the near future by the Board's law clerk for purposes of setting up a scheduling conference.[11] The public is invited to attend any oral argument, pre-hearing conference, or evidentiary hearing unless otherwise ordered by the Commission.[12] Notices of these sessions will be published in the **Federal Register** and/or made available to the public at the NRC Public Document Room, located at One White Flint, 11555 Rockville Pike (first floor), Rockville, Maryland, and through the NRC Web site, *http://www.nrc.gov*.

The Administrative Dispute Resolution Act of 1996 (ADR Act)[13] encourages the use of alternative dispute resolution by Federal agencies.[14] The parties are encouraged to explore voluntary processes, including settlement talks with or without a neutral, to resolve the issues in this case. Upon request, a settlement judge from the ASLBP could be appointed.[15]

Additionally, as provided in 10 CFR 2.315(a), any person not a party to the proceeding may submit a written limited appearance statement setting forth his or her position on the issues in this proceeding. These statements do not constitute evidence but may assist the Board and/or parties in defining the issues being considered. Persons wishing to submit a written limited appearance statement should send it by mail to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff. A copy of the statement should also be served on the Chairman of this Atomic Safety and Licensing Board by mail to the Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. At a later date, the Board may entertain oral limited appearance statements at a location or locations in the vicinity of the Prairie Island facility. Notice of any oral limited appearance sessions will be published in the **Federal Register** and/or made available to the public at the NRC Public Document Room and on the NRC Web site, *http://www.nrc.gov*.

Documents relating to this proceeding are available for public inspection at the NRC's Public Document Room or electronically from the publicly available records component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *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 may contact the NRC Public Document Room reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Rockville, Maryland, January 16, 2009.

It is so ordered.

For the Atomic Safety and Licensing Board[16]

William J. Froehlich,

Chairman Administrative Judge.

[FR Doc. E9–1578 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

[11] *Id.* § 2.332; *see also* 10 CFR Part 2, App. B (II) (Model Milestones for Hearings Conducted under 10 CFR Part 2, Subpart L).

[12] 10 CFR 2.328.

[13] 5 U.S.C. 571–584.

[14] Public Law No. 104–320, § 4(a), 110 Stat. 3871 (1996).

[15] *See* 10 CFR 2.338(b).

[16] Copies of this order were sent this date by the agency's E-Filing system to counsel for (1) Applicant, Northern States Power Company, (2) Petitioner, Prairie Island Indian Community, and (3) NRC Staff.

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–362; NRC–2009–0023]

Southern California Edison Company; San Onofre Nuclear Generating Station, Unit 3; Exemption

1.0 Background

Southern California Edison Company (SCE, the licensee) is the holder of Facility Operating License No. NPF–15, which authorizes operation of San Onofre Nuclear Generating Station, Unit 3 (SONGS 3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in San Diego County, California.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 74, Section 74.19(c), requires that each licensee who is authorized to possess special nuclear material (SNM), at any one time and site location, in a quantity greater than 350 grams of contained uranium-235, uranium-233, or plutonium, or any combination thereof, shall conduct a physical inventory of all SNM in its possession under license at intervals not to exceed 12 months.

By application dated January 14, 2008, the licensee requested an exemption from certain requirements in Section 74.19(c) for SONGS 3. The exemption would allow SCE not to perform the physical inventory for 12 irradiated fission chambers removed from SONGS 3 that are stored in the plant.

3.0 Discussion

Pursuant to 10 CFR 74.7, the Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part, when (1) the exemptions are authorized by law, will not present undue risk to public health and safety, and, will not endanger life or property or the common defense and security, and (2) when special circumstances are present. These special circumstances include actions to maintain exposures to radiation as low as is reasonably achievable (ALARA).

Authorized by Law

This exemption would exempt the licensee from the requirements of 10 CFR 74.19(c) for the physical inventory requirements of 12 irradiated fission chambers removed from SONGS 3 in 1995 and in storage. As stated above, 10 CFR 74.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 74. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purposes of 10 CFR 74.19 is for licensees to conduct a physical inventory of special nuclear material in its possession at periodic intervals and to retain records associated with each physical inventory. No changes in the physical or administrative controls are associated with the special nuclear materials related to this request. The licensee will continue to conduct an annual inventory of the 12 fission chambers by visual verification to confirm that the high integrity container (HIC), where the 12 fission chambers are stored, remains in its storage location and the container is structurally intact. In addition, the visual inventory will be augmented to include verification that the tamper-indicating device installed in November 2007 on the HIC has not been disturbed. Based on the above, no new accident precursors are created with the exemption from this requirement. Thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated

accidents are not increased. Therefore, there is no undue risk to public health and safety.

Will Not Endanger Life or Property or Common Defense and Security

Physical location and administrative controls associated with the storage of the 12 irradiated fission chambers are adequately controlled and accounted for by the licensee. Therefore, the exemption will not endanger life or property or common defense and security.

Otherwise in the Public Interest

The licensee pointed out that the ALARA requirement in 10 CFR Part 20, ''Standards for protection against radiation,'' requires ''* * * making every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, * * *'' This request for an exemption from the physical inventory requirements of 10 CFR 74.19(c) would relieve SCE of potentially significant occupational radiation exposures with no decrease in quality and safety. Therefore, the exemption is in the public interest and consistent with the special circumstances of maintaining exposures ALARA.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 74.7, the exemption is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants SCE an exemption to SONGS 3 from the requirements of 10 CFR 74.19(c) for physical inventory for 12 irradiated fission chambers removed from SONGS 3 in 1995 and in storage. In accordance with the licensee's letter dated January 14, 2008, SCE will continue to conduct an annual inventory of the 12 fission chambers by visual verification to confirm that the HIC, where the 12 fission chambers are stored, remains in its storage location and the container is structurally intact. In addition, the visual inventory will be augmented to include verification that the tamper-indicating device installed in November 2007 on the HIC has not been disturbed. The annual physical inventory of all other SNM will continue to be performed per the requirements of 10 CFR 74.19(c).

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (73 FR 79936, dated December 30, 2008).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 15th day of January 2009.

For the Nuclear Regulatory Commission

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–1566 Filed 1–23–09; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Request for Comments and Notice of Public Hearing Concerning Proposed Trans-Pacific Partnership Free Trade Agreement With Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of intent to initiate negotiations on a Trans-Pacific Partnership (TPP) free trade agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam, request for comments, and notice of public hearing.

SUMMARY: The United States intends to initiate negotiations on a Trans-Pacific Partnership free trade agreement with Singapore, Chile, New Zealand, Brunei Darussalam, Australia, Peru and Vietnam. The interagency Trade Policy Staff Committee (TPSC) will convene a public hearing and seek public comment to assist the United States Trade Representative (USTR) in amplifying and clarifying negotiating objectives for the proposed agreements and to provide advice on how specific goods and services and other matters should be treated under the proposed agreement.

DATES: Persons wishing to testify orally at the hearing must provide written notification of their intent to testify, as well as their testimony, by February 25, 2009. A hearing will be held in Washington, DC, on March 4, 2009, and will continue as necessary on subsequent days. Written comments are due by noon, March 11, 2009.

ADDRESSES: Notices of intent to testify, testimony and/or written comments should be submitted electronically via the Internet at *http://www.regulations.gov*. For alternatives to on-line submissions please contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–3475.

FOR FURTHER INFORMATION CONTACT: For procedural questions concerning written comments or participation in the public hearing, contact Gloria Blue, Executive Secretary, Trade Policy Staff Committee, at (202) 395–3475. All other questions regarding the TPP should be directed to Douglas Bell, Deputy Assistant USTR for Southeast Asia and the Pacific, at (202) 395–6813.

SUPPLEMENTARY INFORMATION:

1. Background

The process followed for notifying and consulting on the TPP negotiation is based on the procedures outlined under section 2104 of the Trade Act of 2002 (Trade Act) (19 U.S.C. 3804). Under these procedures, the President must provide the Congress with at least 90 calendar days written notice of his intent to enter into negotiations and identify the specific objectives for the negotiation and, before and after submission of the notice, consult with appropriate Congressional committees regarding the negotiations. Under the Trade Act of 1974, as amended, the President must (i) afford interested persons an opportunity to present their views regarding any matter relevant to any proposed agreement, (ii) designate an agency or inter-agency committee to hold a public hearing regarding any proposed agreement, and (iii) seek the advice of the U.S. International Trade Commission (ITC) regarding the probable economic effects on U.S. industries and consumers of the removal of tariffs and non-tariff barriers on imports pursuant to any proposed agreement.

On September 22, 2008 (for Singapore, Chile, New Zealand and Brunei Darussalam) and December 30, 2008 (for Australia, Peru and Vietnam), after consulting with relevant Congressional committees, the USTR notified the Congress that the President intends to initiate free trade agreement negotiations with these Trans-Pacific countries and identified specific objectives for the negotiations. In addition, the USTR is requesting that the ITC provide its advice on probable economic effects of the free trade agreement. This notice solicits views from the public on these negotiations and provides information on a hearing that will be conducted based on the requirements of the Trade Act of 1974.

2. Public Comments and Testimony

To assist the Administration as it continues to develop its negotiating objectives for the proposed agreements,

the Chairman of the TPSC invites the written comments and/or oral testimony of interested persons at a public hearing. Comments and testimony may address the reduction or elimination of tariffs or non-tariff barriers on any articles provided for in the Harmonized Tariff Schedule of the United States (HTSUS) that are products of the participating Trans-Pacific countries, any concession that should be sought by the United States, or any other matter relevant to the proposed agreement. The TPSC invites comments and testimony on all of these matters and, in particular, seeks comments and testimony addressed to:

(a) General and commodity-specific negotiating objectives for the proposed plurilateral agreement.

(b) Economic costs and benefits to U.S. producers and consumers of removal of tariffs and non-tariff barriers on articles traded with the seven Trans-Pacific countries.

(c) Treatment of specific goods (described by HTSUS numbers) under the proposed agreement, including comments on:

(1) Product-specific import or export interests or barriers,

(2) Experience with particular measures that should be addressed in the negotiations, and

(3) In the case of articles for which immediate elimination of tariffs is not appropriate, a recommended staging schedule for such elimination.

(d) Adequacy of existing customs measures to ensure that imported goods originate from the seven Trans-Pacific countries, and appropriate rules of origin for goods entering the United States under the proposed agreement.

(e) Existing sanitary and phytosanitary measures and technical barriers to trade imposed by the seven Trans-Pacific countries that should be addressed in the negotiations.

(f) Existing barriers to trade in services between the United States and the Trans-Pacific countries that should be addressed in the negotiations.

(g) Relevant electronic commerce issues that should be addressed in the negotiations.

(h) Relevant trade-related intellectual property rights issues that should be addressed in the negotiations.

(i) Relevant investment issues that should be addressed in the negotiations.

(j) Relevant competition-related matters that should be addressed in the negotiations.

(k) Relevant government procurement issues that should be addressed in the negotiations.

(l) Relevant environmental issues that should be addressed in the negotiations.

(m) Relevant labor issues that should be addressed in the negotiations.

Comments identifying as present or potential trade barriers laws or regulations that are not primarily trade-related should address the economic, political, and social objectives of such laws and regulations and the degree to which they discriminate against foreign producers. At a later date, the USTR, through the TPSC, will publish notice of reviews regarding (a) the possible environmental effects of the proposed agreement and the scope of the U.S. environmental review of the proposed agreement, and (b) the impact of the proposed agreement on U.S. employment and labor markets.

A hearing will be held on March 4, 2009, in Rooms 1 and 2, 1724 F Street, NW., Washington, DC. Persons wishing to testify at the hearing must provide written notification of their intent to testify by February 25, 2009. The notification should include: (1) The name, address, and telephone number of the person presenting the testimony; and (2) a short (one or two paragraphs) summary of the presentation, including the subject matter and, as applicable, the product(s) (with HTSUS numbers), service sector(s), or other subjects (such as investment, intellectual property, and/or government procurement) to be discussed. A copy of the testimony must accompany the notification. Remarks at the hearing should be limited to no more than five minutes to allow for possible questions from the TPSC. Persons with mobility impairments who will need special assistance in gaining access to the hearing should contact the TPSC Executive Secretary.

Interested persons, including persons who participate in the hearing, may submit written comments by noon, March 11, 2009. Written comments may include rebuttal points demonstrating errors of fact or analysis not pointed out in the hearing. All written comments must state clearly the position taken, describe with particularity the supporting rationale, and be in English. The first page of written comments must specify the subject matter, including, as applicable, the product(s) (with HTSUS numbers), service sector(s), or other subjects (such as investment, intellectual property and/or government procurement).

3. Requirements for Submissions

Persons submitting an intent to testify and testimony and/or comments must do so in English and must identify (on the first page of the submission) the ''United States—Trans-Pacific Partnership Free Trade Agreement.'' Notice of intent to testify and testimony must be received by February 25, 2009. Written comments must be received by March 11, 2009.

In order to ensure the most timely and expeditious receipt and consideration of testimony and/or comments, USTR has arranged to accept on-line submissions via *www.regulations.gov*. To submit testimony and comments via *www.regulations.gov*, enter docket number USTR–2009–0002 on the home page and click ''go''. The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' on the left side of the search-results page, and click on the link entitled ''Send a Comment or Submission.'' (For further information on using the *http://www.regulations.gov/* Web site, please consult the resources provided on the Web site by clicking on ''How to Use This Site'' on the left side of the home page.)

The *www.regulations.gov* Web site provides the option of making submissions by filling in a ''General Comments'' field, or by attaching a document. We expect that most submissions will be provided in an attached document. If a document is attached, it is sufficient to type ''*See attached*'' in the ''General Comments'' field.

Submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf) are preferred. If an application other than those two is used, please identify in your submission the specific application used. For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC''. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character ''P''. The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or reply comments. Filers submitting comments containing no business confidential information should name their file using the character ''P'', followed by the name of the person or entity submitting the comments or reply comments. Electronic submissions should not contain separate cover letters; rather, information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to a

submission should be included in the same file as the submission itself and not as separate files. All non-confidential comments and reply comments will be placed on the USTR Web site, *http://www.USTR.gov* pursuant to 15 CFR 2003.5.

We strongly urge submitters to avail themselves of the electronic filing, if at all possible. If an on-line submission is impossible, alternative arrangements must be made with Ms. Blue prior to delivery for the receipt of such submissions. Ms. Blue should be contacted at (202) 395–3475. General information concerning the Office of the United States Trade Representative may be obtained by accessing its Internet Web site (*http://www.ustr.gov*).

Carmen Suro-Bredie,

Chairman, Trade Policy Staff Committee.

[FR Doc. E9–1515 Filed 1–23–09; 8:45 am]

BILLING CODE 3190–W9–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

United States-Israel Free Trade Area Implementation Act; Designation of Qualifying Industrial Zones

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Under the United States-Israel Free Trade Area Implementation Act (IFTA Act), articles of qualifying industrial zones encompassing portions of Israel and Jordan or Israel and Egypt are eligible to receive duty-free treatment. Effective upon publication of this notice, the United States Trade Representative, pursuant to authority delegated by the President, is designating the Beni Suief zone and the Al Minya zone as qualifying industrial zones under the IFTA Act.

FOR FURTHER INFORMATION CONTACT: Sonia Franceski, Director for Middle East Affairs, (202) 395–4987, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

SUPPLEMENTARY INFORMATION: Pursuant to authority granted under section 9 of the United States-Israel Free Trade Area Implementation Act of 1985 (IFTA Act), as amended (19 U.S.C. 2112 note), Presidential Proclamation 6955 of November 13, 1996 (61 FR 58761) proclaimed certain tariff treatment for articles of the West Bank, the Gaza Strip, and qualifying industrial zones. In particular, the Presidential Proclamation modified general notes 3 and 8 of the Harmonized Tariff Schedule of the United States: (a) To provide duty-free treatment to qualifying articles that are the product of the West Bank, the Gaza Strip or a qualifying industrial zone and are entered in accordance with the provisions of section 9 of the IFTA Act; (b) to provide that articles of Israel may be treated as though they were articles directly shipped from Israel for purposes of the United States-Israel Free Trade Area Agreement (''the Agreement'') even if shipped to the United States from the West Bank, the Gaza Strip, or a qualifying industrial zone, if the articles otherwise meet the requirements of the Agreement; and (c) to provide that the cost or value of materials produced in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the cost or value of materials produced in Israel under section 1(c)(i) of Annex 3 of the Agreement and that the direct costs of processing operations performed in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the direct costs of processing operations performed in Israel under section 1(c)(ii) of Annex 3 of the Agreement.

Section 9(e) of the IFTA Act defines a ''qualifying industrial zone'' as an area that ''(1) Encompasses portions of the territory of Israel and Jordan or Israel and Egypt; (2) has been designated by local authorities as an enclave where merchandise may enter without payment of duty or excise taxes; and (3) has been specified by the President as a qualifying industrial zone.''

Presidential Proclamation 6955 delegated to the United States Trade Representative the authority to designate qualifying industrial zones.

The United States Trade Representative has previously designated qualifying industrial zones under Section 9 of the IFTA Act on March 13, 1998 (63 FR 12572), March 19, 1999 (64 FR 13623), October 15, 1999 (64 FR 56015), October 24, 2000 (65 FR 64472), and December 12, 2000 (65 FR 77688), June 15, 2001 (66 FR 32660), January 28, 2004 (69 FR 4199), December 29, 2004 (69 FR 78094), and November 16, 2005 (70 FR 69622).

The governments of Israel and Egypt jointly requested in a letter submitted to the United States Trade Representative on January 5, 2009 the designation as a qualifying industrial zone of the areas comprising the Beni Suief and Al Minya zones. The names and locations of the currently producing factories comprising the Beni Suief zone and the Al Minya zone are specified on maps and materials submitted by Egypt and Israel and are on file with the Office of the U.S. Trade Representative. Israel and Egypt have agreed that merchandise may enter, without payment of duty or excise taxes, areas under their respective customs control that comprise the Beni Suief zone and the Al Minya zone. Further, the operation and administration of these zones are provided for in the previously agreed ''Protocol between the Government of the State of Israel and the Government of the Arab Republic of Egypt On Qualifying Industrial Zones.'' Accordingly, the Beni Suief zone and the Al Minya zone meet the criteria under sections 9(e)(1) and (2) of the IFTA Act.

Therefore, pursuant to the authority delegated to me by Presidential Proclamation 6955, I hereby designate the areas occupied by the currently producing factories that comprise the Beni Suief zone and the Al Minya zone as specified on maps and materials received from Egypt and Israel, as qualifying industrial zones under section 9 of the IFTA Act, effective upon the date of publication of this notice, applicable to articles shipped from these qualifying industrial zones after such date.

Susan C. Schwab,

United States Trade Representative.

[FR Doc. E9–1589 Filed 1–23–09; 8:45 am]

BILLING CODE 3190–W9–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

United States-Israel Free Trade Area Implementation Act; Designation of Qualifying Industrial Zones

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: Under the United States-Israel Free Trade Area Implementation Act (IFTA Act), articles of qualifying industrial zones encompassing portions of Israel and Jordan or Israel and Egypt are eligible to receive duty-free treatment. Effective upon publication of this notice, the United States Trade Representative, pursuant to authority delegated by the President, is designating Shoubak, Shouneh Wistah, Madaba/Dalilet, Irbid/Al-Westieyn, and Al-Tafileh as qualifying industrial zones under the IFTA Act.

FOR FURTHER INFORMATION CONTACT: Sonia Franceski, Director for Middle East Affairs, (202) 395–4987, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508.

SUPPLEMENTARY INFORMATION: Pursuant to authority granted under section 9 of the United States-Israel Free Trade Area Implementation Act of 1985 (IFTA Act), as amended (19 U.S.C. 2112 note), Presidential Proclamation 6955 of November 13, 1996 (61 FR 58761) proclaimed certain tariff treatment for articles of the West Bank, the Gaza Strip, and qualifying industrial zones. In particular, the Presidential Proclamation modified general notes 3 and 8 of the Harmonized Tariff Schedule of the United States: (a) To provide duty-free treatment to qualifying articles that are the product of the West Bank, the Gaza Strip or a qualifying industrial zone and are entered in accordance with the provisions of section 9 of the IFTA Act; (b) to provide that articles of Israel may be treated as though they were articles directly shipped from Israel for the purposes of the United States-Israel Free Trade Area Agreement (''the Agreement'') even if shipped to the United States from the West Bank, the Gaza Strip, or a qualifying industrial zone, if the articles otherwise meet the requirements of the Agreement; and (c) to provide that the cost or value of materials produced in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the cost or value of materials produced in Israel under section 1(c)(i) of Annex 3 of the Agreement and that the direct costs of processing operations performed in the West Bank, the Gaza Strip, or a qualifying industrial zone may be included in the direct costs of processing operations performed in Israel under section 1(c)(ii) of Annex 3 of the Agreement.

Section 9(e) of the IFTA Act defines a ''qualifying industrial zone'' as an area that ''(1) encompasses portions of the territory of Israel and Jordan or Israel and Egypt; (2) has been designated by local authorities as an enclave where merchandise may enter without payment of duty or excise taxes; and (3) has been specified by the President as a qualifying industrial zone.''

Presidential Proclamation 6955 delegated to the United States Trade Representative the authority to designate qualifying industrial zones.

The United States Trade Representative has previously designated qualifying industrial zones under Section 9 of the IFTA Act on March 13, 1998 (63 FR 12572), March 19, 1999 (64 FR 13623), October 15, 1999 (64 FR 56015), October 24, 2000 (65 FR 64472), and December 12, 2000 (65 FR 77688), June 15, 2001 (66 FR 32660), January 28, 2004 (69 FR 4199) December 29, 2004 (69 FR 78094), and November 16, 2005 (70 FR 69622).

The Government of Israel and the Government of the Hashemite Kingdom of Jordan agreed in protocols submitted in June 2008 to the designation of Shoubak, Shouneh Wistah, Madaba/Dalilet, Irbid/Al-Westieyn, and Al-Tafileh as qualifying industrial zones. The Government of Israel and the Government of Jordan further agreed that merchandise may enter, without payment of duty or excise taxes, areas under their respective customs control in association with the Shoubak zone, Shouneh Wistah zone, Madaba/Dalilet zone, Irbid/Al-Westieyn zone, and Al-Tafileh zone. Accordingly, the Shoubak, Shouneh Wistah, Madaba/Dalilet, Irbid/Al-Westieyn, and Al-Tafileh qualifying industrial zones meet the criteria under paragraphs 9(e)(1) and (2) of the IFTA Act.

Therefore, pursuant to the authority delegated to me by Presidential Proclamation 6955, I hereby designate the Shoubak, Shouneh Wistah, Madaba/Dalilet, Irbid/Al-Westieyn, and Al-Tafileh, as established by the 2003 Amending Protocols to the Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the State of Israel on Irbid Qualifying Industrial Zone, as qualifying industrial zones under section 9 of the IFTA Act, effective upon the date of publication of this notice, applicable to articles shipped from these qualifying industrial zones after such date.

Susan C. Schwab,

United States Trade Representative.

[FR Doc. E9–1591 Filed 1–23–09; 8:45 am]

BILLING CODE 3190–W9–P

OFFICE OF PERSONNEL MANAGEMENT

January 2009 Pay Adjustments

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice.

SUMMARY: The President adjusted the rates of basic pay and locality payments for certain categories of Federal employees effective in January 2009. This notice documents those pay adjustments for the public record.

FOR FURTHER INFORMATION CONTACT: Tameka Gillis, Center for Pay and Leave Administration, Division for Strategic Human Resources Policy, U.S. Office of Personnel Management; (202) 606–2858; FAX (202) 606–0824; or e-mail to *pay-performance-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: On December 18, 2008, the President signed Executive Order 13483 (73 FR 78587), which implemented the January 2009 pay adjustments. The President made these adjustments consistent with Public Law 110–329, September 30, 2008, which authorized an overall average pay increase of 3.9 percent for the ''statutory pay systems,'' including the General Schedule (GS).

Schedule 1 of Executive Order 13483 provides the rates for the 2009 General Schedule and reflects a 2.9 percent across-the-board increase. Executive Order 13483 also includes the percentage amounts of the 2009 locality payments. (See Section 5 and Schedule 9 of Executive Order 13483.)

The publication of this notice satisfies the requirement in section 5(b) of Executive Order 13483 that the U.S. Office of Personnel Management (OPM) publish appropriate notice of the 2009 locality payments in the **Federal Register**.

GS employees receive locality payments under 5 U.S.C. 5304. Locality payments apply in the continental United States (as defined in 5 CFR 531.602 to include the several States and the District of Columbia, but not Alaska or Hawaii). In 2009, locality payments ranging from 13.86 percent to 34.35 percent apply to GS employees in 32 locality pay areas. (The 2009 locality pay area definitions can be found at *http://www.opm.gov/oca/09tables/locdef.asp.*) These 2009 locality pay percentages, which replaced the 2008 locality pay percentages, became effective on the first day of the first pay period beginning on or after January 1, 2009 (January 4, 2009). An employee's locality rate of pay is computed by increasing his or her scheduled annual rate of pay (as defined in 5 CFR 531.602) by the applicable locality pay percentage. (See 5 CFR 531.604 and 531.609.)

Executive Order 13483 establishes the new Executive Schedule, which incorporates a 2.8 percent increase required under 5 U.S.C. 5318 (rounded to the nearest $100). By law, Executive Schedule officials are not authorized to receive locality payments.

Executive Order 13483 establishes the range of rates of basic pay for senior executives in the Senior Executive Service (SES), as established pursuant to 5 U.S.C. 5382. The minimum rate of basic pay for the SES may not be less than the minimum rate payable under 5 U.S.C. 5376 for senior-level positions ($117,787 in 2009). The maximum rate of the SES rate range is level II of the Executive Schedule ($177,000 in 2009) for SES members covered by a certified SES performance appraisal system and level III of the Executive Schedule

($162,900 in 2009) for SES members covered by an SES performance appraisal system that has not been certified. By law, SES members are not authorized to receive locality payments. Agencies with certified performance appraisal systems in 2009 for senior executives and/or senior-level (SL) and scientific or professional (ST) positions also must apply a higher aggregate limitation on pay—up to the Vice President's salary ($227,300 in 2009).

The Executive order adjusted the rates of basic pay for administrative law judges (ALJs) by 2.9 percent, rounded to the nearest $100 (except for those at AL–1, which was increased by 2.8 percent consistent with the Executive Schedule increase). The maximum rate of basic pay for ALJs is set by law at the rate for level IV of the Executive Schedule, which is now $153,200. The rate of basic pay for AL–2 is $149,600. The rates of basic pay for AL–3/A through 3/F range from $102,400 to $141,600. (See 5 U.S.C. 5372.)

The rates of basic pay for members of Contract Appeals Boards are calculated as a percentage of the rate for level IV of the Executive Schedule. (See 5 U.S.C. 5372a.) Therefore, these rates of basic pay were increased by approximately 2.8 percent.

The maximum rate of basic pay for SL/ST positions was increased by approximately 2.8 percent (to $153,200) because it is tied to the rate for level IV of the Executive Schedule. The minimum rate of basic pay for SL/ST positions is equal to 120 percent of the minimum rate of basic pay for GS–15 and thus was increased by 2.9 percent (to $117,787). (See 5 U.S.C. 5376.) Note that beginning April 12, 2009, employees in SL/ST positions will begin receiving pay under the provisions of a new pay system established under the Senior Professional Performance Act of 2008 (Pub. L. 110–372, October 8, 2008). OPM will issue additional information on the new SL/ST pay system before April 12, 2009.

On October 27, 2008, the President's Pay Agent extended the 2009 locality-based comparability payments to certain categories of non-GS employees. The Governmentwide categories include ALJs and Contract Appeals Board members. The maximum locality rate of pay for these employees is the rate for level III of the Executive Schedule ($162,900 in 2009).

On December 18, 2008, OPM issued a memorandum (CPM 2008–22) on the January 2009 pay adjustments. (See *http://www.opm.gov/oca/compmemo/index.asp.*) The memorandum transmitted Executive Order 13483 and provided the 2009 salary tables, locality pay areas and percentages, and information on general pay administration matters and other related information. The ''2009 Salary Tables'' posted on OPM's Web site at *http://www.opm.gov/oca/09tables/index.asp* are the official rates of pay for affected employees and are hereby incorporated as part of this notice.

Office of Personnel Management.

Michael W. Hager,

Acting Director.

[FR Doc. E9–1643 Filed 1–23–09; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 9b–1; OMB Control No. 3235–0480 ; SEC File No. 270–429.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the existing collection of information provided for in the following rule: Rule 9b–1 (17 CFR 240.9b–1) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 9b–1 (17 CFR 240.9b–1) sets forth the categories of information required to be disclosed in an options disclosure document (''ODD'') and requires the options markets to file an ODD with the Commission 60 days prior to the date it is distributed to investors. In addition, Rule 9b–1 provides that the ODD must be amended if the information in the document becomes materially inaccurate or incomplete and that amendments must be filed with the Commission 30 days prior to the distribution to customers. Finally, Rule 9b–1 requires a broker-dealer to furnish to each customer an ODD and any amendments, prior to accepting an order to purchase or sell an option on behalf of that customer.

There are six options markets that must comply with Rule 9b–1. These six respondents work together to prepare a single ODD covering options traded on each market, as well as amendments to the ODD. These respondents file approximately three amendments per year. The staff calculates that the preparation and filing of amendments should take no more than eight hours per options market. Thus, the total compliance burden for options markets per year is 144 hours (6 options markets × 8 hours per amendment × 3 amendments). The estimated cost for an in-house attorney is $295 per hour,[1] resulting in a total cost of compliance for these respondents of $42,480 per year (144 hours @ $295).

In addition, approximately 1,500 broker-dealers must comply with Rule 9b–1. Each of these respondents will process an average of three new customers for options each week and, therefore, will have to furnish approximately 156 ODDs per year. The postal mailing or electronic delivery of the ODD takes respondents no more than 30 seconds to complete for an annual compliance burden for each of these respondents of 78 minutes, or 1.3 hours. Thus, the total compliance burden per year is 1,950 hours (1,500 broker-dealers × 1.3 hours). The estimated cost for a general clerk of a broker-dealer is $40 per hour,[2] resulting in a total cost of compliance for these respondents of $78,000 per year (1,950 hours @ $40).

The total compliance burden for all respondents under this rule (both options markets and broker-dealers) is 2,094 hours per year (144 + 1,950), and total compliance costs of $120,480 ($42,480 + $78,000).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley

[1] The $295/hour figure for an attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2007,* modified by the Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[2] The $40/hour figure for a general clerk is from SIFMA's *Office Salaries in the Securities Industry 2007,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.92 to account for bonuses, firm size, employee benefits and overhead. The staff believes that the ODD would be mailed or electronically delivered to customers by a general clerk of the broker-dealer or some other equivalent position.

Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: January 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1458 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copy Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 34b–1; File No. 270–305; OMB Control No. 3235–0346.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 34b–1 under the Investment Company Act (17 CFR 270.34b–1) governs sales material that accompanies or follows the delivery of a statutory prospectus (''sales literature'').[1] Rule 34b–1 deems to be materially misleading any investment company sales literature required to be filed with the Commission by Section 24(b) of the Investment Company Act (15 U.S.C. 80a–24(b))[2] that includes performance data, unless the sales literature also includes the appropriate uniformly computed data and the legend disclosure required in investment company advertisements by rule 482 under the Securities Act of 1933 (17 CFR 230.482). Requiring the inclusion of such standardized performance data in sales literature is designed to prevent misleading performance claims by funds and to enable investors to make meaningful comparisons among fund performance claims.

The Commission estimates that 3,210 respondents file approximately 13,001 responses with the Commission that include the information required by rule 34b–1. The burden from rule 34b–1 requires 2.41 hours per response resulting from creating the information required under rule 34b–1. The total burden hours for rule 34b–1 is 31,332 per year in the aggregate (13,001 responses × 2.41 hours per response). Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

The collection of information under rule 34b–1 is mandatory. The information provided under rule 34b–1 is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1459 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Regulation S–K, OMB Control No. 3235–0071, SEC File No. 270–2.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Regulation S–K (17 CFR 229.101–229.103, 229.201–229.202, 229.301–229.308T, 229.401–229.407, 229.501–229.512, 229.601, 229.701–229.703, 229.801–229.802, 229.901–229.915) specifies the non-financial disclosure requirements applicable to registration statements under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and registration statements under Section 12, annual and other reports under Section 13 and 15(d), going-private transaction statements under Section 13, tender offer statements under Section 13 and 14, annual reports to security holders and proxy and information statements under Section 14 and any other documents required to be filed under the Securities Exchange Act of 1934 (15 U.S.C. 78*l*, 78m, 78n, 78o(d)). Regulation S–K is assigned one burden hour for administrative convenience.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to *Shagufta_Ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1460 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange

[1] A ''statutory prospectus'' is a prospectus that meets the requirements of Section 10(a) of the Securities Act of 1933 (15 U.S.C. 77j(a)).

[2] Sales literature addressed to or intended for distribution to prospective investors is deemed filed with the Commission for purposes of Section 24(b) of the Investment Company Act upon filing with a national securities association registered under Section 15A of the Securities Exchange Act of 1934 that has adopted rules providing standards for the investment company advertising practices of its members and has established and implemented procedures to review that advertising. See Rule 24b–3 under the Investment Company Act (17 CFR 270.24b–3).

Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–54C; SEC File No. 270–184; OMB Control No. 3235–0236.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (the ''Act''), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form N–54C (17 CFR 274.54) under the Investment Company Act of 1940 (15 U.S.C. 80a) is a notification to the Commission that a company withdraws its election to be regulated as a business development company. Such a company only has to file a Form N–54C once.

It is estimated that approximately 12 respondents per year file with the Commission a Form N–54C. Form N–54C requires approximately 1 burden hour per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–54C would be 12 hours per year in the aggregate. The estimated annual burden of 12 hours represents a decrease of 6 hours over the prior estimate of 18 hours. The decrease in burden hours is attributable to a decrease in the number of respondents from 18 to 12.

The estimate of average burden hours for Form N–54C is made solely for the purposes of the Act and is not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Form N–54C is mandatory. The information provided by Form N–54C is not kept confidential. 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.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1461 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–6F, SEC File No. 270–185, OMB Control No. 3235–0238.

Notice is hereby given, that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously appproved collection of information discussed below.

The title for the collection of information is ''Form N–6F (17 CFR 274.15), Notice of Intent to be Subject to Sections 55 through 65 of the Investment Company Act of 1940.'' The purpose of Form N–6F is to allow business development companies to take advantage of the less burdensome regulatory provisions available to such companies under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''1940 Act'').

Certain companies may have to make a filing with the Commission before they are ready to elect to be regulated as a business development company.[1] A company that is excluded from the definition of ''investment company'' by Section 3(c)(1) of the 1940 Act because it has fewer than one hundred shareholders and is not making a public offering of its securities may lose such an exclusion solely because it proposes to make a public offering of securities as a business development company. Such a company, under certain conditions, would not lose its exclusion if it notifies the Commission on Form N–6F of its intent to make an election to be regulated as a business development company. The company only has to file a Form N–6F once.

It is estimated that 6 respondents per year file with the Commission a Form N–6F. Form N–6F requires approximately 0.5 burden hours per response resulting from creating and filing the information required by the Form. The total burden hours for Form N–6F would be 3 hours per year in the aggregate. The estimated annual burden of 3 hours represents an increase from the prior estimate of 1 hour. This increase in burden hours is attributable to an increase in the total number of respondents from 2 to 6.

The estimate of average burden hours for Form N–6F is made solely for the purposes of the Paperwork Reduction Act and is not derived from a comprehensive or even representative survey or study of the cost of Commission rules and forms.

The collection of information under Form N–6F is mandatory. The information provided by such Form is not kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Please direct general comments regarding the above information to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or send an e-mail to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 14, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1462 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

[1] A company might not be prepared to elect to be subject to Sections 55 through 65 of the 1940 Act because its capital structure or management compensation plan is not yet in compliance with the requirements of those sections.

SECURITIES AND EXCHANGE COMMISSION

[500–1]

In the Matter of: BBJ Environmental Technologies, Inc.; Order of Suspension of Trading

January 22, 2009.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of BBJ Environmental Technologies, Inc. (''BBJ Technologies'') because it has not filed a periodic report since its 10–QSB/A for

the quarterly period ending September 30, 2004, filed on April 6, 2006.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of BBJ Technologies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in BBJ Technologies securities is suspended for the period from 9:30 a.m. EST on January 22, 2009, through 11:59 p.m. EST on February 4, 2009.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E9–1691 Filed 1–22–09; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59262; File No. SR–FINRA–2008–020]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 2 Thereto Relating to Private Placements of Securities Issued by Members

January 16, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 11, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), and amended on January 7, 2009,[3] the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt new FINRA Rule 5122 (''Rule''). This proposed rule change would require a member that engages in a private placement of unregistered securities issued by the member or a control entity to (1) Disclose to investors in a private placement memorandum, term sheet or other offering document the intended use of offering proceeds and the offering expenses, (2) file such offering document with FINRA, and (3) commit that at least 85 percent of the offering proceeds will be used for business purposes, which shall not include offering costs, discounts, commissions and any other cash or non-cash sales incentives.

Amendment No. 2 to SR–FINRA–2008–020 makes minor changes to the original filing filed on September 11, 2008. The proposed rule change replaces and supersedes the proposed rule change filed on September 11, 2008 in its entirety, except with regard to Exhibit 2, NASD *Notice to Members* 07–27 and comments received in response to NASD *Notice to Members* 07–27.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background and Discussion

FINRA is proposing new FINRA Rule 5122 in response to problems identified in connection with private placements by members of their own securities or those of a control entity (referred to as ''Member Private Offerings'' or ''MPOs''). In recent years, FINRA has investigated and brought numerous enforcement cases concerning abuses in connection with MPOs.[4] Among the allegations in these cases were that members failed to provide written offering documents to investors, or provided offering documents that contained misleading, incorrect or selective disclosure, such as omissions and misrepresentations regarding selling compensation and the use of offering proceeds. In addition, as part of its examination program, FINRA conducted a non-public sweep of firms that had engaged in MPOs and found widespread problems. The MPO sweep revealed that in some cases, offering proceeds were used for individual bonuses, sales contest awards, commissions in excess of 20 percent, or other undisclosed compensation.

Inasmuch as MPOs are *private* placements, they are not subject to existing FINRA rules governing underwriting terms and arrangements and conflicts of interest by members in *public* offerings.[5] This proposed rule change is intended to provide investor protections for MPOs that are similar to the protections provided by NASD Rule 2720 for *public* offerings by members.[6]

In response to concerns about MPOs, in June 2007, FINRA issued *Notice to Members* 07–27 (''NTM 07–27'') soliciting comment on a proposed new rule regarding MPOs (then numbered Proposed Rule 2721). FINRA received sixteen comment letters in response to NTM 07–27.[7] The comments were

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 2 to SR–FINRA–2008–020. This amendment replaced and superseded the original filing submitted to the SEC on September 11, 2008. Amendment No. 1, which was filed on December 22, 2008, was withdrawn on January 7, 2009.

[4] *Franklin Ross, Inc.,* NASD No. E072004001501 (settled April 2006), summarized in *NASD Notice Disciplinary Actions,* p. 1 (May 2006); *Capital Growth Financial, LLC,* NASD No. E072003099001 (settled February 2006), summarized in *NASD Notice Disciplinary Actions,* p. 1 (April 2006); *Craig & Associates,* NASD No. E3B2003026801 (settled August 2005), summarized in *NASD Notice Disciplinary Actions,* p. D6 (October 2005); *Online Brokerage Services, Inc.,* NASD No. C8A050021 (settled March 2005), summarized in *NASD Notice Disciplinary Actions,* p. D5 (May 2005); *IAR Securities/Legend Merchant Group,* NASD No. C10030058 (settled July 2004), summarized in *NASD Notice Disciplinary Actions,* p. D1 (July 2004); *Shelman Securities Corp.,* NASD No. C06030013 (settled December 2003), summarized in *NASD Notice Disciplinary Actions,* p. D1 (February 2004); *Neil Brooks,* NASD No. C06030009 (settled June 2003), summarized in NASD Press Release, NASD Files Three Enforcement Actions for Fraudulent Hedge Fund Offerings (August 18, 2003); *Dep't of Enforcement* v. *L.H. Ross & Co., Inc.,* Complaint No. CAF040056 (Hearing Panel decision January 15, 2005); *Dep't of Enforcement* v. *Win Capital Corp.,* Complaint No. CLI030013 (Hearing Panel decision August 6, 2004). In addition to these cases, FINRA has numerous ongoing investigations involving MPOs.

[5] FINRA Rule 5110 and NASD Rules 2720 and 2810 govern member participation in *public* offerings of securities.

[6] Members would remain subject to other FINRA rules that govern a member's participation in the offer and sale of a security, including FINRA Rules 2010 and 2020 and NASD Rule 2310. Members also are subject to the anti-fraud provisions of the federal securities laws, including Sections 10(b), 11, 12 and 17 of the Exchange Act.

[7] The following is a list of persons and entities submitting comment letters in response to NTM 07–27: Letter from Timothy P. Selby for Alston & Bird LLP dated July 20, 2007 (Alston & Bird letter); Letter from Keith F. Higgins for American Bar Association Committee on Federal Regulation of

Continued

varied. Some commenters expressed support for the intent of the proposed rule, but voiced concerns about its breadth and scope;[8] others questioned the benefit or necessity of the proposed rule.[9] Most comment letters also suggested edits to the proposed rule.[10] In the discussion below, FINRA discusses the comments and note areas that differ significantly from the Rule as previously proposed in NTM 07–27.

Definitions

The proposed rule change states that no member or associated person may offer or sell any security in a MPO unless certain conditions are met. The proposed rule change uses the term ''MPO'' as ''a private placement of unregistered securities issued by a member or control entity.'' The proposed rule further defines two of the terms in the definition of MPO: ''private placement'' and ''control entity.'' In response to one comment,[11] FINRA has defined the term ''private placement'' to be ''a non-public offering of securities conducted in reliance on an available exemption from registration under the Securities Act.''

The proposed rule change defines the term ''control entity'' as ''any entity that controls or is under common control with a member, or that is controlled by a member or its associated persons.'' The term ''control'' is defined as ''a beneficial interest, as defined in Rule 5130(i)(1), of more than 50 percent of the outstanding voting securities of a corporation, or the right to more than 50 percent of the distributable profits or losses of a partnership or other non-corporate legal entity.''[12] The power to direct the management or policies of a corporation or partnership alone (*e.g.*, a general partner)—absent meeting the majority ownership or right to the majority of profits—would not constitute ''control'' as defined in proposed FINRA Rule 5122. For purposes of this definition, entities may calculate the percentage of control using a ''flow through'' concept, by looking through ownership levels to calculate the total percentage of control. For example, if broker-dealer ABC owns 50 percent of corporation DEF that in turn holds a 60 percent interest in corporation GHI, and ABC is engaged in a private offering of GHI, ABC would have a 30 percent interest in GHI (50 percent of 60 percent), and thus GHI would not be considered a control entity under this definition.

FINRA also reaffirms, as stated in NTM 07–27, that performance and management fees earned by a general partner would not be included in the determination of partnership profit or loss percentages. However, if such performance and management fees are subsequently re-invested in the partnership, thereby increasing the general partner's ownership interest, then such interests would be considered in determining whether the partnership is a control entity.

In response to several comments advocating that the timing for determining control take place at the conclusion rather than the commencement of an offering,[13] FINRA has revised the definition of control to be determined immediately after the closing of an offering. The definition also clarifies that, in the case of multiple closings, control will be determined immediately after each closing. If an offering is intended to raise sufficient funds such that the member would not control the entity under the control standard, but fails to raise sufficient funds, the member must promptly come into compliance with the Rule, including providing the required disclosures to investors and filings with FINRA's Corporate Financing Department (''Department'').

Disclosure Requirements

The proposed rule change would require that a member provide a written offering document to each prospective investor in an MPO, whether accredited or not, and that the offering document disclose the intended use of offering proceeds as well as offering expenses and selling compensation.[14] If the offering has a private placement memorandum or term sheet, then such memorandum or term sheet must be provided to each prospective investor and must contain these disclosures. If the offering does not have a private placement memorandum or term sheet, then the member must prepare an offering document that discloses the intended use of offering proceeds as well as offering expenses and selling compensation. The Rule is not meant to require a particular form of disclosure; to emphasize this point, FINRA proposes to issue Supplemental Material 5122.01, which would note that nothing in the Rule shall require a member to prepare a private placement memorandum that meets the additional requirements of Securities Act Rule 502.

FINRA believes that every investor in an MPO should receive basic information concerning the offering. FINRA also believes that none of the disclosures required in the proposed rule change would conflict with requirements under federal or state securities laws.[15]

In response to comments,[16] the proposed rule change eliminates the previously proposed requirements to disclose risk factors and ''any other information necessary to ensure that required information is not misleading.'' One commenter was concerned that requiring disclosure of these items could lead to an inconsistent scheme of regulation in interpreting the application of the federal securities laws to private placements if FINRA's expectation of what should be disclosed

Securities dated July 20, 2007 (ABA letter); Letter from Todd Anders dated July 13, 2007 (Anders letter); Letter from Neville Golvala for ChoiceTrade dated July 19, 2007 (ChoiceTrade letter); Letter from Stephen E. Roth, et al of Sutherland, Asbill & Brennan, LLP for the Committee of Annuity Insurers dated July 20, 2007 (CAI letter); Letter from Peter J Chepucavage for the International Association of Small Broker-Dealers and Advisors dated July 20, 2007 (IASBDA letter); Letter from Alan Z. Engel for LEC Investment Corp. dated June 14, 2007 (LEC letter); Letter from Daniel T. McHugh for Lombard Securities Inc. dated July 20, 2007 (Lombard letter); Letter from Dexter M. Johnson for Mallon & Johnson, P.C. dated July 19, 2007 (Mallon & Johnson letter); Letter from John G. Gaine for Managed Funds Association dated July 20, 2007 (MFA letter); Letter from Curtis N. Sorrells for MGL Consulting Corp. dated July 20, 2007 (MGL letter); Letter from Thomas W. Sexton for the National Futures Association dated July 20, 2007 (NFA letter); Letter from Michael S. Sackheim and David A. Form for the New York City Bar Committee of Futures and Derivatives Regulation dated July 10, 2007 (NYC Bar letter); Letter from Joseph A. Fillip, Jr. for PFG Distribution Co. dated July 19, 2007 (PFG letter); Letter from Mary Kuan for Securities Industry and Financial Markets Association dated July 27, 2007 (SIFMA letter); and Letter from Bill Keisler for Stephens Inc. dated July 20, 2007 (Stephens letter).

[8] *See* MFA letter; CAI letter; Alston & Bird letter.

[9] *See* Anders letter; Mallon & Johnson letter; ChoiceTrade letter; ABA letter; SIFMA letter. FINRA does not agree with SIFMA that the potential for abuses in connection with private offerings by non-members is a reason to abandon the proposed rule change. The FINRA staff believes that offerings by members raise unique conflicts that require the protections of the proposed rule change. FINRA also disagrees with SIFMA's contention that they do not have legal authority to adopt the proposed rule change.

[10] *See* Alston & Bird letter; ABA letter; LEC letter; Mallon & Johnson letter; MFA letter; MGL letter; PFG letter; SIFMA letter.

[11] *See* ABA letter; SIFMA letter.

[12] FINRA added language regarding ''other non-corporate legal entities'' based on commenters' suggestions to clarify that control would extend to entities other than corporations or partnerships. *See* ABA letter; SIFMA letter.

[13] *See* Alston & Bird letter; ABA letter; LEC letter; MFA letter; MGL letter; NYC Bar letter; SIFMA letter.

[14] Given that FINRA is not imposing limits on selling compensation as it does in other rules, they do not believe it is necessary to provide a detailed definition of ''selling compensation'' as urged by SIFMA. FINRA believes that the term ''selling compensation'' for purposes of a disclosure requirement is sufficiently clear.

[15] *See* SIFMA letter.

[16] *See* ABA letter.

differed from the expectations of the SEC and the courts.[17] While FINRA has omitted these disclosures from the proposed rule change, they specifically request comment on their decision to exclude such disclosures.

Filing Requirements

The proposed rule change would require that a member file a private placement memorandum, term sheet or other offering document with the Department at or prior to the first time such document is provided to any prospective investor. Any amendments or exhibits to the offering document also must be filed by the member with the Department within ten days of being provided to any investor or prospective investor. The filing requirement is intended to allow the Department to identify those offering documents that are deficient ''on their face'' from the other requirements of the proposed rule change. Notably, the filing requirement in the proposed rule change differs from that in Rule 5110 (Corporate Financing Rule) in that the Department would not review the offering and issue a ''no-objections'' letter before a member may commence the offering.

FINRA affirms, in response to concerns raised in the comment letters,[18] that information filed with the Department pursuant to FINRA Rule 5122 would be subject to confidential treatment. FINRA has included a provision in the proposed rule change explicitly clarifying this position.[19] The Department plans to develop a Web-based filing system that would allow for the filing to be deemed filed upon submission.[20] In addition, the proposed rule change would not impose any additional requirements regarding filing of advertisements or sales materials, which would continue to be governed by NASD Rule 2210.[21]

One commenter suggested that a member's filing of Form D pursuant to Securities Act Regulation D should provide sufficient information to FINRA.[22] FINRA staff disagrees. For example, FINRA notes that the information in Form D does not include information on a wide variety of expenses or applications of proceeds, nor does Form D require that such information is contained in the offering documents.

Use of Offering Proceeds

Proposed Rule 5122(b)(3) would require that each time an MPO is closed at least 85 percent of the offering proceeds raised be used for business purposes, which would not include offering costs, discounts, commissions or any other cash or non-cash sales incentives. The use of offering proceeds also must be consistent with the disclosures to investors, as described above. This requirement was created to address the abuses where members or control entities used substantial amounts of offering proceeds for selling compensation and related party benefits, rather than business purposes. The proposed rule change does not limit the total amount of underwriting compensation. Rather, under the proposed rule change, offering and other expenses of the MPO could exceed a value greater than 15 percent of the offering proceeds, but no more than 15 percent of the money raised from investors in the private placement could be used to pay these expenses. FINRA notes the 15 percent figure is consistent with the limitation of offering fees and expenses, including compensation, in NASD Rule 2810 (Direct Participation Programs), and the North American Securities Administrators Association (''NASAA'') guidelines with respect to public offerings subject to state regulation.

Some commenters expressed concern that the 85 percent limit was arbitrary or unnecessary[23] and should be reduced or eliminated to allow flexibility for management in MPOs.[24] FINRA believes that when a member engages in a private placement of its own securities or those of a control entity, investors should be assured that, at a minimum, 85 percent of the proceeds of the offering are dedicated to business purposes. FINRA recognizes that changing the business purpose or use of proceeds in an offering may in some instances benefit investors, and remind members that the member may change its use of proceeds, provided it makes appropriate disclosure to investors and files the amended offering document with the Department.

One commenter requested that, when an issuer plans a series of MPOs, the issuer should be allowed to calculate the 85 percent limit at the end of the series.[25] FINRA believes, however, that the limit should apply to *each* MPO in order to assure investors that at least 85 percent of *each* offering in a series is dedicated to the business purposes described in that offering's offering document. As a result, FINRA has clarified that the 85 percent limit applies to each MPO.

Proposed Exemptions

Proposed Rule 5122 would include a number of exemptions for sales to institutional purchasers because the staff's findings did not reveal abuse vis-à-vis such purchasers, who are generally sophisticated and able to conduct appropriate due diligence prior to making an investment. Specifically, the proposed Rule would exempt MPOs sold solely to the following:

- Institutional accounts, as defined in NASD Rule 3110(c)(4);
- Qualified purchasers, as defined in Section 2(a)(51)(A) of the Investment Company Act;
- Qualified institutional buyers, as defined in Securities Act Rule 144A;
- Investment companies, as defined in Section 3 of the Investment Company Act;
- An entity composed exclusively of qualified institutional buyers, as defined in Securities Act Rule 144A; and
- Banks, as defined in Section 3(a)(2) of the Securities Act.

In addition, the proposed rule change excludes the following types of offerings, which do not raise the concerns identified in the sweep or enforcement actions:

- Offerings of exempted securities, as defined by Section 3(a)(12) of the Exchange Act;
- Offerings made pursuant to Securities Act Rule 144A or SEC Regulation S;
- Offerings in which a member acts primarily in a wholesaling capacity (*i.e.*, it intends, as evidenced by a selling agreement, to sell through its affiliate broker-dealers, less than 20% of the securities in the offering);
- Offerings of exempted securities with short term maturities under Section 3(a)(3) of the Securities Act;
- Offerings of subordinated loans under SEA Rule 15c3–1, Appendix D;[26]

[17] *See* ABA letter.

[18] *See* ABA letter; Mallon & Johnson letter; SIFMA letter.

[19] *See* 5122(d). This confidential treatment provision is similar to that provided in Rule 5110(b)(3).

[20] As noted supra, and in NTM 07–27, neither FINRA nor the Department would issue a ''no objections opinion'' regarding any offering document filed with the Department. However, if FINRA subsequently determined that disclosures in the offering document appeared to be incomplete, inaccurate or misleading, FINRA could make further inquiries. The filing requirement also could facilitate the creation of a confidential Department database on MPO activity that would be used in connection with the member examination process.

[21] *See* NYC Bar letter; SIFMA letter.

[22] *See* Mallon & Johnson letter.

[23] *See* IASBDA letter; Mallon & Johnson letter; ABA letter; SIFMA letter.

[24] *See* IASBDA letter; Mallon & Johnson letter; ABA letter.

[25] *See* NYC Bar letter.

[26] Members' offerings of subordinated loans are subject to an alternative disclosure regime. In 2002,

Continued

• Offerings of ''variable contracts,'' as defined in NASD Rule 2820(b)(2);

• Offerings of modified guaranteed annuity contracts and modified guaranteed life insurance policies, as referred to in Rule 5110(b)(8)(E);

• Offerings of securities of a commodity pool operated by a commodity pool operator, as defined under Section 1a(5) of the Commodity Exchange Act;

• Offerings of equity and credit derivatives, including OTC options, provided that the derivative is not based principally on the member or any of its control entities; and

• Offerings filed with the Department under Rule 5110 or NASD Rules 2720 or 2810.

Finally, the proposed rule change also would exempt MPOs in which investors would be expected to have access to sufficient information about the issuer and its securities in addition to the information provided by the member conducting the MPO. These exemptions include:

• Offerings of unregistered investment grade rated debt and preferred securities;

• Offerings to employees and affiliates of the issuer or its control entities; and

• Offerings of securities issued in conversions, stock splits and restructuring transactions executed by an already existing investor without the need for additional consideration or investments on the part of the investor.

This list of exemptions is largely based on the exemptions previously proposed in NTM 07–27, with a few additions and clarifications in response to comments.[27] FINRA clarified that exempted securities, as defined by Section 3(a)(12) of the Exchange Act, would not be subject to the Rule.[28] In addition, FINRA proposes an exemption for commodity pools [29] in view of the oversight and regulation performed by the National Futures Association and the Commodity Futures Trading Commission. FINRA also clarified that variable contracts and other life insurance products [30] would be excluded, because the offer and sale of these types of offerings are already subject to existing FINRA rules.[31] FINRA also proposes an exemption for member private offerings that are filed with the Department under Rule 5110 or NASD Rules 2720 or 2810.

In addition, FINRA clarified aspects of other previously proposed exemptions. FINRA clarified that their intent regarding the exemption for wholesalers is to provide an exemption for those that do not primarily engage in direct selling to investors.[32] FINRA also clarified that offerings of securities issued in conversions, stock splits and restructuring transactions that are executed by an already-existing investor without the need for additional consideration or investment on the part of the investor would be exempt.[33]

FINRA also noted that equity and credit derivatives, such as OTC options, would be exempt, provided that the derivative is not based principally on the member or any of its control entities.[34] As a technical matter, the issuer of an equity or credit derivative is the member firm, and thus would make such offering an MPO. However, where the security offered is not based principally on the member or any of its control entities (e.g., an OTC option on MSFT), FINRA does not believe such sale should be subject to the provisions of the proposed rule change. On the other hand, if the derivative is based principally on the member or a control entity (*e.g.*, an OTC option overlying the member), then the sale of such security should be treated as an MPO and subject to the requirements of the proposed rule change.

Finally, FINRA clarified that the exemption for employees and affiliates of issuers would apply to employees and affiliates of control entities as well, because these persons are expected to have access to a level of information about the securities of the issuer similar to employees and affiliates of the issuer itself.[35]

Based on the comment letters,[36] FINRA also reconsidered whether offerings to accredited investors should be exempt. However, FINRA continues to believe that an exemption for offerings made to accredited investors would not be in the public interest due to the generally low thresholds for meeting the definition of the term ''accredited investor.'' FINRA notes that the SEC has recently proposed clarifying and modernizing its ''accredited investor'' standard due to concerns that the definition is overbroad.[37]

Additionally, it is FINRA's view that financial products offered by a public reporting company,[38] an investment fund [39] or a state or federal bank affiliate of a FINRA member [40] should not be excluded based solely on their status as a reporting company, a fund or a bank. FINRA's belief is that, as a general matter, exemptions are best tailored based on the type of securities offered or the type (and sophistication) of the purchaser rather than the type of offeror. FINRA also declines to exempt offerings that contribute below a specified level of a member's net worth (*e.g.*, 5%), to create a categorical exemption for all exempted securities under Section 3(a) of the Securities Act, or to expand the exemption for securities with short term maturities under Section 3(a)(3) of the Securities Act to include all securities with a maturity of nine months or less.[41] As a practical matter, however, many of these products would be exempt because they meet one of the other exemptions enumerated in the Rule.

Implementation and Compliance

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The implementation date will be 30 days following publication of the *Regulatory Notice* announcing Commission approval, but will not apply retroactively to any offerings that have already commenced selling efforts.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[42] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide important investor protections in

the SEC approved a rule change to require, as part of a subordination agreement, the execution of a Subordination Agreement Investor Disclosure Document. See Exchange Act Release No. 45954 (May 17, 2002), 67 FR 36281 (May 23, 2002); *see also Notice to Members* 02–32 (June 2002).

[27] *See* Lombard letter; ABA letter; MGL letter; NYC Bar letter; MFA letter; NFA letter; Alston & Bird letter; Anders letter; PFG letter; CAI letter; ChoiceTrade letter; Mallon & Johnson letter; SIFMA letter.

[28] Accordingly, FINRA notes that in connection with this proposed Rule, they do not plan to recommend amending NASD Rule 0116 or the List of NASD Conduct Rules and Interpretive Materials that apply to Exempted Securities. *See* CAI letter.

[29] *See* NYC Bar letter; MFA letter; NFA letter; Alston & Bird letter; SIFMA letter.

[30] *See* CAI letter; PFG letter.

[31] *See, e.g.*, NASD Rule 2820.

[32] *See* MGL letter; SIFMA letter.

[33] *See* Mallon & Johnson letter.

[34] *See* SIFMA letter.

[35] *See* Stephens letter; *see also* Lombard letter.

[36] *See* ChoiceTrade letter; PFG letter; SIFMA letter.

[37] *See, e.g.*, Securities Act Release No. 8828 (Aug. 3, 2007), 72 FR 45116 (Aug. 10, 2007); Securities Act Release No. 8766 (Dec. 27, 2006), 72 FR 400 (Jan. 4, 2007).

[38] *See* ABA letter; SIFMA letter.

[39] *See* MFA letter.

[40] *See* Anders letter; ABA letter.

[41] *See* SIFMA letter.

[42] 15 U.S.C. 78o–3(b)(6).

connection with private placements of securities by members and control entities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published in *Notice to Members* 07–27 (June 2007). Sixteen comments were received in response to *Notice to Members* 07–27. A copy of *Notice to Members* 07–27 is attached as Exhibit 2a to this rule filing. A list of the comment letters received in response to *Notice to Members* 07–27 is attached as Exhibit 2b to this rule filing. Copies of the comment letters received in response to *Notice to Members* 07–27 are attached as Exhibit 2c to this rule filing. The comments are summarized above.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2008–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–020. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2008–020 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1466 Filed 1–23–09; 8:45 am]

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[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59259; File No. SR–BX–2009–003]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish a Post-Only Order

January 15, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 14, 2009, 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 substantially prepared by the Exchange. The Exchange has filed this proposal pursuant to Exchange Act Rule 19b–4(f)(6)[3] and requests that the Commission waive the 30-day pre-operative waiting period contained in Exchange Act Rule 19b–4(f)(6)(iii).[4] If such waiver is granted by the Commission, this rule proposal, which is effective upon filing with the Commission, shall become immediately operative.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to establish a Post-Only Order.

The text of the proposed rule change is below. Proposed new language is in italics.

* * * * *

4751. Definitions

(a)–(e) No change.

(f) No change.

(1)–(8) No change.

(9) ''Post-Only Orders'' are orders that if, at the time of entry, would lock an order on the System, the order will be re-priced and displayed by the System to one minimum price increment (i.e., $0.01 or $0.0001) below the current low offer (for bids) or above the current best bid (for offers).

(g)–(j) No change.

* * * * *

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] 17 CFR 240.19b–4(f)(6)(iv).

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

In order to provide enhanced functionality, the Exchange proposes to adopt an additional order type known as the Post-Only Order. A Post-Only Order is an order that does not remove liquidity from the System upon entry if it would lock an order on the Exchange's system for trading cash equities (the ''System''). If, at the time of entry, a Post-Only Order would lock an order on the System it will be re-priced and displayed by the System to one minimum price increment (*i.e.*, $0.01 or $0.0001) below the current low offer (for bids) or above the current best bid (for offers). In the case of a Post-Only Order locking an order, the Post-Only Order will be repriced only once upon entry into the System. As with other Exchange orders, the Post-Only Order will not be routed away to other trading centers.

An example of how the price sliding mechanism will work if the Post-Only Order locks an order on the System is as follows:

- The System is displaying a $10.15 offer.
- A firm enters a Post-Only Order to buy at $10.15.
- The incoming Post-Only Order will go on the book and display at $10.14.

If the Post-Only Order would lock or cross a protected quote of another market center the post-only logic is not applicable and the order will be processed in the same manner as a Price to Comply Post Order.

- Another market center is displaying a $10.15 offer.
- A firm enters a Post-Only Order to buy at $10.15.
- The incoming Post-Only Order will be accepted and display at $10.14.

If the Post-Only Order would cross another order already on the System and the price improvement for executing the order is greater than the liquidity taker fee and higher than the rebate for being a liquidity provider, then the post-only logic is not applicable and the order will be processed and execute in the same manner as an order with a time-in-force of Immediate or Cancel (IOC).

- The System is displaying a $10.15 offer.
- A firm enters a Post-Only Order to buy at $10.16.
- The incoming Post-Only Order will execute at $10.15.

The Exchange believes that the Post-Only Order type will increase the ability of market participants to control their provision or taking of market liquidity and thus better anticipate their trading costs. The Exchange notes that orders similar to the proposed Post-Only Order type are already in use by other market centers.[5] In addition, the process for re-pricing Post-Only Orders is comparable to the existing re-pricing mechanism approved for use for Price to Comply Post Orders.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Section 6(b)(5) of the Act,[8] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Post-Only Order is designed to encourage displayed liquidity and to offer Exchange users greater discretion and flexibility to post liquidity on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the Exchange believes that the Post-Only Order is designed to compete with orders already approved and in use at other national securities exchanges, thereby enhancing competition between the exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. The Commission has determined that waiving the 30-day operative delay of the Exchange's proposal is consistent with the protection of investors and the public interest because such waiver will enable the Exchange to encourage increased liquidity concurrent with the launch of cash equities trading by the Exchange.[11] Therefore, the Commission designates the proposal operative upon filing.

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

[5] *See* Rule 11.9(c)(5) of the BATS Exchange and Rule 7.31 of NYSE Arca. The proposed Post-Only Order has functionalities similar to the NYSE Arca Adding Liquidity Only Order and the BATS Post Only Order.

[6] *See* Rule 4751(f)(8).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). 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 satisfied this requirement.

[11] 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).

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–BX–2009–003 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–BX–2009–003. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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–BX–2009–003 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1464 Filed 1–23–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59260; File No. SR–NASDAQ–2009–001]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7050 Governing Pricing for Nasdaq Members Using the NASDAQ Options Market (''NOM'')

January 15, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2009, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq has filed the proposal pursuant to Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge applicable only to members, which renders the proposed rule change effective upon filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq has filed a proposed rule change to modify Rule 7050 governing pricing for Nasdaq members using the NASDAQ Options Market (''NOM''), Nasdaq's facility for executing and routing standardized equity and index options. Proposed new language is in italics; proposed deletions are in brackets.[5]

* * * * *

7050. NASDAQ Options Market

The following charges shall apply to the use of the order execution and routing services of the NASDAQ Options Market by members for all securities that it trades.

(1) Fees for Execution of Contracts on the NASDAQ Options Market

Except as specified below, the [C]*c*harge to member entering order that executes in the NASDAQ Options Market	$0.45 per executed contract.
For a pilot period ending July 31, 2009, charge for members or non-members entering order via the Options Intermarket Linkage that executes in the Nasdaq Options Market.	$0.45 per executed contract.
Charge to members entering orders in options on QQQQ, SPY, DIA and IWM with an account type "Customer" that executes and remove liquidity entered by another member.	*No fee.*
Credit to member providing liquidity through the NASDAQ Options Market	$0.30 per executed contract.
Credit to member providing liquidity using price-improving orders through the NASDAQ Options Market	$0.35 per executed contract.

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://nasdaqomx.cchwallstreet.com.*

(2)–(4) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to lower the fee for the execution of options contracts for certain orders in certain options on the NASDAQ Options Market (''NOM''). Specifically, Nasdaq is proposing to permit orders with an account type of ''Customer'' to take liquidity [6] for free in certain options. Nasdaq is proposing to apply the new fee provision to options on four exchange-traded funds: QQQQ, SPY, DIA, and IWM. This proposal is designed to attract liquidity to the Nasdaq Options Market and thereby to increase the quality and efficiency of executions.

To ensure that this reduction applies only to customers, the fee reduction will apply only when a customer order entered by one member takes liquidity provided by a different member. When a trade occurs in an included options class and the trade involves a customer removing liquidity that has been provided by the same broker dealer, the customer side of the transaction will be charged the standard rate for removing liquidity. For example, if participant A enters an order and then participant A accesses that liquidity with an order with an account type of ''Customer,'' the ''Customer'' order is still charged $0.45 per executed contract.

This proposed rule change does not impact the liquidity provider rebates set forth in Nasdaq Rule 7050. Nor does it impact the fees assessed for orders executed in the Opening and Closing Crosses, or those orders routed to away markets.

Nasdaq believes that the proposed fees are competitive, fair and reasonable, and non-discriminatory in that they apply equally to all members and customers. As with all fees, Nasdaq may adjust these proposed fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with 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 members and issuers and other persons using any facility or system which Nasdaq operates or controls. As the seventh options market in the national market system, Nasdaq's fees must be competitive and low in order for Nasdaq to attract order flow, execute orders, and grow as a market. Nasdaq believes that its fees are fair and reasonable and consistent with the Exchange Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, Nasdaq has designed its fees to compete effectively for the execution of options contracts and to reduce the overall cost to investors of options trading.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act [9] and Rule 19b–4(f)(2) thereunder,[10] Nasdaq has designated this proposal as establishing or changing a due, fee, or other charge applicable only to members, which renders the proposed rule change effective upon filing. Nasdaq will make the proposed pricing schedule operational on January 12th, 2009.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2009–001 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–NASDAQ–2009–001. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–001 and should be submitted on or before February 17, 2009.

[6] An order that takes liquidity is one that is entered into NOM and that executes against an order resting on the NOM book.

[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).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1465 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59252; File No. SR–NSCC–2008–10]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Enhancement to Its Insurance and Retirement Services To Allow for the Electronic Exchange of Attachments to Messages

January 15, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on November 24, 2008, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by NSCC. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(4) thereunder[3] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change is an enhancement to NSCC's insurance and retirement services (''IPS'') called ''Attachments.''

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to enhance the IPS to allow for the electronic exchange of attachments to IPS messages, such as imaged data in PDF format. The enhancement is referred to as ''Attachments.'' The attachment may be any collection of data that is unstructured and is intended to pass through the network from sender to receiver without edit. The attachment data may but need not be in support of an existing IPS service message.

Background

Recent regulatory developments have highlighted a need for the annuity and insurance industry to have the capability of an electronic exchange of imaged documents, signatures, and forms during the presale, new business, and post-issue process. Industry standards developed by the industry through the straight-through processing (''STP'') initiative led by the National Association of Variable Annuities (''NAVA'') state that signature capture, either through e-signature or on imaged copies of forms, is required at point of sale. The signature and the associated documentation must be transmitted by the selling broker-dealer agent to the insurance carrier for the annuity to be processed ''in-good-order.''

NSCC's Attachments service is in furtherance of the NAVA STP initiative. It will eliminate the need for a paper exchange of information in paper form and will enable STP when signatures are required at point of sale or when original documentation is required in connection with processing what is otherwise automated. Additionally, industry participants will realize savings from reduced mailing costs and from the processing efficiencies associated with expedited document processing. Automation of this process will also create an improved audit trail and will eliminate problems associated with lost paperwork.

The proposed rule change will promote processing efficiencies between insurance companies and distributors of variable insurance products thereby facilitating the prompt and accurate processing of securities transactions, which is consistent with the requirements of the Act and the rules and regulations promulgated thereunder applicable to NSCC.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[5] and Rule 19b–4(f)(4)[6] thereunder because the proposed rule effects a change in an existing service of NSCC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of NSCC or for which it is responsible and (ii) does not significantly affect the respective rights or obligations of NSCC or persons using the service. At any time within sixty days of the filing of such 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–NSCC–2008–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(4).

[4] The Commission has modified the text of the summaries prepared by NSCC.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSCC–2008–10. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. The text of the proposed rule change is available at NSCC, the Commission's Public Reference Room, and *http://www.dtcc.com/downloads/legal/rule_filings/2008/nscc/2008–10.pdf*. 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–NSCC–2008–10 and should be submitted on or before February 17, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1571 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59255; File No. SR–NYSE–2009–02]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Extending Until March 9, 2009, the Operation of Interim NYSE Rule 128 Which Permits the Exchange To Cancel or Adjust Clearly Erroneous Executions If They Arise Out of the Use or Operation of Any Quotation, Execution or Communication System Owned or Operated by the Exchange, Including Those Executions That Occur in the Event of a System Disruption or System Malfunction

January 15, 2009.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 9, 2009, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend until March 9, 2009, the operation of interim NYSE Rule 128 (''Clearly Erroneous Executions for NYSE Equities'') which permits the Exchange to cancel or adjust clearly erroneous executions if they arise out of the use or operation of any quotation, execution or communication system owned or operated by the Exchange, including those executions that occur in the event of a system disruption or system malfunction.

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 Exchange proposes to extend until March 9, 2009, the operation of interim NYSE Rule 128 (''Clearly Erroneous Executions for NYSE Equities'') which permits the Exchange to cancel or adjust clearly erroneous executions if they arise out of the use or operation of any quotation, execution or communication system owned or operated by the Exchange, including those executions that occur in the event of a system disruption or system malfunction.

Prior to the implementation of NYSE Rule 128 on January 28, 2008,[4] the NYSE did not have a rule providing the Exchange with the authority to cancel or adjust clearly erroneous trades of securities executed on or through the systems and facilities of the NYSE.

In order for the NYSE to be consistent with other national securities exchanges which have some version of a clearly erroneous execution rule, the Exchange is drafting an amended clearly erroneous rule which will accommodate such other exchanges but will be appropriate for the NYSE market model.

The NYSE notes that the Commission approved an amended clearly erroneous execution rule for Nasdaq in May 2008.[5] On July 28, 2008, the Exchange filed with the SEC a request to extend the operation of interim Rule 128 until October 1, 2008[6] in order to review the provisions of Nasdaq's clearly erroneous rule and to consider integrating similar standards into its own amendment to Rule 128. On October 1, 2008,[7] the Exchange filed with the SEC a further request to extend the operation of interim Rule 128 until January 9, 2009 in order to consider integrating similar standards into the amendment to Rule 128. The Exchange is in the process of

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 57323 (February 13, 2008), 73 FR 9371 (February 20, 2008) (SR–NYSE–2008–09).

[5] *See* Securities Exchange Act Release No. 57826 (May 15, 2008), 73 FR 29802 (May 22, 2008) (SR–NASDAQ–2007–001).

[6] *See* Securities Exchange Act Release No. 58328 (August 8, 2008), 73 FR 47247 (August 13, 2008) (SR–NYSE–2008–63).

[7] *See* Securities Exchange Act Release No. 58732 (October 3, 2008), 73 FR 61183 (October 15, 2008) (SR–NYSE–2008–99).

finalizing its review of Nasdaq's amended rule and additional market wide CEE initiatives which, if appropriate, may be included in the proposed amendment of Rule 128 and the Exchange is, therefore, requesting to extend the operation of interim Rule 128 until March 9, 2009. Prior to March 9, 2009, the Exchange intends to file a 19b–4 rule change amending interim Rule 128, which, if approved by the SEC, will be effective after March 9, 2009.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') [8] for this proposed rule change is the requirement under Section 6(b)(5) [9] that an Exchange have rules that are 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.

As articulated more fully above, the proposed rule would place the NYSE on equal footing with other national securities exchanges. This will promote the integrity of the market and protect the public interest, since it would permit all exchanges to cancel or adjust clearly erroneous trades when such trades occur, rather than canceling them on all other markets, but leaving them standing on only one market.

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 foregoing rule change has become effective pursuant to Section 19(b)(3)(A) [10] of the Act and Rule 19b–4(f)(6) [11] thereunder. The proposed rule change effects a change that (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition; and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given 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 believes that good cause, consistent with the provisions of Rule 19b–4(f)(6), exists to justify making the rule change immediately effective. Because the proposed rule is based on a rule that has been previously approved by the Commission, and because the proposed rule would in any event be operative only until a more robust and market-appropriate rule was implemented, the NYSE believes that the proposed rule is non-controversial. Moreover, the NYSE believes that the absence of such a rule in an automated and fast-paced trading environment poses a danger to the integrity of the markets and the public interest, and that this exigency justifies filing the rule for immediate effectiveness rather than using the regular Rule 19b–2 process, which would require the Exchange to continue without the protection of the proposed rule until the expiration of the prescribed time periods for notice, comment and approval. In contrast, immediate effectiveness of the proposed rule will immediately and timely enable the NYSE to cancel or adjust clearly erroneous trades that may present a risk to the integrity of the equities markets and all related markets. The proposed rule will also allow the Exchange to protect customers and the public interest, and to continue to provide economically efficient execution of securities transactions.

The NYSE also requests that the Commission waive the five-day period for notice of intent to file this proposed rule change, and the 30-day period before the rule becomes operative, both of which are prescribed by Rule 19b–4(f)(6), but which may be waived pursuant to Rule 19b–4(f)(6)(iii) [12] if such action is consistent with the protection of investors and public interest.[13] The Exchange believes that waiver of these time periods so that the rule may be immediately operative are consistent with the protection of investors and the public interest for the reasons described above.

The Commission believes that waiving the 30-day operative delay will allow the Exchange to continue to immediately and timely cancel or adjust trades that it determines to be clearly erroneous under Rule 128. The Commission believes that the extension of NYSE Rule 128 until March 9, 2009 will allow the Exchange to continue to apply the rule without interruption and is consistent with the protection of investors and the public interest. The Commission hereby designates the proposal as operative upon filing.[14] The Commission has determined to waive the five-day prefiling period in this case.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the 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–NYSE–2009–02 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–NYSE–2009–02. This file number should be included on the subject line if e-mail is used. To help the

[8] 15 U.S.C. 78f(a).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] In fact, the Commission notes, under Rule 19b–4(f)(6)(iii), the ''consistent with the protection of investors and public interest'' standard applies only to the Commission's waiver of the 30-day operative delay. Rule 19b–4(f)(6)(iii) 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.

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–02 and should be submitted on or before February 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–1463 Filed 1–23–09; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to existing OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, e-mail, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and the SSA Reports Clearance Officer to the addresses or fax numbers listed below.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1332 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. Therefore, your comments would be most helpful if you submit them to SSA within 60 days from the date of this publication. Individuals can obtain copies of these collection instruments by calling the SSA Reports Clearance Officer at 410–965–3758 or by writing to the e-mail address listed above.

1. Letter to Employer Requesting Information About Wages Earned by Beneficiary—20 CFR 416.703 & 404.801—0960–0034. SSA uses information from Form SSA–L725 to determine and verify a beneficiary's wages when SSA has incomplete or questionable wage data. SSA uses the information on the SSA–L725 to calculate the correct amount of benefits payable and to maintain an accurate record of earnings for the beneficiary. Respondents are small business employers.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 150,000.

Frequency of Response: 1.

Average Burden per Response: 40 minutes.

Estimated Annual Burden: 100,000 hours.

2. Statement of Care and Responsibility for Beneficiary—20 CFR 404.2020, 404.2025, 408.620, 408.625, 416.620, 416.625—0960–0109. SSA uses information from Form SSA–788 to verify statements of concern made by payee applicants and to identify other potential payees. SSA is concerned with selecting the most qualified representative payee who will use Social Security benefits in the beneficiary's best interest. SSA considers factors such as the payee applicant's capacity to perform payee duties, awareness of the beneficiary's situation and needs, demonstration of past and current concern for the beneficiary's well-being, etc. If the payee applicant does not have custody of the beneficiary, SSA will obtain information from the custodian for evaluation against information provided by the applicant. Respondents are individuals who have custody of the beneficiary in cases where someone else has filed to be the beneficiary's representative payee.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 130,000.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 21,667 hours.

3. Application for Special Age 72-or-Over Monthly Payments—20 CFR 404.380–404.384—0960–0096. Form SSA–19–F6 collects the information needed to determine whether a claimant can qualify for Special Age 72 payments. SSA will evaluate eligibility requirements using the data collected on this form. The respondents are individuals who reached age 72 before 1972.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 10.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 2 hours.

4. Third Party Liability Information Statement—42 CFR 433.136–433.139—0960–0323. Medicaid state agencies must identify third party insurers liable for medical care or services for Medicaid beneficiaries; this reduces Medicaid costs. Regulations at 42 CFR 433.136–433.139 require Medicaid state agencies to obtain this information on Medicaid applications and redeterminations as a condition of Medicaid eligibility. States may enter into agreements with the Commissioner of Social Security to make Medicaid eligibility determinations for aged, blind, and disabled beneficiaries in those states. Applications for and redeterminations of Supplemental Security Income (SSI) eligibility in jurisdictions with such agreements are applications and redeterminations of Medicaid eligibility. Under these agreements, SSA obtains third party liability information using Form SSA–8019 and provides that information to the Medicaid state agencies. The Medicaid state agencies use the information to bill third parties liable for medical care, support, or services for a beneficiary to guarantee that Medicaid remains the payer of last resort. The

respondents are SSI claimants and recipients.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 62,834.

Frequency of Response: 1.

Average Burden per Response: 5 minutes.

Estimated Annual Burden: 5,236 hours.

Dated: January 16, 2009.

John Biles,

Reports Clearance Officer, Social Security Administration.

[FR Doc. E9–1547 Filed 1–23–09; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent to Rule on Passenger Facility Charge (PFC) Application 09–09–C–00–PHX, To Impose and Use PFC Revenue at Phoenix Sky Harbor International Airport, Phoenix, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Phoenix Sky Harbor International Airport, under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before February 25, 2009.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Danny W. Murphy, Aviation Director, City of Phoenix, at the following address: 3400 Sky Harbor Boulevard, Phoenix, AZ 85034. Air carriers and foreign air carriers may submit copies of written comments previously provided to the City of Phoenix under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Darlene Williams, Airport Planner/PFC Specialist, Los Angeles Airports District Office, 15000 Aviation Blvd., Room 3000, Lawndale, CA 90261, *Telephone:* (310) 725–3625. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Phoenix Sky Harbor International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). On January 9, 2009, the application was found substantially complete. The FAA will approve or disapprove the application, in whole or in part, no later than April 18, 2009.

The following is a brief overview of the impose and use application No. 09–09–C–00–PHX:

Proposed charge effective date: March 1, 2010.

Proposed charge expiration date: June 1, 2028 Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $1,858,636,000.

Description of proposed project:

Impose and use: (1) Automated Train—this project will run entirely on airport property with six stations spanning approximately 5 miles from the northeast corner of the airport where it will connect with the urban light rail line, (2) Community Noise Reduction Program—this program operates under voluntary acquisition and relocation and sound insulation mitigation services, (3) Terminal Capacity Improvements—upgrades to Terminals 3 and Terminal 4, (4) Terminal 4 Apron Rehab—rehabilitation of failed concrete pavement around the concourse aprons, (5) South Infield Paving—this project will provide stabilization of the infield asphalt pavement, and (6) Airfield Lighting and Runway Sign Relocation—improving visual conditions of airfield lighting with enhanced technology.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Nonscheduled/on demand air carriers, filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under ''**FOR FURTHER INFORMATION CONTACT**'' and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the City of Phoenix.

Issued in Lawndale, California, on January 12, 2009.

Mia Paredes Ratcliff,

Planning and Programming Manager, Airports Division, Western-Pacific Region.

[FR Doc. E9–1313 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice for Modesto City-County Airport, Modesto, CA

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by City of Modesto, California for Modesto City-County Airport under the provisions of 49 U.S.C. 47501 *et seq.* (Aviation Safety and Noise Abatement Act) and 14 CFR Part 150 are in compliance with applicable requirements.

DATES: *Effective Date:* The effective date of the FAA's determination on the noise exposure maps is January 9, 2009.

FOR FURTHER INFORMATION CONTACT: Camille Garibaldi, Federal Aviation Administration, San Francisco Airports District Office, 831 Mitten Road, Burlingame, California 94010–1303, Telephone: 650/876–2778 extension 613.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for Modesto City-County Airport are in compliance with applicable requirements of Part 150, effective January 9, 2009. Under 49 U.S.C. section 47503 of the Aviation Safety and Noise Abatement Act (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport. 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 take to reduce existing non-compatible uses and prevent the introduction of additional non-compatible uses.

The FAA has completed its review of the noise exposure maps and accompanying documentation submitted by City of Modesto, Modesto, California. The documentation that constitutes the ''Noise Exposure Maps'' as defined in section 150.7 of Part 150 includes: Exhibit 1 ''2008 Noise Exposure Map'', and Exhibit 2 ''2015 Noise Exposure Map''. The Noise Exposure Maps contain current and forecast information including the depiction of the airport and its boundaries, the runway configurations, land uses such as residential, open space, and noise-sensitive institutions and those areas within the Community Noise Equivalent Level (CNEL) 60, 65, 70 and 75 noise contours. Estimates for the number of people within these contours for the year 2008 are shown in Table 3B. Estimates of the future residential population within the 2015 noise contours are shown in Table 3E. Exhibit 2M displays the location of noise monitoring sites. Flight tracks for the existing and the five-year forecast Noise Exposure Maps are found in Exhibits 2C, 2E, and 2G. The type and frequency of aircraft operations (including nighttime operations) are found in Tables 2A and 2B. The FAA has determined that these noise exposure maps and accompanying documentation are in compliance with applicable requirements. This determination is effective on January 9, 2009.

FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program. If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under section 47503 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 47506 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator that submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 47503 of the Act. The FAA has relied on the certification by the airport operator, under section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

Copies of the full noise exposure map documentation and of the FAA's evaluation of the maps are available for examination at the following locations:

Federal Aviation Administration, Planning and Environmental Division, APP–400, 800 Independence Avenue, SW., Washington, DC 20591.

Federal Aviation Administration, Western-Pacific Region, Airports Division, Room 3012, 15000 Aviation Boulevard, Hawthorne, California 90261.

Federal Aviation Administration, San Francisco Airports District Office, 831 Mitten Road, Suite 210, Burlingame, California 94010–1303.

Jerome Thiele, Airport Manager, Modesto City-County Airport, City of Modesto, Public Works Department—Airport Division, 617 Airport Way, Modesto, CA 95354.

Questions may be directed to the individual named above under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Hawthorne, California on January 9, 2009.

Mia Paredes Ratcliff,

Acting Manager, Airports Division, AWP–600, Western-Pacific Region.

[FR Doc. E9–1315 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that Buy America waivers are appropriate for certain steel products used in Federal-aid construction projects in New Jersey, NY, Massachusetts, and Florida.

DATES: The effective date of the waivers is January 27, 2009.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366–1562, *gerald.yakowenko@dot.gov*. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, *michael.harkins@dot.gov*. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at: *http://www.archives.gov* and the Government Printing Office's database at: *http://www.access.gpo.gov/nara*.

Background

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. This notice provides information regarding the FHWA's findings that Buy America waivers are appropriate for four specific cases.

In accordance with section 130 of Division K of the ''Consolidated Appropriations Act, 2008'' (Pub. L. 110–161), the FHWA published on its Web site four notices of intent to issue Buy America waivers: (1) A waiver for Steel API 5L, Grade X52 PSL2 wall tubing in New Jersey *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=25* on December 1, 2008 6, 2008; (2) a waiver for drive machinery and brakes in New York *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=24* on December 1, 2008; (3) a waiver for four forged steel sheave hubs in Massachusetts on December 12, 2008; and (4) a waiver for machinery and motor brakes in Florida *http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=27* on December 9, 2008.

The FHWA received no comments in response to the Steel API 5L, Grade X52 PSL2 wall tubing in New Jersey and the drive machinery brakes in New York, which suggested that the Steel API 5L Grade X52 PSL2 wall tubing and machinery brakes may not be available domestically. The FHWA received one comment in response to four forged steel sheave hubs in Massachusetts, and machinery and motor brakes in Florida, respectively. The comment for the four forged steel sheave hubs in Massachusetts recommends that the certification should be reviewed prior to material purchase. Massachusetts Highway Department indicated that it has a material certification procedure for their highway construction program. The comment for the machinery and motor brakes in Florida suggested that the design needs be reconsidered to make it more attractive to domestic sources. The Florida DOT stated that alteration in the design of the motor brakes is not feasible and that the current design is in compliance with the capacity of the bridge. Further investigation and inquiry revealed that the products are not available domestically.

During the 15-day comment period, the FHWA conducted additional nationwide review to locate potential domestic manufacturers for the products. Based on all the information available to the Agency, including the responses received to the notices as well as the Agency's nationwide review, the FHWA concludes that there are no domestic manufacturers for the Steel API 5L, Grade X52 PSL2 wall tubing, drive machinery and brakes, machinery and motor brakes, and four forged steel sheave hubs.

In accordance with the provisions of section 117 of the ''SAFETEA—LU Technical Corrections Act of 2008'' (Pub. L. 110–244, 122 Stat. 1572), the FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate pursuant to 23 CFR 635.410(c)(1). The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the links above to the New Jersey, New York, Massachusetts and Florida waiver pages noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110–161, 23 CFR 635.410.)

Issued on: January 15, 2009.

Thomas J. Madison, Jr.,

Federal Highway Administrator.

[FR Doc. E9–1516 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Essex and Middlesex Counties, MA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice, in accordance to the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations contained in 23 CFR part 771, to advise the public that an Environmental Impact Statement (EIS) will be prepared for proposed highway improvements and an interchange project on Interstate 93 (I–93) in Essex and Middlesex Counties, Massachusetts.

FOR FURTHER INFORMATION CONTACT: John McVann, Director of Project Delivery, Federal Highway Administration, 55 Broadway Floor, Cambridge, Massachusetts 02142, Telephone: (617) 494–2416.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Massachusetts Highway Department (MassHighway), will prepare an Environmental Impact Statement (EIS) on a proposal to improve I–93 in Essex and Middlesex Counties, Massachusetts. The proposed project would involve highway improvements to I–93 and the construction of a new break-in-access interchange near the Andover/Tewksbury/Wilmington town borders. Improvements to the I–93 corridor were examined in the Route I–93 Corridor Traffic Study finalized in 2004 and endorsed by the Merrimack Valley Metropolitan Planning Organization (MPO). The proposed break-in-access was the subject of an Interchange Justification Report dated July 2006, and conditionally approved by FHWA pending the completion of the NEPA process. Because it is anticipated that the resulting project may allow for general economic development opportunities, the Commonwealth of Massachusetts Executive Office of Housing and Economic Development (EOHED) is a partnering agency with MassHighway in this project.

The proposed project is to provide improvements for the existing and projected traffic demand, as well as to improve safety in the area where the use of the breakdown lane is allowed for regular vehicle travel during morning and evening peak periods. The proposed interchange will provide access to all three towns including potential new development sites. Alternatives under consideration include: (1) Taking no action; (2) Transportation Demand Management (TDM); (3) using alternate travel modes; (4) providing improvements at other local and interstate roadway network locations; and (5) constructing a new interchange. Design variations of grade, alignment, and access will be incorporated into and studied with the various build alternatives.

A formal scoping meeting will be held at the Tewksbury Town Hall Auditorium on March 19, 2009, from 2 p.m. to 4 p.m. (EST) for the participating agencies, and from 4 p.m. to 8 p.m. (EST) for the general public. Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held in Andover, Tewksbury and Wilmington, Massachusetts throughout 2009. In addition, a public hearing will be held within 60 days of the availability of the draft EIS. Public notice will be given of the time and place of the meetings and hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

Comments and suggestions are invited from all interested parties during the appropriate step in the NEPA process to ensure that the full range of issues related to this proposed action are addressed and all significant issues identified. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: January 15, 2009.

Lucy Garliauskas,

Division Administrator.

[FR Doc. E9–1422 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Action on PIN 8006.72, New York State Route 17 at Exit 122 Within the Town of Wallkill, Orange County, NY

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation on claims for judicial review of actions by FHWA and other federal agencies.

SUMMARY: This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project, that involves reconstruction of an interchange and related transportation improvements centered on the New York State Route 17 Exit 122 interchange within the Town of Wallkill, Orange County, in the State of New York. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before July 27, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Jeffrey W. Kolb, P.E., Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 7th Floor, Clinton Avenue and North Pearl Street, Albany, New York 12207, Telephone: (518) 431–4127 or Joan Dupont, P.E., Regional Director, NYSDOT Region 8; 4 Burnett Boulevard, Poughkeepsie, New York 12603, *Telephone:* (845) 431–5750.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the FHWA, and other Federal agencies have taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following transportation project in the State of New York: New York Route 17 Exit 122 in the Town of Wallkill, Orange County. The project will reconstruct and rehabilitate the existing Exit 122 interchange ramp configuration to provide for new loop and directional ramps connected to relocated sections of East Main Street and Crystal Run Road to improve safety and operation and bring it up to current Federal standards for an Urban Principal Arterial Interstate. Crystal Run Road will be realigned to connect to East Main Street. The East Main Street extension will not be constructed, but the project could accommodate future roadway construction of an East Main Street extension if planned and approved through the local government planning process and built by others. The Crystal Run Road Bridge over NYS Route 17 will be removed and replaced in a location closer to the Wallkill River. Auxiliary ramps will be provided between Exits 122 and 121 to separate weaving maneuvers from the mainline NYS Route 17. The project will also include reasonable measures to minimize environmental impacts, and other landscape and aesthetic enhancements within the project limits. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on July 21, 2008 and in the FHWA Record of Decision (ROD) issued on December 18, 2008. The FEIS, ROD, and other project records are available by contacting the FHWA or the New York State Department of Transportation at the addresses provided above.

This notice applies to all Federal agency decisions related to the New York Route 17 Exit 122 project as of the issuance date of this notice and all laws under which such actions were taken, include but are not limited to:

1. National Environmental Policy Act [42 U.S.C. 4321–4351].
2. Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].
3. Clean Air Act [42 U.S.C. 7401–7671(q)].
4. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303].
5. Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536].
6. Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)].
7. Migratory Bird Treaty Act [16 U.S.C. 703–712].
8. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*].
9. Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)].
10. Farmland Protection Policy Act [7 U.S.C. 4201–4209].
11. Wetlands and Water Resources: Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377].
12. Land and Water Conservation Fund [16 U.S.C. 4601–4604].
13. Rivers and Harbors Act of 1899 [33 U.S.C. 401–406].
14. Executive Order 11990 Protection of Wetlands.
15. Executive Order 11988 Floodplain Management.
16. Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: January 6, 2009.

Jeffrey W. Kolb,

Division Administrator, Federal Highway Administration. Albany, New York.

[FR Doc. E9–1534 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Number: FTA–2009–0005]

Notice of Availability of Discussion Paper on the Evaluation of Economic Development

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces the availability of the Federal Transit Administration's (FTA) discussion paper on the Evaluation of Economic Development and requests your comments on it. The paper describes one possible approach that could be used to evaluate economic development impacts of projects seeking New Starts funding. Economic development is one of the criteria that FTA uses to assess project justification, which, along with local financial commitment, informs FTA funding decisions for New Starts projects.

DATES: Comments must be received within 60 days after publication in the **Federal Register**. Late filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments [identified by the Docket Number FTA–2008–0053] by any of the following methods:

Web site: http://regulations.gov. Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 202–493–2251.

Mail: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., 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 Ave., SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the docket number (FTA–2009–0005). You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted without change to the federal government Web site located at *http://regulations.gov.* This means that if your comment includes any personal identifying information, such information will be made available to users of Web site.

FOR FURTHER INFORMATION CONTACT: Ron Fisher, Office of Planning and Environment, telephone (202) 366–4033. FTA is located at 1200 New Jersey Ave., SE., East Building, Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Although the discussion paper is reasonably detailed, FTA invites comments that may address broader areas of the evaluation of economic development as well as comments that address the level of detail described. Comments made on the discussion paper will be considered by FTA in its development of proposed policy guidance some time in the future on the approach for evaluation of economic development. That proposed policy guidance will also be published for notice and comment prior to being finalized.

FTA is departing from its usual approach of simply issuing proposed guidance and then final because no formal FTA approach to evaluation of this criterion exists, there is a broad diversity of views on the definition of economic development, and the state-of-the-practice for its evaluation is far behind that for more traditional measures of mobility improvements. FTA requests comments on the evaluation of economic development and specifically on the discussion paper, which is available in DOT's electronic docket at *http://regulations.gov* and on FTA's Web site at *http://www.fta.dot.gov/planning/newstarts/planning_environment_5615.html.*

Issued on: January 16, 2009.

Sherry E. Little,

Acting Administrator.

[FR Doc. E9–1545 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Limitation on Claims Against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Limitation on Claims.

SUMMARY: This notice announces final environmental actions taken by the Federal Transit Administration (FTA) for public transportation projects in the following areas: San Francisco, California; Miami, Florida; Sacramento, California; and Hudson County, New Jersey and New York, New York. The purpose of this notice is to announce publicly the environmental decisions by FTA on the subject projects and to activate the limitation on any claims that may challenge these final environmental actions.

DATES: By this notice, FTA is advising the public of final agency actions subject to Title 23, United States Code (U.S.C.), section 139(l). A claim seeking judicial review of the FTA actions announced herein for the listed public transportation projects will be barred unless the claim is filed on or before July 27, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Zelasko, Environmental Protection Specialist, Office of Planning and Environment, 202–366–0244, or Christopher Van Wyk, Attorney-Advisor, Office of Chief Counsel, 202–366–1733. FTA is located at 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 9 a.m. to 5:30 p.m. EST, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency actions by issuing certain approvals for the public transportation projects listed below. The actions on these projects, as well as the laws under which such actions were taken, are described in the documentation issued in connection with each project to comply with the National Environmental Policy Act (NEPA), and in other documents in the FTA administrative record for the corresponding project. The final agency environmental decision documents—Records of Decision (ROD) or Findings of No Significant Impact (FONSI)—for the listed projects are available online at *http://www.fta.dot.gov/planning/environment/planning_environment_documents.html* or may be obtained by contacting the corresponding FTA Regional Office for the metropolitan area where the project is located. Contact information for the FTA Regional Offices may be found at *http://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed projects as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to, the NEPA [42 U.S.C. 4321–4375], Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], Section 106 of the National Historic Preservation Act [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period of 180 days for challenges of project decisions subject to previous notices published in the **Federal Register** (e.g., this notice does not extend the limitation on claims announced in the **Federal Register** on November 2, 2007, for the ROD issued for the Miami-Dade Orange Line Phase 2 Project).

The projects and actions that are the subject of this notice are:

1. *Project name and location:* Central Subway Project, San Francisco, California.

Project sponsor: San Francisco Municipal Transportation Authority (SFMTA).

Project description: The FTA and SFMTA have completed a Final Supplemental Environmental Impact Statement (FSEIS) and Final Supplemental Environmental Impact Report (FSEIR) for the Central Subway Project, an extension of the Third Street Light Rail Project. SFMTA will build a 1.7-mile extension along Fourth and Stockton Streets from the existing Third Street Light Rail Station at Fourth and King Streets to a new terminus in Chinatown at Stockton and Jackson Streets. The light rail transit will transition to subway operation at a portal under the I–80 Freeway and continue along Fourth Street in a twin-tunnel configuration. The Central Subway project includes one surface station between Brannan and Bryant Streets and three subway stations: Moscone, Union Square/Market Street, and Chinatown. A temporary construction tunnel would extend beyond the Chinatown Station under Stockton Street to Columbus Avenue near Washington Square. *Final Agency Actions:* ROD signed on November 26, 2008; Section 106 Memorandum of Agreement signed on November 5, 2008; Project-level Air Quality Conformity determination; and Section 4(f) *de minimis* impact finding. *Supporting documentation:* Central Subway Project Supplemental Final Environmental Impact Statement/Environmental

Impact Report published on October 3, 2008.

2. *Project name and location:* Miami-Dade Orange Line Phase 2: North Corridor Metrorail Extension, Miami, Florida (the ''Project''). *Project sponsor:* Miami-Dade Transit *Project description:* The FTA and Miami-Dade Transit prepared a Supplemental Environmental Assessment on changes made to the Project after FTA signed a Record of Decision on April 26, 2007. The Project involves a 9.2-mile heavy rail transit extension of the existing Metrorail system that would run along NW. 27th Avenue from NW. 76th Street to NW. 215th Street. Changes to the Project introduced since the ROD include modifying the location and layout of the NW. 82nd Street Station, identifying a new relocation site for the North Central Branch Library, shifting the alignment and station configuration at NW. 103rd Street Station, identifying a new location for the NW. 119th Street Station, and proposing new locations for the Park and Ride facilities at NW. 199th Street and NW. 215th Street Station Park and Ride Facilities. *Final agency actions:* FONSI signed on November 7, 2008; Section 106 Finding of No Historic Properties Affected. *Supporting documentation:* Miami-Dade Orange Line Phase 2: North Corridor Metrorail Extension Supplemental Environmental Assessment published in August 2008.

3. *Project name and location:* South Sacramento Corridor Phase 2 Extension Project, Sacramento, California. *Project sponsor:* Sacramento Regional Transit District (RT). *Project description:* FTA and RT have prepared a Supplemental Final Environmental Impact Statement/ Subsequent Final Environmental Impact Report for a 4.3-mile Light Rail Transit (LRT) extension from the South Line at Meadowview Road to Cosumnes River College. The LRT project includes the construction of four stations at Morrison Creek, Franklin, Center Parkway, and the Cosumnes River College. *Final agency actions:* ROD signed on December 18, 2008; Project-level Air Quality Conformity determination; Consultation with U.S. Department of Interior (DOI) under Section 7 of the Endangered Species Act resulting in DOI's issuance of a Biological Opinion; Section 106 Finding of No Historic Properties Affected. *Supporting documentation:* Supplemental Final Environmental Impact Statement/ Subsequent Final Environmental Impact Report for the South Sacramento Corridor Phase 2 Extension Project published on October 17, 2008.

4. *Project name and location:* Access to the Region's Core Project (ARC), Hudson County, New Jersey and New York City, New York. *Project sponsor:* New Jersey Transit (NJ Transit). *Project description:* FTA and NJ Transit have completed a Final Environmental Impact Statement for a 7.6 mile commuter rail project that includes a new commuter rail tunnel under the Hudson River from New Jersey into Manhattan, a new commuter rail station near the existing Penn Station New York, and the track capacity expansion of the Northeast Corridor in New Jersey from the Koppers Coke site in Kearny through the Frank R. Lautenberg Station in Secaucusto the portal of the new Hudson River tunnel near Tonnelle Avenue. Key components of the project include a new direct connection at Secaucus between the Northeast Corridor and the Main, Bergen County, and Pascack Valley lines; two new single track tunnels under the Palisades in New Jersey and the Hudson River and through the west side of Manhattan to the new underground 6-track station that will end at Fifth Avenue and West 34th Street in Manhattan; and a mid-day train storage yard on the Koppers Coke site, two fan plants/construction access shafts in New Jersey, and four fan plants/construction access shafts in Manhattan. *Final agency actions:* ROD signed on January 14, 2009, Project-level Air Quality Conformity Determination, Section 4(f) finding, Section 106 Programmatic Agreement dated October 13, 2008, Finding of no practicable alternative to significant encroachment into floodplains in accordance with Executive Order 11988, and Finding of no practicable alternative to new construction in wetlands in accordance with Executive Order 11990. *Supporting documentation:* Access to the Region's Core Project Final Environmental Impact Statement published on November 7, 2008.

Issued on: January 15, 2009.

Susan Borinsky,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. E9–1408 Filed 1–23–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Four Individuals Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of four newly-designated individuals whose property and interests in property are blocked pursuant to Executive Order 13224 of September 23, 2001, ''Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism.''

DATES: The designation by the Director of OFAC of the four individuals identified in this notice, pursuant to Executive Order 13224, is effective on January 16, 2009.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the ''Order'') pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with

the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On January 16, 2009, the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, four individuals whose property and interests in property are blocked pursuant to Executive Order 13224.

The designees are as follows:

1. AL-BAHTIYTI, Muhammad Rab'a al-Sayid (a.k.a. AL-BAHTITI, Muhammad Mahmud; a.k.a. AL-BAHTITI, Muhammad Mahmud Rabi' al-Zayd; a.k.a. AL-BAHTITI, Muhammad Rabi'; a.k.a. AL-HATITI, Muhammad Rabi' al-Sa'id; a.k.a. AL-MASRI, Abu Dujana); DOB 1971; POB al-Sharqiyyah, Egypt; nationality Egypt (individual) [SDGT]

2. BIN LADEN, Sa'ad (a.k.a. ABBUD, Bin Muhammad Awad; a.k.a. ABUD, Sa'ad Muhammad Awad; a.k.a. ADBUD, Muhammad 'Awad; a.k.a. AWAD, Muhammad; a.k.a. BAABOOD, Sa'ad Muhammad; a.k.a. BIN LADEN, Sad; a.k.a. ''AL-KAHTANE, Abdul Rahman''); DOB 1982; POB Saudi Arabia; nationality Saudi Arabia; Passport 520951 (Sudan); alt. Passport 530951 (Sudan) (individual) [SDGT]

3. HAMID, Mustafa (a.k.a. AL-MASRI, Abu al-Walid; a.k.a. AL-MISRI, Abu Walid; a.k.a. AL-WALID, Abu; a.k.a. ATIYA, Mustafa; a.k.a. HAMID, Mustafa Muhammad 'Atiya; a.k.a. ''AL-MAKKI, Hashim''); DOB Mar 1945; POB Alexandria, Egypt; nationality Egypt; alt. nationality Pakistan (individual) [SDGT]

4. HUSAIN, Ali Saleh (a.k.a. 'ALA'LAH, 'Ali Salih Husayn; a.k.a. AL-TABUKI, Ali Saleh Husain; a.k.a. AL-TABUKI, 'Ali Salih Husayn al-Dhahak; a.k.a. AL-YEMENI, Abu Dhahak; a.k.a. DAHHAK, Abu; a.k.a. 'ULA'LAH, 'Ali Salih Husayn); DOB circa 1970; POB al-Hudaydah, Yemen; nationality Yemen; Individual's height is 5 feet 9 inches. (individual) [SDGT]

Dated: January 16, 2009.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E9–1594 Filed 1–23–09; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0695]

Agency Information Collection (Application for Reimbursement of Licensing or Certification Test Fees) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 25, 2009.

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. 2900–0695'' 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. 2900–0695.''

SUPPLEMENTARY INFORMATION:

Title: Application for Reimbursement of Licensing or Certification Test Fees, 38 CFR 21.1030(b), 21–7140(c)(4), VA Form 22–0803.

OMB Control Number: 2900–0695.

Type of Review: Revision of a currently approved collection.

Abstract: Claimants complete VA Form 22–0803 to request reimbursement of licensing or certification fees paid.

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 November 10, 2008, at pages 66691–66692.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,000 hours.

Frequency of Response: On occasion.

Estimated Average Burden per Respondents: 15 minutes.

Estimated Annual Responses: 4,000.

Dated: January 14, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1579 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0353]

Agency Information Collection (Certification of Lessons Completed) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the

nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 25, 2009.

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. 2900–0353'' 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. 2900–0353.''

SUPPLEMENTARY INFORMATION:

Title: Certification of Lessons Completed, (Under Chapters 30, 32, and 35, Title 38, U.S.C.; Chapter 31, 110, 1606 and 1607, Title 10, U.S.C., and Section 903, Public Law 96–342), VA Forms 22–6553b and 22–6553b–1.

OMB Control Number: 2900–0353.

Type of Review: Extension of a currently approved collection.

Abstract: Students enrolled in a correspondence school complete VA Forms 22–6553b and 22–6553b–1 to report the number of correspondence course lessons completed and forward the forms to the correspondence school for certification. School official certifies the number of lessons serviced and submits the forms to VA for processing. Benefits are payable based on the data provided on the form. Benefits are not payable when students interrupt, discontinue, or complete the training. VA uses the data collected to determine the amount of benefit payable.

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 November 10, 2008, at page 66691.

Affected Public: Individuals or households, and Business or other for-profit.

Estimated Annual Burden: 411 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: Quarterly.

Estimated Number of Respondents: 821.

Number of Responses Annually: 2,463.

Dated: January 13, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1580 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-New (10–0466)]

Proposed Information Collection (VHA Mental Health Residential Rehabilitation and Treatment Programs); Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed new collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to achieve and maintain accreditation by the Commission on Accreditation of Rehabilitation Facilities.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 27, 2009.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*; or to Mary Stout, Veterans Health Administration (193E1), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *mary.stout@va.gov.* Please refer to ''OMB Control No. 2900-New (10–0466)'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Mary Stout at (202) 461–5867 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: VHA Mental Health Residential Rehabilitation and Treatment Programs (MHRRTP) Veterans Satisfaction Survey, VA Form 10–0466.

OMB Control Number: 2900-New (10–0466).

Type of Review: New collection.

Abstract: VA Form 10–0466 will be used to collected data necessary to improve VA's Mental Health Residential Rehabilitation and Treatment Programs. MHRRTP will use the data to assess their performance against other VA sites and evaluate the need for programmatic changes to improve the quality of rehabilitation service for veterans with disabilities.

Affected Public: Individuals or households.

Estimated Annual Burden: 567.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 34,000.

Dated: January 14, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1581 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0156]

Agency Information Collection (Notice of Change in Student Status) Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the

collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 25, 2009.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0156'' 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. 2900–0156.''

SUPPLEMENTARY INFORMATION:

Titles: Notice of Change in Student Status (Under Chapter 30, 32, or 35, Title 38 U.S.C; Chapters 1606 and 1607, Title 10 U.S.C.; or Section 901 and 903 of Public Law 96–342; the National Call to Service Provision of Public Law 107–314; the ''Transfer of Entitlement'' Provision of Public Law 107–107; and the Omnibus Diplomatic Security and Antiterrorism Act of 1986), VA Form 22–1999b.

OMB Control Number: 2900–0156.

Type of Review: Extension of a currently approved collection.

Abstract: Educational institutions use VA Form 22–1999b to report a student's enrollment status. Benefits are not payable when the student interrupts or terminates a program. VA uses the information to determine the student's continued entitlement to educational benefits or if the benefits should be increased, decreased, or terminated.

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 November 12, 2008, at page 66960.

Affected Public: Business or other for-profit, and Not-for-profit institutions.

Estimated Annual Burden: 51,667 hours.

a. VA Form 22–1999b (Paper Copy)—16,667 hours.

b. VA Form 22–1999b (Electronically Filed)—35,000 hours.

Estimated Average Burden Per Respondent:

a. VA Form 22–1999b (Paper Copy)—10 minutes.

b. VA Form 22–1999b (Electronically Filed)—7 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 8,500.

Estimated Total Number of Responses Annually: 400,000.

a. VA Form 22–1999b (Paper Copy)—100,000.

b. VA Form 22–1999b (Electronically Filed)—300,000.

Dated: January 13, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1582 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0674]

Agency Information Collection (Clarification of a Notice of Disagreement) Activities Under OMB Review

AGENCY: Board of Veterans' Appeals, 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 Board of Veterans' Appeals (BVA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before February 25, 2009.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0674'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0674.''

SUPPLEMENTARY INFORMATION:

Title: Clarification of Notice of Disagreement.

OMB Control Number: 2900–0674.

Type of Review: Extension of a currently approved collection.

Abstract: A Notice of Disagreement (NOD) is a written communication from a claimant or his or her representative to express disagreement or dissatisfaction with the result of an adjudicative determination by the agency of original jurisdiction (AOJ). The data collected will be used by the AOJ to reexamine the issues in dispute and to determine if additional review or development is warranted.

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 November 12, 2008, at pages 66960–66961.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 113,539.

Estimated Average Burden per Respondent: 1 hour.

Frequency of Response: On occasion.

Estimated Total Number of Respondents: 113,539.

Dated: January 13, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1585 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0690]

Agency Information Collection (FSC Product Line Surveys) Under OMB Review

AGENCY: Office of Management, 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 Office of Management (OM), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before February 25, 2009.

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. 2900–0690'' in any correspondence.

For Further Information or a Copy of the Submission Contact: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0690.''

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, OM invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of OM's functions, including whether the information will have practical utility; (2) the accuracy of OM's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: FSC Product Line Surveys.

OMB Control Number: 2900–0690.

Type of Review: Extension of a currently approved.

Abstract: Financial Services Center (FCS) conducts annual surveys to evaluate customer satisfaction on various products and services provided by FSC. The data will be used to improve FSC business practices and customer services.

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 October 28, 2008, at pages 64015–64016.

Affected Public: Federal Government.

Estimated Annual Burden: 42 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 500.

Dated: January 14, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. E9–1588 Filed 1–23–09; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Monday,
January 26, 2009

Part II

Library of Congress

Copyright Royalty Board
Copyright Office

37 CFR Part 385

Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding; Review of Copyright Royalty Judges Determination; Final Rule and Notice

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. 2006–3 CRB DPRA]

Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges are announcing their final determination of the rates and terms for the use of musical works in physical phonorecords, permanent downloads, and ringtones and are adopting as final regulations the rates and terms for the use of musical works in limited downloads, interactive streaming, and incidental digital phonorecord deliveries.

DATES: *Effective Date:* March 1, 2009.

ADDRESSES: The final determination also is posted on the Copyright Royalty Board Web site at *http://www.loc.gov/crb/proceedings/2006–3/dpra-public-final-rates-terms.pdf.*

FOR FURTHER INFORMATION CONTACT: Richard Strasser, Senior Attorney, or Gina Giuffreda, Attorney Advisor. Telephone: (202) 707–7658. Telefax: (202) 252–3423.

SUPPLEMENTARY INFORMATION:

I. Introduction

This is a rate determination proceeding convened under 17 U.S.C. 803(b) and 37 CFR 351. A Notice announcing commencement of the proceeding with a request for Petitions to Participate to determine the rates and terms of royalty payments [1] for the making and distribution of phonorecords, including digital phonorecord deliveries (''DPDs''), under the statutory license set forth in Section 115 of the Copyright Act was published in the **Federal Register** on January 9, 2006. 71 FR 1454. The rate to be paid to songwriters and music publishers for the reproduction and distribution of their musical works in physical phonorecords and permanent digital downloads is the larger of 9.1¢ or 1.75¢ per minute of playing time (or fraction thereof) for the entire license period; the rate to be paid under section 115 for ringtones is 24¢. Consistent with our adoption of the same term for late payments in the *Webcaster II* and *SDARS* determinations, 72 FR 24084, 24107 (May 1, 2007) (*Webcaster II*), 73 FR 4080, 4099 (January 24, 2008) (SDARS), we are establishing a late payment fee of 1.5% per month measured from the date the payment was due as provided in the regulations of the Register. *See* 37 CFR 201.19(e)(7)(i). Section 803(d)(2)(B) of the Copyright Act governs the effective date of the rates and terms established in this proceeding. 17 U.S.C. 803(d)(2)(B). The parties submitted a settlement regarding the rates to be paid to songwriters and music publishers for the reproduction of their musical works in limited downloads, interactive streaming and incidental DPDs and that settlement was published for comment pursuant to 17 U.S.C. 801(b)(7)(A)(i). Having received no objection to the settlement from any participant, we are adopting the settled rates and terms as final regulations. The effective date of these rates and terms also is governed by 17 U.S.C. 803(d)(2)(B).

II. This Proceeding

A. Procedural History

The following entities filed Petitions to Participate in response to the January 9, 2006, request: Royalty Logic, Inc. (''RLI''); the Songwriters Guild of America (''SGA''); the National Music Publishers' Association, Inc. (''NMPA''), the Songwriters Guild of America, and the Nashville Songwriters Association International, jointly (collectively, ''Copyright Owners''); Apple Computer, Inc.; America Online, Inc.; RealNetworks, Inc.; Napster, LLC; Sony Connect, Inc.; Digital Media Association (''DiMA''); Yahoo! Inc.; MusicNet, Inc.; MTV Networks, Inc.; and Recording Industry Association of America (''RIAA'').

Following an unsuccessful negotiation period, the following parties filed written direct statements by the November 30, 2006 deadline: RIAA; Copyright Owners; and DiMA, joined by its member companies America Online, Inc., Apple Computer, Inc., MusicNet, Inc., Napster, LLC, RealNetworks, Inc. and Yahoo! Inc.[2] RLI filed its written direct statement on March 2, 2007.[3]

Discovery was followed by live testimony. Testimony in the direct phase was taken from January 28, 2008, to February 26, 2008. Copyright Owners presented the testimony of the following witnesses: Mr. Rick Carnes, songwriter, and President, Songwriters Guild of America; Mr. Steve Bogard, professional songwriter and President, Nashville Songwriters Association International; Mr. Roger Faxon, Chairman and Chief Executive Officer (''CEO''), EMI Music Publishing; Mr. Philip Galston, songwriter, music publisher and record producer; Ms. Victoria Shaw, songwriter; Ms. Maia Sharp, singer, songwriter and musician; Mr. Steven Paulus, composer; Mr. Irwin Z. Robinson, Chairman, Paramount Arabella Music; Ms. Claire Enders, CEO, Enders Analysis; Mr. David Israelite, President and CEO, NMPA; Mr. Ralph Peer, Chairman and CEO, Peermusic, Inc.; Ms. Helen Murphy, President, International Media Services, Inc.; Dr. William Landes, Clifton R. Musser Professor of Law and Economics, University of Chicago Law School; and Mr. Nicholas Firth, former Chairman and CEO, BMG Music Publishing Worldwide.

RIAA presented testimony from the following witnesses: Mr. Geoffrey Taylor, CEO, British Phonographic Industry; Mr. Richard Boulton, Global Managing Director, Finance and Accounting Services; Ms. Linda McLaughlin, Senior Vice President, National Economic Research Associates; Mr. Colin Finkelstein, Chief Financial Officer, EMI Music North America; Ms. Andrea Finkelstein, Senior Vice President of Business Affairs Operations and Administration, SONY BMG Music Entertainment; Mr. Michael Kushner, Senior Vice President, Business and Legal Affairs, Atlantic Music Group; Mr. Jerold Rosen, Executive Vice President of the Commercial Music Group, SONY

[1] Section 115 divides the responsibility of setting terms governing royalty payments between the Copyright Royalty Judges and the Register of Copyrights. *See* 17 U.S.C. 115(c)(3)(C) & (D) (setting forth Judges' authority) and (b)(1) & (c)(4)–(5) (setting forth Register's authority); *see also, Final Order, Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights Under the Section 115 Statutory License,* Docket No. RF 2008–1, 73 FR 48396 (August 19, 2008); *see also infra* at Section V.

[2] Yahoo! Inc. and Napster LLC each subsequently withdrew from the proceeding. *See* Yahoo! Inc. Notice of Withdrawal of Petition to Participate (filed August 24, 2007) and Napster, LLC Notice of Withdrawal (filed October 19, 2007).

[3] The Judges never officially accepted RLI's written direct statement. That aside, RLI's direct statement made clear that its participation was solely ''on the issue of competition among agents for the licensing of musical works and/or the collection and distribution of royalties, on behalf of copyright owners and/or their agents.'' RLI Written Direct Statement at 1. Subsequently, RLI and the Copyright Owners stipulated that RLI would not participate in the direct or rebuttal phases of the proceeding or the closing arguments unless the issue identified in RLI's direct statement was raised at any point in the proceeding. *See Joint Stipulation Regarding Participation by Royalty Logic, Inc. in the Above-Captioned Proceeding* (filed February 1, 2008). The issue was not raised.

BMG Music Entertainment; Dr. David J. Teece, the Thomas Tusher Chair, Haas School of Business, and Director, Institute of Management, Innovation and Organization, University of California at Berkeley; Ms. Victoria Bassetti, Senior Vice President of Industry and Government Affairs Worldwide and Vice President, Anti-Piracy, North America, for EMI Music; Mr. Ronald Wilcox, former Executive Vice President and Chief Business and Legal Affairs Officer, SONY BMG Music Entertainment; Mr. David Hughes, Senior Vice President of Technology, RIAA; Mr. Glen Barros, President and CEO, Concord Music Group; and Mr. David Munns, independent music consultant in the United Kingdom, former Vice Chairman of EMI Music and CEO of EMI Music North America.

DiMA presented testimony from the following witnesses: Mr. Eduardo (''Eddy'') Cue, Vice President, iTunes; Mr. Alan McGlade, President and CEO, MediaNet Digital; Ms. Margaret Guerin-Calvert, Vice Chairman, Compass Lexecon and Senior Managing Director, FTI; and Mr. Timothy Quirk, Vice President of Music Programming, Rhapsody America.

The parties' filed written rebuttal statements on April 10, 2008. Rebuttal testimony was taken from May 6, 2008, through May 21, 2008. On May 15, 2008, the parties informed the Copyright Royalty Judges (''Judges'') that they had reached a settlement regarding the rates and terms for ''limited downloads and interactive streaming, including all known incidental digital phonorecord deliveries.'' *See Joint Motion to Adopt Procedures for Submission of Partial Settlement* at 1 (filed May 15, 2008).[4] The parties filed the partial settlement on September 22, 2008, and it was published in the **Federal Register** on October 1, 2008, 73 FR 57033. Public comments were due on October 31, 2008. A single comment, filed jointly by CTIA–The Wireless Association and the National Association of Broadcasters, was received. *See infra* at Section III.C.

DiMA presented the rebuttal testimony of: Ms. Guerin-Calvert; Mr. Dan Sheeran, Senior Vice President of Business Development, RealNetworks; and Mr. Alexander Kirk, General Manager of Product Management, Rhapsody America, LLC.

RIAA presented the rebuttal testimony of: Mr. David Alfaro, Managing Director, FTI Technology Practice; Ms. Terri Santisi, President, T. Media Services, International; Mr. Scott Pascucci, President, Rhino Entertainment Company, an affiliate of Warner Music Group; Dr. Daniel Slottje, Professor of Economics, Southern Methodist University and Senior Managing Director, FTI Consulting, Inc.; Mr. Bruce Benson, Senior Managing Director, FTI Consulting, Inc.; Ms. Finkelstein; Dr. Steven Wildman, James H. Quello Professor of Telecommunication Studies and Co-Director of the Quello Center for Telecommunications Management and Law, Michigan State University; Mr. Mark Eisenberg, Executive Vice President, Business and Legal Affairs, in the Global Digital Business Group, SONY BMG Music Entertainment; and Mr. Robert Emmer, Chief Operating Officer and co-founder, Shout! Factory.

Copyright Owners presented the rebuttal testimony of: Mr. Faxon; Mr. Jeremy Fabinyi, Managing Director of Mechanicals, MCPS–PRS Alliance; Dr. Kevin Murphy, George J. Stigler Distinguished Service Professor of Economics in the Graduate School of Business and the Department of Economics, University of Chicago; Mr. Alfred Pedecine, Senior Vice President and Chief Financial Officer, The Harry Fox Agency; Dr. Landes; Dr. Ketan Mayer-Patel, Associate Professor, Department of Computer Science, University of North Carolina at Chapel Hill; and Ms. Judith Finell, President, Judith Finell MusicServices, Inc.

In addition to the written direct statements and written rebuttal statements, the Judges heard 28 days of testimony, which filled over 8,000 pages of transcript. Over 140 exhibits were admitted. The docket contains over 340 pleadings, motions and orders.

On July 2, 2008, after the evidentiary phase of the proceeding, the Participants filed their respective Proposed Findings of Fact and Conclusions of Law. The Participants filed replies on July 18, 2008. Closing arguments occurred on July 24, 2008, after which time the record was closed.

On October 2, 2008, the Judges issued the Initial Determination of Rates and Terms. Pursuant to 17 U.S.C. 803(c)(2) and 37 CFR Part 353, RIAA filed a motion on October 17, 2008, for rehearing to reconsider the timing of the late payment fee of 1.5% per month. At the same time, all the parties jointly requested that the Judges ''hold this motion for 20 days to allow negotiation by the parties'' because they were of the view that they ''may be able to resolve the issues related to the timing of the late fee through negotiation, which may obviate this motion.'' As part of the joint request, Copyright Owners indicated they opposed the rehearing, while DiMA took no position on rehearing. The parties' negotiations failed to resolve the issues related to the timing of the late fee within the requested 20 days, and nothing further was filed on the motion. Having reviewed the motion, the Judges denied the motion for rehearing, by Order dated November 12, 2008. As reviewed in said Order, none of the grounds in the motion presented the type of exceptional case where the Initial Determination is not supported by the evidence. 17 U.S.C. 803(c)(2)(A); 37 CFR 353.1 and 353.2. The motion did not meet the required standards set by statute, by regulation and by case law. The motion amounted to no more than a rehash of the same arguments the Judges considered and rejected in the Initial Determination.

B. Referrals to the Register

During the course of the proceeding, RIAA and DiMA each sought from the Judges referral of a novel question of law to the Register of Copyrights (''Register''). RIAA filed its motion prior to the filing of written direct statements; DiMA filed its motion prior to the presentation of oral testimony in the direct phase of the proceeding. In addition, the Judges, *sua sponte*, referred a material question of substantive law to the Register after the close of the record.

1. Ringtones

In its motion, RIAA sought referral to the Register of a novel question of law regarding the eligibility of ringtones for licensing under section 115. *See Motion of [RIAA] Requesting Referral of a Novel Question of Substantive Law* (filed August 1, 2006). After considering the views of all of the participants, the Judges granted RIAA's motion in part and referred to the Register two novel questions of law regarding (1) whether ringtones—regardless of whether the ringtone is monophonic, polyphonic or a mastertone—constitute delivery of a digital phonorecord subject to statutory licensing under section 115 and (2) if so, what legal conditions and/or limitations

[4] In the motion, the parties requested that the Judges permit the parties to submit the settlement on September 15, 2008, or a later date set by the Judges, and relieve the parties of their obligation to file proposed findings of fact and conclusions of law on the settled issues. *See Joint Motion to Adopt Procedures for Submission of Partial Settlement* at 2–3 (filed May 15, 2008). On May 27, 2008, the Judges denied the parties' request to set a deadline for submission of the partial settlement and granted their request regarding their obligation to address the settled issues in their proposed findings of fact and conclusions of law. *See Order Re Joint Motion to Adopt Procedures for Submission of Partial Settlement,* Docket No. 2006–3 CRB DPRA (May 27, 2008). Subsequently, the Judges amended their order to provide for a September 22, 2008 deadline for the parties to submit their settlement. *See Order Setting Deadline to File Settlement,* Docket No. 2006–3 CRB DPRA (September 17, 2008).

would apply. *See Order Granting in Part the Request for Referral of a Novel Question of Law*, Docket No. 2006–3 CRB DPRA (August 18, 2006). On October 16, 2006, the Register transmitted a Memorandum Opinion to the Judges that addressed the novel questions of law, concluding:

> [R]ingtones (including monophonic and polyphonic ringtones, as well as mastertones) qualify as digital phonorecord deliveries (''DPDs'') as defined in 17 U.S.C. 115. * * * [W]hether a particular ringtone falls within the scope of the statutory license will depend primarily upon whether what is performed is simply the original musical work (or a portion thereof), or a derivative work (*i.e.*, a musical work based on the original musical work but which is recast, transformed, or adapted in such a way that it becomes an original work of authorship and would be entitled to copyright protection as a derivative work).

The Register's Memorandum Opinion was published in the **Federal Register** on November 1, 2006. 71 FR 64303.

2. Interactive Streaming

DiMA requested referral to the Register of what it described as a novel question of law as to whether ''interactive streaming'' constituted a DPD under section 115. *See Motion of [DiMA] Requesting Referral of a Novel Material Question of Substantive Law* (''DiMA Motion'') (filed January 7, 2008).[5] Copyright Owners opposed DiMA's motion and RIAA took no position on it. The Judges heard oral arguments on the motion on January 28, 2008.

On February 4, 2008, the Judges denied DiMA's motion, finding that the definition of ''interactive streaming'' presented a question of fact and not a question of law as required by section 802(f)(1)(B). *See Order Denying Motion of [DiMA] for a Referral of a Novel Material Question of Substantive Law*, Docket No. 2006–3 CRB DPRA (February 4, 2008). We stated:

> During oral argument, there was much discussion regarding the term ''interactive streaming.'' The term is neither defined nor mentioned in the Copyright Act, and it is apparent that there is not agreement among the parties as to the meaning of the term. Given these two factors, the Judges determine that there is not a ''novel question of substantive law concerning an interpretation of those provisions'' of the Copyright Act. 17 U.S.C. 802(f)(1)(B). Rather, the matter of what is ''interactive streaming'' is a factual question. The Register could not render a determination as to whether ''interactive streaming'' is a digital phonorecord delivery without inquiring into the factual circumstances and types of activities that could be considered ''interactive streaming,'' and the extent to which these factual circumstances and types of activities result in reproductions of musical works. That is not a matter of substantive law as required by the statute.

Order Denying Motion of DiMA at 2. The correctness of our conclusion that streaming is not a defined term or behavior was confirmed subsequently by the witness testimony. 5/14/08 Tr. at 6594–95 (Kirk) (''I mean, one of the wonderful things about computers on the internet is they offer you a number of different ways to do things. And streaming can encompass a whole range of behaviors.''); *see also* 5/15/08 Tr. at 6664–65; 5/21/08 Tr. at 7598 (Mayer-Patel) (''Yes, streaming is—is a reasonably broad word and, for the most part, it's generally understood to mean making use of data as it arrives as opposed to waiting for the entire data to arrive and then making use of it.''). The Register also concluded that this matter has many uncertainties.[6]

3. Authority Over Terms

After closing arguments, the Judges, on their own motion, referred to the Register a material question of substantive law concerning the division of authority between the Judges and the Register to establish terms under the Section 115 statutory license. *See Order Referring Material Question of Substantive Law*, Docket No. 2006–3 CRB DPRA (July 25, 2008). On August 8, 2008, the Register transmitted a Memorandum Opinion to the Judges that addressed the material question of substantive law.[7] *See infra* at section V.

III. The Section 115 License

A. Overview of the License

Created shortly after the turn of the twentieth century, the Section 115 compulsory license represents Congress's first effort to balance the exclusive rights of copyright owners with the concern of public access to protected works. Despite the almost 100-year history of the license, our proceeding marks only the second time that a governmental body other than the Congress is establishing the royalty rates to be paid for reproductions of musical works by copyright users.

At the time of Congress's major revision of the copyright laws in 1909, protection for musical works was a long-recognized concept. The protection extended to performances of musical works and to copies of sheet music made by songwriters and music publishers. However, the year before, the United States Supreme Court decided in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), that piano rolls did not embody a system of notation that could be read and therefore were not ''copies'' of musical works within the meaning of the existing copyright laws, but rather were merely parts of devices for mechanically performing the music. Reacting to this decision, Congress extended the protection of musical works to include the right to make mechanical devices embodying musical works but without extending the protection to the mechanical devices themselves. H.R. Rep. No. 60–2222, at 9 (1909). The extension of protection was tempered, however, by a concern about monopolistic control of music for recording purposes by the makers of piano rolls and phonorecords. The right of a copyright owner to mechanical control of his or her musical work was limited by a compulsory license once the owner made or authorized the recording of his or her musical composition; hence the now common term ''mechanical license.'' 17 U.S.C. 1 (1909). Upon payment of a royalty rate of 2¢ per ''mechanical,'' any person was free to manufacture and distribute a reproduction of a musical work.

Congress revisited the mechanical license in the 1976 copyright law revision, now found in section 115 of title 17 of the United States Code, clarifying that the license cannot be invoked unless and until a nondramatic musical work embodied in a phonorecord has been distributed to the public under authority of the copyright owner (clarifying that a demonstration record or tape is not subject to the license); that the license is not available for duplicating, without authorization, another's sound recording of a musical work; that the license for phonorecords is not transferable; and that compulsory licensees are granted some latitude in the arrangement of their version of the

[5] DiMA defined ''interactive streaming'' for purposes of its requested referral as ''the playing of a specific sound recording in response to a listener's request without the creation of an audio file that remains accessible on the client computer beyond the playing of such sound recording.'' *See* DiMA Motion at 1 (footnote omitted).

[6] In announcing her interim rule clarifying the scope and application of section 115 as it relates to DPDs, the Register stated: It is sufficient to note that the record in this rulemaking and the *Cartoon Network* opinion create sufficient uncertainty to make it inadvisable to engage in rulemaking activity based on the Office's analysis in the *DMCA Section 104 Report*. Consequently, the interim rule does not address whether streaming of music that involves the making of buffer copies, but which makes no further copies, falls within the section 115 compulsory license, or whether such buffer copies qualify as DPDs. *Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries: Interim Rule and request for comments*. 73 FR 66173, 66177 (November 7, 2008).

[7] The Memorandum Opinion was published in the **Federal Register** on August 19, 2008. 73 FR 48396.

recorded musical work. The Copyright Office was directed to establish requirements (terms) for the notice of intention to obtain the section 115 license, as well as the payment of royalties. These regulations are currently found at 37 CFR 201.18 and 201.19. The 2¢ per phonorecord royalty fee adopted under the 1909 Act was retained, but the Copyright Royalty Tribunal was instructed to conduct a proceeding to adjust the rate. That proceeding is discussed *infra* at section III.B.

Change came to the section 115 license almost 20 years later[8] with the passage of the Digital Performance Right in Sound Recordings Act, Public Law No. 104–39, 109 Stat. 336. Of the amendments made by this Act, the most important is extension of the license to ''digital phonorecord deliveries,'' which the statute defines as

> each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied there is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.

17 U.S.C. 115(d). The license now covers digital transmissions of phonorecords, in addition to the physical copies, such as compact discs (CDs), vinyl and cassette tapes, and, unlike the license for physical phonorecords, the license for DPDs is transferable. Congress also created a subset of the DPD, the ''incidental digital phonorecord delivery'' (''IDPD''), and although it did not define what constitutes an IDPD, instructed the Judges to adopt royalty terms and rates that distinguish between DPDs and IDPDs.

In describing this history and structure of the section 115 license, the Judges note how extensive and detailed is its operation, particularly with respect to the regulations adopted by the Copyright Office. The complexity of compliance, and the associated transactions costs, create a curious anomaly: virtually no one uses section 115 to license reproductions of musical works, yet the parties in this proceeding are willing to expend considerable time and expense to litigate its royalty rates and terms. The Judges are, therefore, seemingly tasked with setting rates and terms for a useless license. The testimony in this proceeding makes clear, however, that despite its disuse, the section 115 license exerts a ghost-in-the-attic like effect on all those who live below it. *See* 5/12/08 Tr. at 5757:10–17 (A. Finkelstein). Thus, the rates and terms that we set today will have considerable impact on the private agreements that enable copyright users to clear the rights for reproduction and distribution of musical works.

B. History of the Section 115 Rates

When Congress created the section 115 license as part of the 1909 Copyright Act, it set the statutory rate for the making and distributing of physical phonorecords at 2¢ for each musical work embodied in the phonorecord. 17 U.S.C. 1(e) (1909). This rate remained in effect until Congress revised the copyright laws in 1978, with the passage of the 1976 Copyright Act, Public Law No. 94–553, 90 Stat. 2541. In the 1976 Copyright Act, Congress codified the mechanical compulsory license as section 115 and raised the statutory rate to 2.75¢ per phonorecord or .6¢ per minute of playing time or fraction thereof, whichever amount was larger. 17 U.S.C. 115(c)(2) (1978). Congress also determined that future adjustments of the section 115 rates would not be set by statute but rather would be made by the Copyright Royalty Tribunal (''CRT''), an administrative body created by Congress in the 1976 Act to administer all of the compulsory licenses.[9] *See* H.R. Rep. No. 94–1476, at 111 (1976) (''This rate will be subject to review by the [CRT], as provided in section 801, in 1980 and at 10-year intervals thereafter.''); *see also* 17 U.S.C. chapter 8 (1978). With regard to the section 115 license, the CRT was tasked with the job of setting ''reasonable'' royalty rates informed by a set of four delineated factors. 17 U.S.C. 801(b)(1) (1978). The CRT had no authority to set terms for the license; rather, Congress delegated that authority to the Register of Copyrights.[10]

Pursuant to its statutory directive, the CRT conducted the first, and only other, contested proceeding to set rates for the section 115 compulsory license, which it began in 1980. 45 FR 63 (January 2, 1980). The copyright owners were represented by, among others, NMPA and the Nashville Songwriters Association International, while the copyright users were represented primarily by RIAA. *See* 46 FR 10466 (February 3, 1981).

After taking 46 days of testimony from 35 witnesses which comprised over 6,000 pages of transcripts, the CRT issued a lengthy decision in which it substantially increased the existing 2.75¢ rate per phonorecord made and distributed to 4¢ per phonorecord and established a complex system for future interim adjustments during the 7-year license period to reflect increases in the average list price of record albums. *Id.* at 10467, 10485–86. Specifically, the CRT concluded ''that the application of the statutory criteria [in Section 801(b)(1)] to the evidence in this proceeding demonstrates that the mechanical royalty rate must be adjusted to either four cents, or three-quarters of one cent per minute of playing time or fraction thereof, whichever amount is larger.'' *Id.* at 10485. With respect to future interim adjustments, the CRT found ''that any adjustment to the rate should and must be directly related to the retail list price of records, now and in the future.'' *Id.*

The United States Court of Appeals for the District of Columbia Circuit upheld the CRT's determination of the rates but set aside the CRT's mechanism for adjusting the rates within the licensing period as being beyond the CRT's statutory authority. *Recording Industry Ass'n. of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1 (D.C. Cir. 1981). The court remanded the case to the CRT ''for the limited purpose of allowing the Tribunal to consider whether it wishes to adopt an alternative scheme for interim adjustments.'' 46 FR 55276 (November 9, 1981). Upon remand, the CRT adopted automatic adjustments to occur in 1983, 1984 and 1986. By 1986, the rate had been increased to the larger of 5¢ per musical work or .95¢ per minute of playing time or fraction thereof. 46

[8] Congress did make a slight adjustment to section 115 when it abolished the Copyright Royalty Tribunal in 1993 by authorizing copyright arbitration royalty panels (''CARPs'') to adopt terms—and in particular notice and recordkeeping terms—in rate adjustment proceedings. Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103–198, 107 Stat. 2304. This authorization was carried forward to the Judges upon abolition of the CARP system. Copyright Royalty and Distribution Reform Act of 2004, Public Law No. 108–419, 118 Stat. 2341.

[9] At the time the 1976 Copyright Act was enacted, the other compulsory licenses were set forth in 17 U.S.C. 111, 116 and 118.

[10] Specifically, Congress charged the Register with the authority to promulgate regulations governing the notice of intention to obtain the section 115 license as well as the monthly and annual statements of account. *See* 17 U.S.C. 115(b)(1) and (c)(3) (1978); *see also* 37 CFR 201.18 (notice of intent to obtain license) and 201.19 (statements of account).

FR 66267 (December 23, 1981); *see also* 37 CFR 255.3(a)–(c).

The next adjustment of the SECTION 115 rates was scheduled to begin in 1987. On March 18, 1987, the CRT received a joint proposal from NMPA and SGA, on behalf of the copyright owners, and RIAA, on behalf of copyright users, seeking adoption of rates voluntarily negotiated by the parties. The settlement, which was ultimately adopted by the CRT, set the rate at 5.25¢ per track beginning on January 1, 1988, and established a schedule of rate increases based on the percentage change in the CPI every two years over the next 10 years, except that the rates would remain the same when the CPI declined and could not be increased in any single adjustment by more than 25%. *See* 52 FR 22637 (June 15, 1987). Over the ensuing decade, the rate increased until 1996, when the rate was 6.95¢ per track or 1.3¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(d)–(h).

Congress abolished the CRT in 1993 and replaced it with the Copyright Arbitration Royalty Panel (''CARP'') system. *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law No. 103–198, 107 Stat. 2304. The CARPs were to set reasonable rates and, for the first time, terms for the section 115 license, subject to review by the Librarian of Congress (''Librarian'').[11]

Because the rates set by the CRT pursuant to the 1987 settlement were set to expire on December 31, 1997, the year 1997 was a window year for adjusting the section 115 rates. The first step in the process of adjusting rates under the CARP system was for the Librarian to initiate a voluntary negotiation period to allow copyright owners and users to negotiate terms and rates of the license. The Librarian set the negotiation period to run from July 17, 1996, through December 31, 1996. 61 FR 37213 (July 17, 1996). The second step of the process was to convene a CARP to determine reasonable terms and rates for parties not subject to a negotiated agreement. The convening of a CARP was not necessary because NMPA, SGA and RIAA were able, after lengthy negotiations, to reach an agreement regarding the adjustment of the physical phonorecord and digital phonorecord delivery royalty rates. Under the settlement, which was ultimately adopted by the Librarian, the rate for physical phonorecords was set at 7.1¢ per track beginning on January 1, 1998, and a schedule was established for fixed rate increases every two years over the next 10-year period with the rate beginning on January 1, 2006, being the larger of 9.1¢ per track or 1.75¢ per minute of playing time or fraction thereof. *See* 37 CFR 255.3(i)–(m); *see also*, 63 FR 7288 (February 13, 1998). The rates adopted for digital phonorecord deliveries for the 10-year period were the same as those set for physical phonorecords, and the rates for incidental DPDs were deferred until the next scheduled rate proceeding. *See* 37 CFR 255.5, 255.6; *see also*, 64 FR 6221 (February 9, 1999). These rates for physical and digital phonorecords are still in effect.

C. The Parties' Settlement of Rates and Terms for Conditional Downloads, Interactive Streaming and Incidental Digital Phonorecord Deliveries

During the latter stages of the rebuttal hearings, counsel for Copyright Owners, RIAA and DiMA advised the Judges that they had reached a global settlement with respect to limited downloads, interactive streaming, and ''all known incidental DPDs.'' Copyright Owners PFF at ¶ 199. The parties announced their intention to file their settlement just a short period of time before the October 2 deadline for the Judges' initial determination, expressing concern that it might influence our decision with respect to physical phonorecords, downloads and ringtones, and finally did so after we issued an Order compelling them to submit the settlement no later than noon on September 22, 2008. *Order Setting Deadline to File Settlement*, Docket No. 2006–3 CRB DPRA (September 17, 2008). Upon receipt of the agreement and pursuant to 17 U.S.C. 801(b)(7)(A), we published it in the **Federal Register**. *See,* 73 FR 57033 (October 1, 2008).[12] No objections were filed by any of the participants to the proceeding. A joint comment was received from CTIA—The Wireless Association and the National Association of Broadcasters arguing that adoption of the settlement is beyond the Judges' authority, contrary to law and bad policy.

Our jurisdiction with respect to the settlement is clear. Section 801(b), entitled ''FUNCTIONS'' of the Copyright Royalty Judges, sets forth our responsibilities in eight specific subsections. Subsection (7)(A) directs us:

> To adopt as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding, except that—
>
> (i) the Copyright Royalty Judges shall provide to those that would be bound by the terms, rates, or other determination set by any agreement in a proceeding to determine royalty rates an opportunity to comment on the agreement and shall provide to participants in the proceeding under section 803(b)(2) that would be bound by the terms, rates, or other determination set by the agreement an opportunity to comment on the agreement and object to its adoption as a basis for statutory terms and rates; and
>
> (ii) the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement, if any participant described in clause (i) objects to the agreement and the Copyright Royalty Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.

17 U.S.C. 801(b)(7)(A). Thus, we are mandated to adopt the determination of the settling parties to a distribution and rate proceeding. If it is a rate proceeding (but not a distribution proceeding), we must afford those who would be bound by the settled rates and terms, but are not parties to the proceeding, an opportunity to comment and we must afford the parties to the proceeding an opportunity to object to the settlement. The comments received from non-parties have no bearing on the outcome since the statute does not grant us authority to reject or amend the settlement on that basis. Only if an objection is received by one or more of the parties are we given any discretion over the settlement, and then we are limited to rejecting it if we determine that the settlement ''does not provide a reasonable basis for setting statutory rates and terms.'' *Id.*[13] Chapter 8 of the Copyright Act encourages settlements among the parties. The procedure in section 803 incorporates mandated settlement negotiations.

In the present case and as noted above, we have published the settlement in the **Federal Register**. Unsurprisingly, none of the parties have objected.

[11] The Register still retained her authority over the notice of intention to obtain the license and the monthly and annual statements of account.

[12] We are making two technical amendments in the regulatory text of this final rule to correct two errors that appeared in the proposed regulatory text. Both corrections are in § 385.13 of title 37 of the Code of Federal Regulations. In the second sentence of § 385.13(a)(1), the reference to § 385.12(b)(1) is changed to § 385.12(b)(3); and in the first sentence of § 385.13(a)(2), the reference to § 385.12(b)(3) is changed to § 385.12(b)(1).

[13] The requirement that a rate settlement must be offered for public comment without consequence is curious but apparently intentional. Only parties to a proceeding have a voice in whether the settlement is adopted, an apparent effort to encourage those who will be bound by the rates and terms of a proceeding to actively engage in the proceeding rather than sit on the sidelines and attempt to later seek to influence the outcome. There is no legislative history on this point.

Therefore, we have no choice but to adopt it as the basis for the necessary statutory rates and terms applicable to the corresponding licensed activities.[14] In doing so, we observe that the provisions of the settlement do not constitute a finding of fact or a resolution of law by us. The statute provides that the settlement is an adjustment of rates and terms by the parties that we *must* adopt. We emphasize this statutory distinction to clarify the procedure applicable to the settlement. The provisions of 17 U.S.C. 802(f)(1)(D) permit the Register of Copyrights to review material questions of substantive law that are resolutions that are part of our final determination; however, inasmuch as the settlement does not represent a resolution of the Judges, the Register's review is not part of the procedure applicable to the relevant rates and terms established by this settlement.[15]

IV. Determination of Royalty Rates

A. Application of Section 115

Based on the applicable law and relevant evidence received in this proceeding, the Copyright Royalty Judges must determine rates for the section 115 musical works reproduction licenses utilized by record companies and other music distributors in the distribution of phonorecords of such works.

The Copyright Act requires that the Copyright Royalty Judges establish rates for the section 115 license that are reasonable and calculated to achieve the following four specific policy objectives: (A) To maximize the availability of creative works to the public; (B) to afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; (C) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and (D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. 115(c) and 17 U.S.C. 801(b)(1).

Having carefully considered the relevant law and the evidence received in this proceeding, the Copyright Royalty Judges determine that the appropriate section 115 license rate is the greater of 9.1¢ per song or 1.75¢ per minute of playing time (or fraction thereof) for physical phonorecord deliveries and for permanent digital downloads; and, further, that the appropriate Section 115 license rate is 24¢ for ringtones. Section 803(d)(2)(B) governs the effective date of the rates established in this proceeding.

The applicable rate structure for the section 115 license is the starting point for the Copyright Royalty Judges' determination.

B. The Rate Proposals of the Parties and the Appropriate Royalty Structure for Section 115 Licenses

1. Rate Proposals

The contending parties propose several different rate structures. In its second amended rate proposal, RIAA offers a percentage of wholesale revenues approach as its preferred alternative, with a rate of 9% of all-in wholesale revenues applicable to physical product and permanent downloads and a rate of 15% of all-in wholesale revenues applicable to ringtones. As its less preferred alternative, RIAA proposes a ''penny-rate'' ranging from 3.6¢ per track to 9.45¢ per track depending on the corresponding level of wholesale price associated with the track for tracks reproduced on physical product or as permanent downloads. As part of this alternative approach, RIAA proposes a separate rate of 18¢ per ringtone. RIAA Second Amended Rate Proposal (July 2, 2008) at 1–6.

DiMA offers a second amended rate proposal applicable only to permanent downloads that is formulated as a ''greater of'' comparison between 6% of applicable receipts and 4.8¢ per track for singles or 3.3¢ per track for tracks sold as part of bundles. DiMA Second Amended Rate Proposal (July 2, 2008) at 3.

By contrast, the Copyright Owners' second amended rate proposal presents only a ''penny-rate'' choice for physical product and permanent downloads, equal to the greater of 12.5¢ per song or 2.4¢ per minute of playing time for physical product and the greater of 15¢ per track or 2.9¢ per minute of playing time for permanent downloads. These penny rates would be additionally subject to a ''periodic'' adjustment ostensibly to reflect the change in the consumer price index (CPI–U) over such period. However, in the case of ringtones, Copyright Owners propose a tri-partite ''greater of'' comparison between (1) 15% of all revenue received in conjunction with the licensed product or service; (2) 33.3% of the total content costs paid for mechanical rights to musical compositions and rights to sound recordings; and (3) 15¢ per ringtone subject to periodic adjustments for inflation as measured by the consumer price index (CPI–U) over such period. Copyright Owners' Second Amended Rate Proposal (July 2, 2008) at 1–2.

2. Rate Structure

From the evidence of record, the Copyright Royalty Judges conclude that several factors tip the scales in favor of a usage fee structure for those licenses for which contested proposals have been submitted by the parties. First, unlike our recent determination in the SDARS proceeding, here we are not faced with difficult or intractable problems in measuring usage nor do we find that a percentage of revenue approach provides the most efficient mechanism for capturing the value of the reproduction and distribution rights at issue here. *See* 73 FR at 4085–4087. Second, although not presenting as many of the same problems as the proposed revenue-based metrics in *Webcaster II* (*see* 72 FR at 24088–24090), we conclude that the evidence in the record here is that enough difficulties remain with the revenue-based proposals submitted by the parties to determine that it is more reasonable to adopt a usage-based fee structure for the licenses still at issue in this proceeding.

[14] The Joint Comment of CTIA-The Wireless Association and the National Association of Broadcasters argues that the Judges ''may not adopt a rule that is contrary to law, regardless of whether or not the parties to the proceeding may agree.'' Joint Comment at 6. As discussed above, the statute provides that the Judges adopt settlements, except when specific conditions occur. By adopting a settlement when these conditions are absent, the Judges are adopting a regulation that follows the law. Further review of settlements as proposed in the Joint Comment will require amendments to 17 U.S.C. 801(b)(7)(A). As the Joint Comment suggests, it may be good public policy for the Judges to have discretion to decide if the terms of a settlement should be adopted. Had CTIA-The Wireless Association and the National Association of Broadcasters participated in this proceeding, their objections to the settlement and proposed revisions may have been the basis for considering the merits of the settlement.

[15] In her review of substantive questions of material law in Docket Nos. 2005–5 CRB DTNSRA and 2006–1 CRB DSTRA, the Register concluded that it was legal error for the Judges not to set forth a standalone rate for the section 112 license for preexisting subscription services and new subscription services. 73 FR 9143 (February 19, 2008). The rates and terms for these services, however, were adopted pursuant to settlements of the parties under section 801(b)(7)(A) and were not a final determination of the Judges. *See*, 73 FR at 9145 (Register does not address the statutory limitations imposed on the Judges with regard to settlements in merely stating, without more, that: ''The Copyright Royalty Judges have authority to accept or reject the settlement and it is the resulting Final Order which is then subject to review by the Register'').

In the instant proceeding, measuring usage is straightforward. Each reproduction of the musical work on a physical CD (or some other older physical format such as cassette tapes or vinyl LPs), a permanent digital download or a digital ringtone counts as a use of the musical work. No proxies need be formulated to establish the number of such reproductions. They are readily calculable as the number of units in transactions between the parties. *See* 2/7/08 Tr. at 2173–4 (Landes). Such ease of calculation with respect to usage was not observed by the Judges in the *SDARS* proceeding.[16] Indeed, in the *SDARS* proceeding, the best the parties could offer were ''per play'' and ''per broadcast'' alternatives that were problematic proxies for a usage metric. Adjustments aimed at improving the ''per play'' and ''per broadcast'' proposals in that proceeding resulted in additional ambiguities rather than more precision. *See* 73 FR at 4085–4087. In the instant case, measuring the quantity of reproductions presents no such problems. This ease of application offers an efficiency in valuing the rights at issue not available under the percentage of revenue alternatives offered by the parties in this proceeding.

In contrast to the ease of applying a usage metric in this proceeding, some of the difficulties associated with a percentage of revenue approach cited in *Webcaster II* are also discernible in the instant matter. In *Webcaster II*, we concluded that the evidence in the record of that proceeding weighed in favor of a per performance usage fee structure for both commercial and noncommercial webcasters, but we further suggested that, in the absence of some of the more egregious problems noted therein, the use of a revenue-based metric as a proxy for a usage-based metric might be reasonable. *Webcaster II*, 72 FR at 24090. Unfortunately, at least some of the same salient difficulties associated with a percentage of revenue approach in *Webcaster II* appear in this proceeding as well.

In particular, one of the more intractable problems associated with the revenue-based metrics proposed by the parties in *Webcaster II*, 72 FR at 24090, was the parties' strong disagreement concerning the definition of revenue for certain services. This was further complicated by questions related to applying the same revenue-based metric to noncommercial as well as commercial services. *See Webcaster II*, 72 FR 24094 at n.15. Although the same degree of difficulty is not presented by the applicable facts in this proceeding,[17] yet some similar difficulties remain. For example, even in those cases where opposing parties to this proceeding proposed a revenue-based metric, there were important differences and disagreements related to the definition of revenues in their proposals. *Compare* Copyright Owners PFF at ¶¶ 610, 614–22, Copyright Owners RFF at ¶ 667 *and* DiMA PFF at ¶¶ 219–220, 237–9, DiMA RFF at ¶¶ 105, 113–4, DiMA RCL ¶ 39 *and* RIAA PFF at ¶¶ 1603–4, 1620–2, 1628–9, 1632–47, 1650, 1653, 1655, 1663–4, RIAA PCL at ¶ 182–3, RIAA RFF at ¶¶ 457, 462–5.

Moreover, while such differences may be surmountable for some formats, in the case of the physical formats and permanent digital downloads that account for the overwhelming bulk of mechanical license use at issue in this proceeding, the parties have until now lived under a penny-rate standard not a revenue-based regime. Therefore, the parties are less familiar with the operation of a revenue-based metric. The value of such familiarity lies in its contribution towards minimizing disputes and, concomitantly, constraining transactions costs.[18] Therefore, the absence of such familiarity with respect to the large majority of transactions at issue in this proceeding may well give rise to higher transactions costs, stemming from the greater likelihood of disputes over component definitions of revenue. Continuing the familiar penny-rate system will avoid such disputes.

In addition, some higher costs to Copyright Owners will be avoided by leaving publisher-songwriter contracts structured on a penny-rate system, and not having to modify them to accommodate a revenue-based structure. 5/14/08 Tr. at 6427–37 (Faxon).

RIAA's shrill contention that a penny-rate structure ''would be disruptive as consumer prices continue to decline'' and should, therefore, be replaced by a percentage rate system in order to satisfy 801(b) policy considerations related to the minimization of disruption (see, for example, the RIAA contention summarized in RIAA PFF at ¶ 1478) is not supported by the record of evidence in this proceeding. As the Judges indicated in the SDARS proceeding, ''disruption'' typically refers to an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the industry participants to adequately adapt to the changed circumstances and, as a consequence, such adverse impacts threaten the viability of the music delivery currently offered under the license in question. *See* 73 FR at 4097. In the instant proceeding RIAA offers no persuasive evidence of a *causal* relationship between any specified past level of record industry revenue shortfalls and the *structure* (as distinguished from the amount) of this one component of industry expenses (as distinguished from several other major cost components) over the same period. Nor does the RIAA offer any persuasive evidence that would in any way quantify any claimed adverse impact on projected future revenues stemming from the continued application of a penny-rate structure over the course of the license period in question.

Then too, RIAA's and DiMA's asserted claims of the relative advantage of their proposed revenue-based structures fail to adequately consider negative impacts on copyright owners. For example, RIAA's claim that a pure percentage rate allows more pricing flexibility than a penny rate appears exaggerated and unfairly ignores the disadvantages of the pure percentage rate for copyright owners. RIAA contends that ''With a fixed cents rate, record companies cannot lower their prices below a certain threshold without losing the margin needed to cover their very significant costs.'' (See this RIAA contention in RIAA PFF at ¶ 1503). Yet the record of evidence in this proceeding does not identify such a threshold, but rather indicates that even under the current penny rate the record companies have been able to reduce prices. *See*, for example, 5/14/08 Tr. at 6425–26 (Faxon); 2/12/08 Tr. at 2683 (Firth); 2/5/08 Tr. at 1666–7 (Peer); 2/14/08 Tr. at 3376, 3379–80 (A.

[16] In the *SDARS* proceeding, the Judges concluded that: ''Indeed, in stark contrast to the record in *Webcaster II*, neither the SDARS nor SoundExchange provided substantial evidence to indicate that a true per performance rate was susceptible of being calculated by the parties to this proceeding. Therefore, we find that a revenue-based measure is currently the most effective proxy for capturing the value of the performance rights at issue here, particularly in the absence of any substantial evidence of how some readily calculable true per performance metric could be applied to the SDARS.'' 73 FR 4087.

[17] For example, accounting differences between for-profit entities and not-for-profit entities are not an issue in the instant proceeding. Similarly, in contrast to commercial webcasting, identifying relevant user revenues here does not appear to be as complex across the spectrum of potential mechanical license users as doing so for a number of commercial webcasters (such as some simulcasters) who offer features and formats either unrelated to music or who only partially employ music as part of their programming. *See Webcaster II*, 72 FR at 24089.

[18] In addition, auditing and enforcement costs are likely to be lower. Fewer data elements are required to be collected and reviewed under the existing penny-rate system as compared to a revenue-based metric. Copyright Owners PFF at ¶¶ 595–596 and 648.

Finkelstein). Record companies may have other costs such as overhead that also could serve as the source for further potential price reductions.[19] Copyright Owners PFF at ¶¶ 422–23. Moreover, this purported business flexibility ''advantage'' raises serious questions of fairness precisely because the percentage of revenue metric may be a less than fully satisfactory proxy for measuring more usage or the actual intensity of the usage of the rights in question.[20] Copyright Owners RCL at ¶ 132. It is not fair to fail to properly value the reproduction rights at issue in this proceeding. Such a result is at odds with the stated policy objective of the statute to afford the copyright owner a fair return for his creative work. 17 U.S.C. 801(b)(1).

At the same time, DiMA contends that the adoption of a percentage rate structure would increase their incentives to invest more in the quality and breadth of their offerings and therefore expand the availability of works to the public consistent with the first of the four policy objectives of 801(b). See, for example, DiMA PFF at ¶¶ 216, 219. However, these contentions are related to the amount of revenue (net of the payment of a specific amount of mechanical license fees) that would remain to DiMA members *irrespective* of the structure of the rate. (''But this advantage will be realized *only if the percentage rate is not set so high* (or accompanied by unreasonably high 'minima') that it discourages technological experimentation.'' DiMA PFF at ¶ 216, emphasis added. ''A percentage rate can promote technological investment and innovation, and thereby expand the availability of works to the public, *only if the revenue base is not overly broad*.'' DiMA PFF at ¶ 219, emphasis added.) Therefore, so far as the *structure* of the rate is concerned, there is nothing novel in these additional DiMA contentions that set them apart from the business flexibility arguments previously discussed above and found wanting.

For all of the above reasons, we are persuaded that the penny-rate structure provides a better measure of actual usage than the alternatives proposed by parties in this proceeding and that the application of the penny-rate structure to all the licenses in contention in this proceeding will result in fewer overall transaction cost issues over the course of the license period compared to the proffered alternatives.[21] While the problems identified above for a revenue-based proxy for usage may be remedied in the future by the parties in light of evolving circumstances, the parties' proposals in this proceeding do not offer a sufficient basis upon which to determine that a revenue-based alternative is a reasonable alternative to the penny rate for the licenses at issue in this proceeding.

C. The Section 115 Royalty Rates

Chapter 8 and section 115 of the Copyright Act require the Judges to determine reasonable rates and terms of royalty payments for the activities specified by section 115 of the Copyright Act. 17 U.S.C. 115(c)(3)(C). The rates the Judges establish under section 115 of the Copyright Act must be calculated to achieve the objectives set forth in section 801(b)(1)(A) through (D) of that Act. Moreover, in establishing rates and terms under section 115, the Judges may consider voluntary license agreements described in subparagraphs (B) and (C) of section 115(c)(3). *See* 17 U.S.C. 115(c)(3)(D).

The parties in the proceeding agree that in determining reasonable rates, market benchmarks can be a useful starting point. RIAA PCL at ¶ 26 (although ''royalty rates set in this proceeding need not be market rates * * * market benchmarks can be a very useful starting point''); Copyright Owners PCL at ¶ 26, quoting SDARS Determination (''determination of a reasonable mechanical rate should 'begin with a consideration and analysis of [marketplace] benchmarks and testimony submitted by the parties, and then measure the rate or rates yielded by that process against the statutory objectives' of Section 801(b). [M]arketplace benchmarks are critical to the identification of 'the parameters of a reasonable range of rates within which a particular rate most reflective of the four 801(b) factors can be located.' ''); DiMA PCL at ¶ 73 (''[t]he statutory objectives help to determine a 'range of reasonable royalty rates' along with various potential benchmarks from which the Court is free to make a judgment about how best to proceed,'' quoting *Recording Industry Assoc. of America* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 9 (DC Cir. 1981)).

As discussed below, however, the parties disagree about what constitutes the most appropriate benchmark to guide the Judges in determining a reasonable rate. Moreover, the parties do not limit their offer to benchmarks for similar products drawn from a marketplace in which buyers and sellers are similarly situated, but rather offer a variety of negotiated rates, legislated rates, and previously determined rates as proposed benchmarks. These various proffered benchmarks are described and discussed below.

1. Copyright Owners' Proposed Benchmarks

Copyright Owners argue that the most appropriate benchmarks, as proffered by their expert economist, Dr. Landes, are: (1) Licenses for mastertones;[22] (2) licenses for synchronization rights; and (3) the royalty structure of the Audio Home Recording Act (''AHRA''). 17 U.S.C. 1001–1010. These benchmarks are proffered to support royalty rates applicable to several types of uses of the section 115 compulsory license.

a. Proposed Mastertone Benchmark

With respect to mastertones, economic expert Dr. Landes found that Copyright Owners entered into

[19] It is also not clear from the record of evidence how much of record company costs savings have been translated into consumer price reductions and how much have been retained by the companies in order to preserve profit margins.

[20] DiMA's offer of a dual minimum penny rate (*i.e.*, with two different minima for stand-alone tracks and bundled tracks) as part of its percentage-based proposal ostensibly aims to mitigate this adverse effect in exchange for less than full flexibility. Thus, the DiMA proposal adds the complexity and costs of multiple measurements, but does not offer persuasive evidence that such costs are reasonably incurred relative to the more modest potential benefits to users (*i.e.*, some price flexibility although less than full flexibility) and owners (*i.e.*, no zero payments for use of additional musical work although differential payments for use of same work still possible) flowing from its proposed rate structure.

[21] While both Copyright Owners and RIAA have proposed a revenue-based alternative for compensating ringtones and while some ringtone agreements in the record offer revenue-based compensation as one alternative in a ''greater of'' formulation, Copyright Owners and RIAA have not shown whether or how those agreements have overcome the hereinabove described problems with the parties' revenue-based proposals. Therefore, in light of the efficiency of administration gained from a single structure when spread over the much larger number of musical works reproduced as physical phonorecords or digital permanent downloads as compared to ringtones and the fact that both Copyright Owners and RIAA have also proposed a penny-rate alternative for ringtones, the Judges determine that a single penny-rate structure is best applied to ringtones as well as physical phonorecords and digital permanent downloads.

[22] A ringtone is a digital audio file that is downloaded to a mobile phone or similar portable device to personalize the ring that alerts the consumer to an incoming call or message. Monophonic ringtones contain only a musical work's melody (or a portion of the melody). Polyphonic ringtones contain a musical work's melody and harmony (or a portion thereof). Mastertones are ringtones that are extracted from digital sound recordings. Mastertone sellers must acquire rights to both the musical work and the sound recording. Copyright Owners PFF at ¶ 492. Although the Register has determined that certain ringtones qualify as DPDs as defined in section 115, ''[t]he vast majority of the ringtone and mastertone licenses reviewed by Dr. Landes predated the [Register's] Ringtone Opinion.'' Copyright Owners PFF at ¶ 492.

agreements with two different groups consisting of: (1) Third-party sellers of ringtones (*ie.*, aggregators or cellular telephone companies) and (2) record companies. The agreements with the third-party sellers typically provided for royalty payments for the musical works reproduction at the greater of (1) a per-mastertone penny-rate minimum; (2) a percentage of retail price of the mastertones; or (3) a percentage of gross revenue. Copyright Owners PFF at ¶ 494. The penny rate minimums for such agreements ranged from 10 cents to 25 cents, with an average of 12.5 cents. *Id.* at ¶ 495. Retail price percentages ranged from 10% to 15%, with an average of 10.5%. *Id.* at ¶ 496. Stated gross revenue percentages ranged from 9% to 20%. *Id.* at ¶ 497.[23]

Ringtone agreements between Copyright Owners and record companies have taken the form of either a (1) ''New Digital Media Agreement'' (''NDMA''), covering, among other rights, the licensing of musical compositions for use in mastertones; or (2) standalone licenses for mastertones only. *Id.* at ¶ 498. The NDMAs specified a tiered royalty rate for mastertones under which record companies agreed to pay a fee equal to the greater of 10 cents, 10% [of the retail price of the mastertone sold], or 20% of the wholesale price of each mastertone sold. Copyright Owners PFF at ¶ 500.

According to Copyright Owners, mastertones have typically been sold at retail prices of $1.99 or more, and music publishers have therefore been paid on a percentage of revenue rather than the minimum penny rate. Actual payments have ranged from 16 cents to 25 cents per mastertone.[24] Copyright Owners PFF at ¶ 503. Dr. Landes concludes that Copyright Owners typically acquire 20% of the total amount paid for compositions and sound recordings in the mastertone market. Copyright Owners PFF at ¶ 491.

RIAA expert economist Dr. Wildman maintains that the NDMAs provide a blanket license, ''which is a significant benefit to record companies because it avoids the complexities and administrative burden of individual license negotiations. In contrast, the compulsory license is a burdensome, song-by-song licensing process with the burdens falling primarily on the record companies.'' Wildman WRT at ¶ 46. Nevertheless, Copyright Owners represent that standalone mastertone licenses, presumably with record companies rather than third-party sellers, that postdate the NDMAs have identical rates as those contained in the NDMAs. Copyright Owners PFF at ¶ 502.

In addition, prior to the November 2004 execution date for the NDMAs, certain non-record company mastertone sellers obtained mastertone licenses under which the sellers of the mastertones agreed to pay music publishers the greater of 15 cents or 10% of retail revenue per mastertone. Copyright Owners PFF at ¶ 501. However, Copyright Owners contend that the rates in the NDMAs ''were consistent'' with these earlier agreements. *Id.* They refrain from offering an explanation for the 33% drop in the minimum penny rate from the earlier agreements to the NDMAs that could well be due to increased bargaining power of the major record companies compared to the earlier mastertone sellers (*e.g.*, Opera Telecom), the maturing of the mastertone market, or a combination of these and other factors. Without some credible explanation for the differences between the two sets of agreements, we cannot agree with the Copyright Owners' assessment that these rate structures are fully consistent.

Copyright Owners concede that a ''relatively small number of songs account for the bulk of mastertone revenue,'' but contend that the mastertone market mirrors the music industry as a whole, which, according to Copyright Owners, is ''hit-driven.'' Copyright Owners PFF at ¶ 513. Perhaps as a result of these contentions, Copyright Owners offer no adjustment to the proposed mastertone benchmark to align it to the market for CDs or downloads.[25]

While the proposed mastertone benchmark certainly offers valuable rate evidence from the marketplace[26] for one of the types of products covered by the Section 115 license that is the subject of this proceeding (*i.e.*, ringtones), it is much less persuasive when that benchmark is applied to the other products at issue in this proceeding (*i.e.*, CDs and permanent downloads) that are, at best, only in small part similar in nature and ultimate consumer use. For example, although CDs and permanent downloads may be easily perceived as substitutes by consumers, it is unlikely that consumers would regard a CD as a very good substitute for a mastertone or vice-versa. In short, we find that although substantial empirical evidence shows that sound recording rights are paid similar multiple times the amounts paid for musical works rights in most ringtone markets, that proposed benchmark evidence is far from dispositive of what the size of that multiple might be for other types of products such as CDs and permanent downloads.[27] While similar sellers and sometimes even similar buyers might be participants in both the proposed benchmark ringtone market and the target CD and permanent download markets, the benchmark and target markets differ significantly in terms of the ultimate product consumed.

b. Proposed Synch License Benchmark

With respect to synch licenses, Copyright Owners represent that they typically receive one-half of the total licensing fees paid by licensees who wish to use a sound recording in an audiovisual work. Copyright Owners PFF at ¶ 531. To use a sound recording in an audiovisual work, such as a film, television show or commercial, a licensee must obtain a ''synchronization'' (or ''synch'') license for the underlying musical composition as well as a ''master use'' license for the

[23] Dr. Landes reviewed and relied upon nearly 200 third-party agreements from six different music publishers spanning the years 2004, 2005, and 2006. Copyright Owners PFF at ¶ 494. The Copyright Owners proposed no factual findings with respect to the sophistication or lack thereof of the publishers or the third-party sellers.

[24] Dr. Landes stated that one company commonly licenses its recordings for a flat rate, ranging in its agreements from $1.00 to $1.35. Twenty percent of those wholesale rates yields a range of 20 cents to 27 cents per mastertone sold.

[25] RIAA's expert economist Dr. Wildman contends that not only would an adjustment of the mastertone benchmark be required to align it with the market for CDs and downloads but one would also be required to align the mastertone benchmark with the market for mastertones. *See* Wildman WRT at 44–52 (citing the fact that NDMAs include interdependent rights in addition to mastertone use). Dr. Wildman concludes, however, that the adjustment of the mastertone rate to derive a rate for CDs and downloads ''is all but impossible to make * * * with any real level of confidence.'' Wildman WRT at 46.

[26] The record of evidence is that mastertones have substantially displaced monophonic and polyphonic ringtones in the current marketplace. Rosen WDT at 5; RIAA Ex. 102–RR at Figure 2.

[27] It is clear from their offer of a range of relative values, bounded on the low end by their ringtone benchmark and on the high end by their synch market benchmark, that even Copyright Owners must recognize that their relative value of music content benchmark evidence varies with the particular benchmark markets they have selected. This is not surprising, given the different use to which the ultimate consumer product in these markets is put and, therefore, given the relative difference in importance that each respective input plays in shaping the nature of the differing output in each of the respective markets in question. In some markets, a specific sound recording by a particular artist is simply more important to the consumers of the ultimate product than in others, so that its relative value compared to that of the underlying musical work is higher than it might be in other markets. This is further underlined by the Copyright Owners' proposals for different shares of content costs varying by product market (*e.g.*, 33% of content costs for ringtones compared to equivalent of 20% for permanent downloads).

sound recording, neither of which is subject to a compulsory license. Copyright Owners PFF at ¶ 532. Synch licenses and master use licenses typically contain ''most favored nation'' provisions, which state that if a licensee acquires one of the two necessary rights and subsequently agrees to pay the licensor of the other necessary right more than it paid the first, the licensee will be obligated to increase retroactively the fee paid to the first party. Copyright Owners PFF at ¶ 534. The presence of most favored nation provisions in typical synch license agreements may effectively dictate that the fees paid to music publishers for synch rights walk in lockstep with those paid to record companies for master use rights. *See* Copyright Owners PFF at ¶ 535. Even assuming that the differences in the market for synch rights and that for CDs, downloads, and ringtones could be reconciled, it is difficult to see what useful information could be gleaned about the value of a compulsory license to make and distribute a phonorecord from the relative value of two licenses that a prospective licensee must obtain to use a particular recording in an audio-visual work where obtaining those licenses is predicated on the licensee paying each of the licensors an equal share of royalties.

Copyright Owners represent that there are tens of thousands of synchronization transactions completed each year. *Id.* at ¶ 533. They do not, however, proffer proposed factual findings relating to the percentage of songs recorded in a particular year that might be the subject of a synch license. Moreover, Copyright Owners do not proffer evidence that would allow the Judges to generalize about the relative bargaining power of licensees and licensors in the benchmark market as compared to the target market.

At bottom, the consumer products from which demand is derived for music inputs are clearly not comparable in the proposed benchmark market and the target market.[28] No benchmark adjustments are proffered to remedy this shortcoming. Therefore, we do not find the proposed synch license benchmark to be of any meaningful value.

Potential benchmarks are confined to a zone of reasonableness that excludes clearly noncomparable marketplace situations. The musical works inputs in the synch market are used in very different ultimate consumer products by different input buyers as compared to the target market and the input sellers may have different degrees of market power in the benchmark market as compared to the target market. The mere fact a musical work is used as an input in both the proposed benchmark market and the target market is not sufficient to overcome all the aforementioned fundamental differences between the proposed benchmark market and the target market even in a purely relative value analysis. Because of the large degree of its incomparability, the synch market ''benchmark'' clearly lies outside the ''zone of reasonableness'' for consideration in this proceeding. Therefore, we find this particular benchmark cannot serve as a starting point for the 801(b) analysis that must be undertaken in this proceeding.

c. The Audio Home Recording Act

Dr. Landes also offered a third benchmark—the royalty structure from the Audio Home Recording Act (''AHRA''). 17 U.S.C. 1001–1010. Under the AHRA, royalties payable by manufacturers of digital recording devices are divided as follows: one-third for the ''Musical Works Funds'' and two-thirds for the ''Sound Recording Fund.'' Copyright Owners contend that this royalty allocation ''provides corroboration of the relative value of the rights to musical compositions and sound recordings through the statute's division of royalties from the sale of digital audio recorders.'' Copyright Owners PFF at ¶ 490. According to Copyright Owners, the AHRA was ''spurred by concerns within the music industry that new digital recording devices would permit consumers to easily make high-quality digital copies of music, adversely affecting the market for audio recordings.'' Copyright Owners PFF at ¶ 541.

Dr. Landes concedes that the AHRA ''is not strictly the result of a voluntary exchange in a competitive market,'' rather, ''it reflects the outcome of a compromise among competing interest groups in the legislative context.'' Copyright Owners PFF at ¶ 542. Nevertheless, Dr. Landes contends that the AHRA rate structure ''provides evidence of the relative value of copyrighted songs and sound recordings.'' *Id.*

Although the AHRA refers to the payments required under the act as ''royalties,'' they are, we conclude, in no material respect comparable to the payments prospective licensees of copyrighted musical works agree to pay to obtain a license to make and distribute those works. Rather, the AHRA payments are legislative assessments imposed on the manufacturers of digital audio recording devices and media to partially offset potential lost revenues that the copyright owners and record companies may suffer as a result of unlicensed copies of sound recordings facilitated by those recording devices and media. Congress determined that a certain percentage of those assessments should be allocated to musical works and a certain percentage to sound recordings. We cannot conclude on the record before us that Congress intended its allocation of AHRA assessments to reflect in any respect its view of the relative value of musical works vis-á-vis sound recordings. Nor can we conclude that such an assessment would reasonably reflect market conditions today for comparable products, which is the essence of a benchmark analysis. In the absence of such evidence, we do not find this proffered ''benchmark'' particularly relevant to the task at hand.

2. RIAA and DiMA Proposed Benchmarks

RIAA contends that a number of ''benchmarks'' are most relevant to our determination, including: (1) Several types of ''average effective mechanical royalty rates'' as calculated by their economics expert Dr. Wildman; (2) certain mechanical rates applicable in other countries; and (3) an analysis of historical norms by their economic expert Dr. Teece. DiMA also argues, together with RIAA, that certain mechanical rates applicable in other countries provide a useful benchmark for the licenses at issue in this proceeding.

a. Effective Mechanical Rate Data

RIAA argues that the most appropriate ''benchmark'',[29] as proffered by their

[28] See Pascucci WRT at 3–4 (''[t]he purpose that music serves when it is licensed for use in movies, television shows and advertisements is fundamentally different from the purpose it serves when used in CDs, downloads and other audio formats * * * While music can serve important purposes in terms of dramatizing a story, setting a mood, creating positive associations with a product, or drawing people's attention, the purpose of the music [in the synch market context] is secondary to that of the larger audio-visual work into which the music is incorporated—and it is that larger work that consumers pay to watch (in the case of a movie) or for which producers and advertisers pay with the hope that consumers will watch (in the case of a television show or advertisement).'').

[29] Although RIAA indicated in their final oral argument that their primary ''benchmark'' was the average effective royalty rate in the free market (*see* 7/24/08 Tr. at 7864 (Smith, Closing Oral Argument for RIAA)), it is not clear that Dr. Wildman was affirmatively offering such a ''benchmark.'' First, Dr. Wildman testified only as a rebuttal witness and, in the context of criticizing Dr. Landes' choice of benchmarks, presented evidence that he indicated cast doubt on the accuracy of Dr. Landes' benchmarks. *See* Wildman WRT at 30. Second, in his rebuttal testimony, Dr. Wildman opined that for benchmarks to be useful, they must satisfy three specific criteria. Wildman WRT at 3. Dr. Wildman

Continued

economics expert, Dr. Wildman, is derived by analyzing the overall average effective mechanical rate, compared to what would be paid if all mechanicals were paid at the statutory rate. Dr. Wildman further supplements this analysis by examining (1) what is paid for first uses of songs (as opposed to a subsequent use of a song that has previously been released), which are not subject to the compulsory license; and (2) the mechanical royalty rates paid for first uses to certain non-singer songwriters who agree to rates that are not part of some broader agreement like those containing controlled composition clauses for singer-songwriters.[30] Wildman WRT at 5–6; 42–43. According to Dr. Wildman, an examination of all three data sets lead to the conclusion that the market rate for mechanicals on CDs and digital downloads is between 5.25 cents and 7.8 cents per track, or about 7.25% to 10.08% of wholesale revenues. *Id.* at 6.

Dr. Wildman based his analysis of potential benchmarks on mechanical royalty data he received from three major record companies: SONY BMG (''SONY''), Warner Music Group (''WMG''), and Universal Music Group (''UMG''). *Id.* at 35. As a preliminary matter, the data from the record companies was limited to mechanical royalties negotiated and paid on one quarter of one fiscal year's releases, including data on which releases involved agreements by singer-songwriters to receive reduced royalties, which releases involved co-writers who had agreed to write songs for reduced rates, and which individual tracks were first uses (and thus not subject to the compulsory license). *Id.* In short, the analysis was based on data from only three record companies and only for a single quarter. Indeed, the data from one of the record companies, UMG, was not even from the same quarter as that from the others.[31] Moreover, Dr. Wildman conceded that the data he received from UMG had limited usefulness since UMG does not separately break out situations in which co-writers agreed to write songs at reduced rates because of similar restrictions that apply to their companion songwriter. *Id.* at 36. Dr. Wildman also limited his analysis to rates for physical rather than digital products. In sum, Dr. Wildman himself conceded that his data set was less than ideal. 5/12/08 Tr. at 5850–51 (Wildman).

Based on this limited data set, Dr. Wildman concluded that the average effective per track rates for mechanical royalties for physical products paid by the three record companies ranged from [REDACTED] for WMG to [REDACTED] for UMG. Wildman WRT at 37–38. However, there are substantial unexplained differences in the average effective rates he obtains from his analysis of the data both as between different companies (UMG mean [REDACTED] than WMG mean) and also as between results obtained from different data sources for the same companies (*e.g.* 7.42 cents mean for SONY from publisher data as compared to [REDACTED] for SONY from record company data). Even the direction of the latter difference is not consistent for the two companies for which Dr. Wildman presents publisher data. Wildman WRT at 37–39; 5/12/2006 Tr. at 5850–1 (Wildman). Dr. Wildman acknowledges that the agreements he analyzed were negotiated in an environment where the statutory rate is 9.1 cents, which, Copyright Owners contend is a ceiling above which the record companies will not pay.[32] Dr. Wildman also acknowledged the presence in the agreements of so-called ''controlled composition clauses.''

Dr. Wildman analyzed just that portion of the agreements that involved the first use of sound recordings, which are not subject to the compulsory mechanical royalty rate, but which may include controlled composition clauses. The average effective per track rates were [REDACTED] for SONY, [REDACTED] for WMG, and [REDACTED] for UMG. Wildman WRT at 42. In addition, Dr. Wildman further analyzed first use agreements involving ostensibly only ''pure'' songwriters (*i.e.*, not singer-songwriters) or ''co-writers who had agreed to controlled rates and all individuals not subject to a controlled composition clause at all.'' Wildman WRT at 43. The per track average effective rate for this latter group was [REDACTED] for SONY and [REDACTED] for WMG. (UMG data did not permit such an analysis). Wildman WDT at 43–44. Yet, these two more limited (in scope of coverage) supplemental analyses do not serve to provide substantial corroboration for Dr. Wildman's initial broader effective rate analysis. Looked at on a company-by-company basis, each data base cut produces a substantially different result for the same company and a different rank order for the companies analyzed. These differences are not explained. Moreover, Dr. Wildman admits that his regression analysis of the first use data provides very little explanatory power for the variation in the effective rate obtained for WMG and UMG and, even in the best case, leaves over half the variation in the effective rate obtained for SONY unexplained. 5/12/2008 Tr. 5853–4 (Wildman).

Even viewed in the best light, Dr. Wildman's overall effective rate analysis is simply no more than a ''starting point'' as he himself cautions. 5/12/08 Tr. 5881 (Wildman). It makes no adjustment for the impact of controlled composition clauses that reflect trade-offs between the various elements of an artist contract that may cover rights and forms of compensation well beyond the mechanical rights addressed by the clause. Copyright Owners PFF at ¶¶ 686–7. As briefly noted hereinbefore, the effective rates derived by Dr. Wildman also suffer from empirical shortcomings. Therefore, we decline to assign the weight necessary to Dr. Wildman's effective rate analysis to view it as a useful specific benchmark. However, given the absence of any more substantial or better evidence in the record of a lower rate, the Wildman overall effective rate data can help to identify the low-end limits for

then not only found Dr. Landes' benchmarks wanting with respect to these three criteria (*see*, for example, Wildman WRT at 3–4), but also appeared to indicate that his own evidence failed to meet these three criteria (*see* 5/12/08 Tr. at 5881). Nevertheless, irrespective of whether they meet Dr. Wildman's criteria for a benchmark, we find that Dr. Wildman's various summaries of mechanical license data do provide some limited information relevant to our inquiry. Inasmuch as both RIAA as well as Copyright Owners refer to these data as ''benchmarks'' in their arguments, we adopt their label as a convention in this determination.

[30] Controlled composition clauses reduce the royalty rate that a copyright user is willing to pay a songwriter who is also a performer. A typical controlled composition clause would place a percentage cap on the amount of mechanical royalties that a record company would be willing to pay to a songwriter/performer (*i.e.*, a cap of 75% of the statutory rate). A typical controlled composition clause might also reduce the amount of mechanical royalties that a record company would be willing to pay a songwriter/performer by limiting the number of album tracks upon which the company would be willing to pay mechanicals (*e.g.*, a 10-track limit on mechanical royalties).

[31] For SONY and WMG, the data was from the third quarter of 2006. For UMG, it was from the fourth quarter of 2007. 5/12/08 Tr. at 5844.

[32] Under this argument, made by Dr. Landes and others, recording companies have no incentive to pay above the compulsory royalty rate in a voluntary agreement because they can always pay the compulsory rate if they are willing to comply with the compulsory licensing process. *See*, for example, Landes WRT at 39. The evidence in the record suggests that most are not. *See*, for example, Tr. 2/14/08 at 3325–6 (A. Finkelstein). RIAA's expert economist supplies another view of the compulsory license process compared to that offered by Dr. Landes. *See* Wildman WDT at 31 and n.39 (''[a]s witnesses for both record companies and music publishers have explained, essentially no one uses the compulsory license process—licenses for mechanical royalties for sales of sound recordings are negotiated in the market on a voluntary basis. * * * The fact that they enter into voluntary agreements is not itself evidence that transaction costs [in such agreements] are low. It simply means that the transaction costs of voluntary agreements are lower than those associated with using the compulsory license. * * *'').

reasonable rates in this proceeding. Therefore, we conclude that the effective rate data submitted by Dr. Wildman show only that a reasonable rate for the mechanical license for CDs and permanent downloads could not be lower than the range indicated by his broadest effective rate data set (*i.e.*, 5.88 cents to 7.68 cents per song).

Dr. Wildman does not offer an independent benchmark that would apply specifically to ringtones. Rather, he proffers an adjustment to Dr. Landes' mastertone benchmark that Dr. Wildman contends would yield a reasonable rate for ringtones of between 14.5% to 20% of the wholesale price of ringtones. *See* Wildman WRT at 53. Although he does not elaborate, the upper end of the 14.5% to 20% of wholesale range would yield a penny rate of 25 cents based on his assumed wholesale price of $1.25. The lower boundary of his estimate is based on a ''surplus'' analysis that assumes a sharing of ''surplus'' revenues in the same proportion as would occur in the CD and permanent download market—assuming that the results of his previously discussed effective rate analysis were deemed to be accurate. However, given the shortcomings of his effective rate analysis and his own strong cautions against assuming that the mastertone market is comparable to the CD and permanent download market absent numerous other quantifiable adjustments (*see* Wildman WRT at 46), this attempt at bootstrapping falls flat. In addition, there are serious questions concerning the adequacy of Dr. Wildman's assumptions concerning his treatment of costs. Copyright Owners RFF at ¶¶ 422–5. In short, questionable assumptions coupled with concerns over the reliability of the data used in the Wildman effective rate analysis cause us to regard the findings of Dr. Wildman's ''surplus'' analysis as carrying little, if any, weight.

b. 1981 CRT Decision and Historical Norms

RIAA also invites the Judges to consider in setting a rate the approach taken by the Copyright Royalty Tribunal (''CRT'') in the 1981 section 115 determination, as characterized by RIAA's expert economist, Dr. David Teece.[33] According to Dr. Teece, the best place to begin the rate analysis should be to use the 1981 CRT decision ''as a starting point and [adjust it] for changes in the industry over the interim period.'' Teece WDT at 76. In other words, Dr. Teece recommends that the 1981 rate, adjusted to reflect its relative value in terms of today's average retail CD prices, should be adopted by the Judges as a benchmark and then further adjusted downward by an unspecified amount in order to reflect a consideration of changed circumstances[34] over the past 25 years in the 801(b) factors. In the alternative, Dr. Teece suggests adjusting the 1997 industry settlement rate by the percent change in the wholesale CD price since 1998.

Dr. Teece contends that following the 1981 CRT decision would produce a rate today of 7.8% of wholesale, which should then be adjusted downward to bring it into accordance with the section 801(b) factors. Teece WDT at 81. In the alternative, adjusting forward from the initial 1997 industry settlement rate would produce a rate today of 7.6% of wholesale. Teece WDT at 113.

We do not find that either the 1981 CRT rate or the basis of the 1997 industry settlement is useful as a benchmark. Both the 1981 CRT decision and the 1997 settlement reflect a view of the product market that has changed substantially relative to the types of products and the modes of product distribution modes available today. Moreover, both the 1981 CRT rate as well as the 1997 industry settlement explicitly or implicitly incorporated the equivalent of some or all the 801(b) factor analysis. Although the Judges acknowledge that the financial condition of the industry, including the potential impact of piracy, can properly play a role in considering whether an adjustment is necessary to a particular benchmark, such considerations, in and of themselves, do not form the basis of a useful benchmark. Therefore, we find that neither of Dr. Teece's proffered ''benchmarks'' provide sufficient comparability to offer a useful yardstick by which to gauge prices in today's markets, and we defer further discussion of the condition of the industry until our consideration of the section 801(b) factors below.

c. Foreign Mechanical Rates

DiMA contends that the most useful benchmark in the record is the license agreement reached in the United Kingdom for 8% of retail revenue plus applicable minima, which includes the reproduction, distribution and public performance of musical works by digital music services. This benchmark, according to DiMA, represents an ''upper bound estimate for a reasonable rate in this proceeding.'' DiMA PCL ¶ 77. This benchmark was proffered by DiMA economics expert Ms. Guerin-Calvert. In addition to also proffering the U.K. mechanical rates as a benchmark, RIAA suggests that both Japanese and Canadian rates are also relevant, although the bulk of the evidence presented by RIAA also related to the U.K. mechanical rates. RIAA, while agreeing with the 8% of retail price cited by DiMA, notes that the rate is set at 8% of retail price less 17.5% Value Added Tax (''VAT''). RIAA PFF at ¶¶ 729, 731. The RIAA presents further adjustments to arrive at a wholesale price equivalent of 7.7% (*see* RIAA PFF at ¶ 740), which may rise to as much as 11.1% of wholesale (or approximately 8.0 cents) depending on the amount of discounting from the Published Price to Dealer (''PPD'') assumed for the U.K. in order to translate the U.K. rate to an actual wholesale price received by record companies in the U.S. (*see* RIAA RFF at ¶ 123).

DiMA and RIAA contend that the rates adopted in the U.K. settlements should serve as a useful benchmark because they claim those rates involve comparable markets,[35] comparable parties[36] and a comparable basket of rights (*i.e.*, mechanical rights for permanent downloads). *See*, for

[33] *See Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, Copyright Royalty Tribunal Docket No. 80–2, 46 FR 10466 (Feb. 3, 1981).

[34] For example, Dr. Teece explained that the record industry now confronts significant and sustained business challenges, such as the spread of piracy and the advent of new digital distribution challenges that were not present when the CRT raised the mechanical royalty rates in the 1981 proceeding. Dr. Teece contends that almost every financial indicator of the record companies' financial position has worsened from that described by the CRT in its 1981 decision. Teece WDT at 79–80. However, Dr. Teece failed to adequately consider whether financial measures such as revenue generation were of greater or lesser significance than company profitability as the industry's structure has changed. Similarly, Dr. Teece fails to adequately inquire as to whether any impact of changed industry circumstances or changed profitability has greater or lesser significance for that substantial portion of the industry where record companies and publishers are units of the same parent company as compared to standalone record companies and publishers.

[35] DiMA and RIAA contend that there are a number of similarities between the recorded music industries and markets in the two countries (*e.g.*, both have ''extremely significant record markets;'' invest heavily in A&R (artist and repertoire), marketing and promotion, and in developing an online music market while battling piracy; and are international in focus). DiMA PFF at ¶¶ 316–318, RIAA PFF at ¶¶ 705–715.

[36] For example, DiMA states that the U.K. settlements resolved licensing rate disputes among the British Phonographic Industry Limited (a record company trade association whose members include the major record labels), the Mechanical-Copyright Protection Society Limited (which distributes royalties to the owners of mechanical rights), and digital distributors such as iTunes, Napster and MusicNet. *Id.* at ¶ 319.

example, DiMA PFF at ¶¶ 316–320 and RIAA PFF at ¶¶ 316–320.

In reply, Copyright Owners object to the comparability of the foreign rates on, among other grounds, that: (1) The percentages presented are not applied consistently to the same revenue base (Copyright Owners RFF at ¶¶ 597–601); and (2) the various foreign percentage rates may translate into higher actual revenue for copyright owners than they currently receive in the U.S. because of exchange rate differences (Copyright Owners RFF at ¶¶ 601–3). The Copyright Owners' objections related to revenue base calculation may not fully capture the range of problems surrounding this issue. For example, the revenue base for the foreign rates is also subject to differing tax structures in the U.S. as compared to the U.K., adding to the difficulties of translating the U.K. benchmark into a U.S. equivalent benchmark.[37]

While the Copyright Owners' objections to the foreign rate benchmark noted hereinabove have merit, they serve to underline the greater concern that comparability is a much more complex undertaking in an international setting than in a domestic one. There are a myriad of potential structural and regulatory differences whose impact has to be addressed in order to produce a meaningful comparison. For example, the fact that the record industry in the U.K. does not employ controlled composition clauses needs to be carefully weighed in seeking to extend the proposed benchmark to physical product subject to such clauses in this country. Copyright Owners PFF at ¶ 713. Similarly, even if the foreign benchmark were purely a product of a negotiated settlement between similar types of parties, it is hard to imagine that such parties would structure their settlement to encompass not only the U.K. copyright regime and U.K. industry considerations but to simultaneously encompass the U.S. copyright regime and U.S. industry considerations. To the extent such parties fail to do so and differences exist, a comparison between such foreign rates becomes less probative for benchmark purposes. We find, that on the record before us, the full range of comparability issues has not been sufficiently analyzed and presented to permit us to use the foreign rates presented as a benchmark for the target U.S. markets in question in this proceeding.

3. Conclusions With Respect to Benchmarks

Based on the evidence before us, we conclude that no single benchmark offered in evidence is wholly satisfactory with respect to all of the products for which we must set rates.

As previously noted, the proposed mastertone benchmark certainly offers valuable rate evidence from the marketplace for one of the types of products covered by the section 115 license that is the subject of this proceeding (*i.e.*, ringtones). The mastertone benchmark yields a rate of 20% of wholesale which if applied to the $1.20 wholesale price of a ringtone suggested by RIAA in their penny rate proposal (*see* RIAA Second Amended Rate Proposal, July 2, 2008, at 1–6),[38] produces a penny-rate equivalent of 24 cents. However, the mastertone benchmark carries little weight when it is applied to the other products at issue in this proceeding (*i.e.*, CDs and permanent downloads) that are, at best, only in small part similar in nature and ultimate consumer use.

Also as noted hereinbefore, because the effective rates derived by Dr. Wildman suffer from analytical and empirical shortcomings, we decline to employ the results of his analysis as a specific benchmark for CDs and permanent downloads. Rather, we conclude that the effective rate data submitted by Dr. Wildman show only that a reasonable rate for the mechanical license for CDs and permanent downloads could not be lower than the range indicated by his overall effective rate data set, or 5.88 cents to 7.68 cents per song or track. Moreover, since this proffered benchmark was based only on physical product data and was offered only as a benchmark for CDs and permanent downloads, we decline to assign little, if any, weight to the Wildman effective rate data set in determining the rate for such a different product as ringtones.

In sum, the usable evidence with respect to rate comparables offered by the parties supports the determination of the parameters of a zone of reasonableness. Based on the record of evidence in this proceeding, we have determined that the 20% rate (or 24 cent penny-rate equivalent) identified hereinabove marks the upper boundary for a zone of reasonableness for potential marketplace benchmarks. We have also determined that potential marketplace benchmarks cannot be less than somewhere between 5.88 cents and 7.68 cents. However, neither of these two pieces of evidence offers a specific benchmark for all the products at issue in this proceeding in terms of comparability. Rather we find that the upper boundary serves as a good benchmark for ringtones, but only carries small weight as a benchmark for CDs and permanent downloads. On the other hand, with respect to CDs and permanent downloads, some rate closer to the lower boundary carries more weight than one closer to the upper boundary in terms of comparability, but, given the previously noted analytical and empirical shortcomings of Dr. Wildman's effective rate analysis, we are not persuaded that the existing 9.1 cent rate for such products, now in effect for nearly three years, is too high or inappropriate. We now turn to the 801(b) policy considerations to determine the extent to which those policy considerations weigh in the same direction or a different direction as the benchmark evidence hereinbefore reviewed.

4. The Section 801(b) Factors

Section 801(b)(1) of the Copyright Act states, among other things, that the rates that the Judges establish under section 115 shall be calculated to achieve the following objectives: (A) To maximize the availability of creative works to the public; (B) to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; (C) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of markets for creative expression and media for their communication; and (D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practice. 17 U.S.C. 801(b)(1). In the *SDARS* proceeding, we stated that

[37] To underscore this difficulty in making a comparison of rates across countries, one only need examine the difficulty RIAA's witness has in explaining the tax structure in the U.K. 2/12/08 Tr. 2771–2 (Taylor):

CHIEF JUDGE SLEDGE: I hate to interrupt. On page 12, before you leave that chart, the rates exclude the value added tax. What is the amount of that?

THE WITNESS: That is 17½ percent, Your Honor, in the U.K.

BY MR. SMITH: Q. Now, on—

CHIEF JUDGE SLEDGE: And—17½ percent of what?

THE WITNESS: It's charged—I'm not a tax expert, Your Honor, but it's actually more complicated than being charged on the retail price. I think you have to do some complicated calculation of 117.5 percent of something. I'm sorry. I can't explain it very well, but essentially it's 17½ percent of the retail price, but it's calculated not by taking 17½ percent of the retail price and adding it. It's slightly more complicated than that.

[38] This wholesale price is consistent with Mr. Benson's testimony concerning a wholesale price for ringtones in 2006 of $1.21. Benson WRT at 22.

''the issue at hand [in analyzing the section 801(b) factors] is whether these policy objectives weigh in favor of divergence from the results indicated by the benchmark marketplace evidence.'' *See* 73 FR at 4094. In the current proceeding, we have found that only one applicable benchmark, the mastertone benchmark proffered by Dr. Landes, serves as a relevant reference point for determining a mechanical royalty rate, but only for ringtones. For CDs and permanent downloads, we find that the proffered benchmarks lead only to the conclusion that the existing statutory rate [39] is neither too high nor too low or otherwise inappropriate. Our analysis of the Section 801(b) objectives, discussed below, leads us to further conclude that the available evidence submitted by the parties related to these policy objectives does not reasonably weigh in favor of any further adjustments beyond establishing a 24 cent statutory rate for ringtones and the maintenance of the existing previously negotiated 9.1 cent rate for CDs and permanent downloads without any add-on to account for general inflation during the license period.

a. Maximize Availability of Creative Works

The various arguments of the parties ultimately reduce to a question of whether their respective incentives with respect to this policy objective will be adversely impacted by the rates adopted in this proceeding.

Copyright Owners' argument with respect to this objective is that songwriters and music publishers rely on mechanical royalties and both have suffered from the decline in mechanical income. See Copyright Owners PFF at ¶ 343. Under the current rate, they contend, songwriters have difficulty supporting themselves and their families. As one songwriter witness explained, ''The vast majority of professional songwriters live a perilous existence.'' Carnes WDT at 3. We acknowledge that the songwriting occupation is financially tenuous for many songwriters. However, the reasons for this are many and include the inability of a songwriter to continue to generate revenue-producing songs, competing obligations both professional and personal, the current structure of the music industry, and piracy. The mechanical rates alone neither can nor should seek to address all of these issues. We find no persuasive evidence in the record to support the notion that the current mechanical royalty rates are leading to a shortage of musical compositions. Furthermore, while we acknowledge that the mechanical royalty rate is an important source of income for songwriters, we find no persuasive evidence in the record that an undiminished nominal [40] mechanical rate will fail to ensure adequate incentives for songwriters and publishers over the course of the license period in question.

RIAA for its part contends that this policy objective is only satisfied to the extent that the mechanical rate levels provide sufficient incentives for record companies to make sound recordings out of the musical works provided by the songwriters because, they contend, it is only through these sound recordings that the musical works reach the consuming public. *See*, for example, RIAA PCL at ¶ 69. RIAA argues that in light of declining industry revenues from the sale of physical products, the mechanical royalty rate must be lowered so as to provide record companies with sufficient cost reductions and, thereby, sufficient incentives to continue to make sound recordings available to the same degree. *See*, for example, RIAA RFF at ¶ 349. However, Copyright Owners respond that: (1) Record company declining album sales in recent years have not been shown to be the result of the current mechanical rate and, indeed, Dr. Teece, RIAA's own economic expert, attributes the decline to a ''whole set of demand-related phenomena'' rather than only the size of mechanical royalties; and (2) notwithstanding this recent decline in physical product revenues, other product lines have grown and the record companies continue to enjoy profitability. *See* Copyright Owners RFF at ¶¶ 85–86 and 147. While the recording industry's physical product revenues have declined in recent years, the reasons for this decline are many and include, but are not limited to, various management and business planning decisions made by individual record companies, shifts in the modes of music distribution, and piracy. We find no persuasive evidence in the record to support the notion that the current mechanical royalty rates are substantially responsible for, let alone are the direct and sole reason for, any espoused contraction in the overall number of sound recordings reaching the public. Similarly, there is no persuasive case made in the record that reducing the nominal mechanical rate will positively impact sound recording production and distribution. Nor does the record before us even persuasively indicate that a reduction in this one specific nominal royalty rate is the only cost cutting solution available.[41] In other words, we find that the record of evidence does not support the notion that an undiminished nominal mechanical rate will reduce record company incentives over the course of the license period in question.

At the same time, in an environment where overall industry revenues are declining, any increase in the nominal mechanical rates to reflect general inflation should be reasonably justified. Because the Copyright Owners' general inflation adjustment is neither specific as to timing or frequency (*see* 7/24/08 Tr. at 7791–2, Cohen Closing Argument for Copyright Owners) nor supported by any persuasive rationale justifying such an adjustment (RIAA RFF at ¶¶ 479–81; *see also* DiMA PFF at ¶¶ 259–60), we find no reason to increase these nominal rates to reflect changes in the general level of inflation.

DiMA contends that this policy objective is best satisfied by lowering mechanical royalty rates to encourage companies, such as DiMA members, that make musical works available to the public through digital distribution. DiMA PCL at ¶ 34. But DiMA's focus is a narrow one which excludes consideration of the impact of its proposals on the overall supply of sound recordings through both physical and electronic distribution modes. It fails to adequately consider and measure the substitution effects of changes in the price of only one mode of distribution. Therefore, we are not persuaded that lowering the nominal cost for a single input used in a single mode of distribution will call forth even greater overall growth in the production and distribution of sound recordings.[42] Moreover, even with respect to the limited scope of its concerns, DiMA offers no specific empirical evidence such as demand elasticities or persuasive consumer surveys to support the cause-and-effect results which it postulates. While we agree that digital distribution of musical recordings, such as that provided through DiMA members like Apple's iTunes, provides an important avenue for enhancing the

[39] The current rate for physical products and permanent downloads is 9.1 cents per track or 1.75 cents per minute of playing time or fraction thereof. This rate, reached in a settlement between RIAA, NMPA and SGA, and adopted by the Librarian, has been in effect since January 1, 2006.

[40] We employ the term ''nominal'' only to connote that the rate in question is stated in current dollars.

[41] For example, the record companies may well be able to make reductions in overhead costs which remain substantial despite restructuring efforts. *See* Copyright Owners RFF at ¶¶ 131–3.

[42] Dr. Landes also points out that setting a low rate simply to favor one mode of distribution may lead to market distortions of a type that may not be justifiable economically. Landes WRT at 18.

public's access to creative works, we find no persuasive evidence in the record that simply lowering the mechanical rates, as DiMA has proposed, will necessarily increase the public's access to those creative works. Indeed, as noted hereinbefore, digital distribution has grown considerably while the current mechanical rates have been in place.

We find that the current nominal statutory mechanical rates for physical products and permanent downloads as well as the current market nominal rates for ringtones as reflected by the Landes benchmark, on balance, will address each of the issues stressed by the parties and should help to maximize the availability of creative works to the public. In other words, the policy goal of maximizing the availability of creative works to the public is reasonably reflected in these current nominal rates and, therefore, no further adjustment is warranted.

b. Afford Fair Return/Fair Income Under Existing Market Conditions

With respect to this policy objective, Copyright Owners contend that ''[w]hereas the record companies can ensure themselves a fair return through their pricing policies, a songwriter has no such option, because the right of songwriters and music publishers to earn a fair return depends upon the availability of a sufficient statutory rate of return.'' Copyright Owners PCL at ¶ 81, citation omitted.

Copyright Owners further contend that:

> [S]ubstantial evidence adduced at trial shows that record company profitability has been increasing due to streamlining of the physical business and improved margins on digital sales, which have relieved the record companies of substantial manufacturing, distribution, and returns expense. Record companies have also identified, and have begun to exploit, other new revenue streams through ''360 contracts,'' synchronization deals and performing rights royalty collections. The economics of digital distribution should lead to even greater profitability as the share of digital sales continues to grow.

Copyright Owners PCL at ¶ 89.

Copyright Owners also contend that ''[t]he record shows that iTunes, the dominant seller of permanent downloads, is profitable and would continue to be profitable if the 15 cent permanent download rate [proposed by the Copyright Owners] were adopted, whether or not Apple absorbs the cost.'' *Id.* Copyright Owners further assert that ''[t]he evidence also shows that there has been substantial new entry into the permanent download business and DiMA has not established that new entrants would be precluded from entering the business, and thriving in it, by the Copyright Owners' proposed rate.'' *Id.*

For its part, RIAA contends that, in analyzing this policy objective, the Judges must consider existing economic conditions, which, RIAA asserts ''means a period in which record companies have faced and continue to face enormous challenges, in which consumers are willing to pay less and less for CDs, the prices of digital downloads are stagnant or softening and the prices of ringtones are falling, and in which publishers are making healthy profits far beyond a reasonable risk-adjusted return on capital.'' RIAA PCL at ¶ 80. On this latter point, RIAA further contends that ''The result of the current system is that music publishers generate bloated profit margins and record companies and songwriters each bear the brunt.'' RIAA PCL at ¶ 96.

DiMA proposes that, in analyzing this policy objective, we also consider the impact of piracy on the music industry and the role that digital music services play as ''the most important bulwark against piracy.'' DiMA PCL at ¶ 41.

In addressing this policy objective, we have analyzed the myriad of forces that are currently at play in the music industry. These include, as discussed above, falling sales of CDs and the commensurate impact that such decreases have had on record companies as well as on the copyright owners. We have also considered the rising importance to record companies and copyright owners of revenues from downloads and from mastertones. Then too, we have examined the record evidence regarding the role that piracy has played in the industry. In this latter context, we have analyzed the available evidence on the costs that record labels and publishers have incurred in battling piracy, whether through legal action or through changes in business models. We have also examined the role that new services, such as iTunes, may have played in channeling consumers toward legal sources of sound recordings. In addition, in determining reasonable mechanical rates, we considered evidence that there is little if any actual current use of the section 115 statutory license even when an identical rate is agreed upon by users and owners.[43] Then too, we have considered that a significant portion of the mechanical royalties that songwriters earn, in those instances where the songwriter is not also the publisher, ultimately is paid to music publishers, including some that are affiliated with the record companies themselves. We also considered the relative contribution that music publishers make to the process.

Viewing the totality of the evidence on this policy objective, we find that Copyright Owners have not provided sufficient evidence to establish that songwriters or publishers, under existing market conditions, will fail to receive a fair return for the artists' creative works as a result of the adoption of a 24 cent statutory rate for ringtones based on marketplace evidence and the maintenance of the existing statutory 9.1 cent rate for CDs and permanent downloads. Nor do we find that RIAA or DiMA have provided sufficient evidence that would establish that their income, under existing economic conditions, would be unfairly constrained by adopting these rates. In short, we do not find that the evidence in the record supports any further adjustment to these in order to achieve this policy objective.

c. Reflect Relative Roles of Copyright Owner and Copyright Users

This policy objective requires that the rates we adopt reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of markets for creative expression and media for their communication. In this connection, the Copyright Owners emphasize the songwriters' efforts in writing the creative work, the publishers' efforts in supporting the songwriters, both financially through advances, and professionally by introducing them to co-writers.[44] Not surprisingly, RIAA emphasized the record companies' efforts in identifying promising artists, financing sound recordings, promoting and distributing the songwriters'

[43] *See*, for example, 2/14/2008 Tr. 3325–6 (A. Finkelstein).

[44] Copyright Owners maintain that ''the songwriter is the provider of an essential input to the phonorecord: The song itself.'' Copyright Owners PCL at ¶ 91, *quoting* the 1981 CRT decision, 46 FR at 10480. Copyright Owners further contend that ''the overwhelming weight of the evidence established that music publishers—both majors and independents—are responsible for discovering and developing songwriters and then assisting them in sharing their creativity with the public. This requires significant financial investments and involves substantial risk. Publishers provide advances to songwriters, which typically constitute a large percentage of the publishers' yearly expenses. In addition, the success rate of songwriters is very low. Thus, the recoupment rates of publishers are low, and yearly write-offs are high.'' Copyright Owners PCL at ¶ 94.

creative works.[45] Finally, DiMA emphasized the contribution digital distribution companies make, both through technological innovation, and through capital expenditure in developing and nurturing new avenues for the commercial exploitation of the artists' works.[46]

Upon a careful weighing of the evidence submitted by the parties, we find that the current market indicated rate for ringtones and the current statutory rate for physical product and permanent downloads require no further adjustment arising from a consideration of this policy factor. Stripped of the considerable hyperbole attached to the evidentiary interpretations offered by the parties' advocates, no persuasive evidence of substantial change in the balance of the contributions made by the parties appears to necessitate against the unadjusted continuation of these previously negotiated nominal rates over the course of the license period.

d. Minimize Disruptive Impact

In the *SDARS* proceeding, we noted that a new mechanical royalty rate may be considered to be disruptive ''if it directly produces an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for [the parties impacted by the rate] to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music delivery service currently offered to consumers under this license.'' 73 FR at 4097. The same analysis applies in this proceeding as well.

RIAA argues that the current statutory rate is already disruptive and, as a consequence, any increase such as that proposed by Copyright Owners must also be disruptive. *See* RIAA PFF at ¶¶ 1441–52. Copyright Owners respond that an increase in the mechanical rates, as they have proposed, would not have a disruptive impact on record companies because their aggregate profitability is on the rise and mechanicals constitute only a small fraction of their overall expense. Copyright Owners PCL at ¶ 98. Moreover, Copyright Owners argue that, with respect to DiMA companies, the digital market is growing rapidly. They point to the success of iTunes as evidence that DiMA members ''can easily absorb the increases in the penny rate'' that they seek. *Id.* at ¶ 100. DiMA, in turn, argues that the Judges should at a minimum avoid rates and rate structures that would adversely affect digital music distributors' ability to attain a sufficient subscriber base or generate sufficient revenue to reach certain financial targets. DiMA PCL at ¶ 63. DiMA contends that the rates proposed by Copyright Owners ''would halt innovation in its tracks. Even if [the Copyright Owners' proposed rates] did not stop digital distribution entirely, [they] would stifle further entry [into the market].'' *Id.*

Because the rates we have identified as reasonable are currently in place (as marketplace rates in the case of ringtones and as the statutory rate in the case of CDs and permanent downloads), the various arguments concerning the consequences of a rise in the applicable rates is inapposite. Furthermore, we find that the RIAA's contentions with respect to the disruptive impact of the current rates have little merit. RIAA's list of horribles allegedly attributable to the current mechanical rates is not supported by any substantial evidence of cause-and-effect. Even the RIAA admits that ''high mechanical royalty rates did not cause all of these problems.'' *Compare* RIAA PFF at ¶ 1441 listing record industry disruptions *with* RIAA PFF at ¶ 1442. Further, the RIAA's proffered evidence fails to persuade us that reducing this one particular cost will alleviate all the claimed record industry adversity in any substantial way and fails to adequately weigh other cost-based or demand-based alternative explanations for the alleged adversity. Similarly, DiMA's claims related to lowering the bar for new market entrants are not adequately supported by evidence to indicate the degree to which the overall cost structure and pricing capabilities of such new entrants differ from existing market participants such as Apple iTunes. Thus, we find that RIAA and DiMA have failed to show that the current mechanical rates have caused and are anticipated to continue to cause an adverse impact that is substantial, immediate and irreversible in the short-run because there is insufficient time for the parties impacted by the rate to adequately adapt to the changed circumstances produced by the rate change and, as a consequence, such adverse impacts threaten the viability of the music currently offered to consumers under this license. *SDARS*, 73 FR at 4097.

On the other hand, Copyright Owners contend that the ''draconian'' cut in royalties that RIAA and DiMA seek would cause disruption to the Copyright Owners. They contend that such a cut would have a disproportionate impact upon songwriters but also argue that a rate cut would ''materially impact the ability of music publishers to play the vital role in the creation of music that songwriters depend upon to exercise their creative craft.'' *Id.* at ¶ 101. Again, inasmuch as the rates we have identified as reasonable are currently in place, these arguments concerning the consequences of a substantial cut in the applicable rates are inapposite. Furthermore, in analyzing the potential disruptive impact the rates we have adopted may have on the market we examined not only the rates but also the rate structure and have found that continuing the penny-rate structure rather than fostering disruption in the industry will likely minimize such disruption. *See supra* at section IV.B.2.

The current compulsory rates for CDs and permanent downloads are rates that the copyright owners and copyright users have been paying since 2006. In addition, the evidence before us indicates that a ringtone rate derived from the Landes mastertone benchmark is comparable to the average rate that copyright owners currently receive and that copyright users currently pay. Therefore, we do not find from the record before us that these rates would have an adverse impact that is substantial, immediate and irreversible in the short-run.

[45] RIAA also asks that we consider that ''[t]he record companies' business model is changing radically and they are facing declining sales and revenues, while at the same time the music publishers are facing much less difficult economic times.'' *Id.* at ¶ 101. RIAA also asserts that ''the impact of investment by record companies on other revenue streams of the music publishers is highly relevant to the risks that each party faces. Where, as here, expenditures of the record companies on the creation, marketing, and distribution of sound recordings actually facilitate and promote other revenue streams of the music publishers (such as synchronization and performance revenues), that promotion reduces the risk faced by songwriters and music publishers.'' *Id.* at ¶ 103. Finally, RIAA contends that ''record companies make all of the investments to create sound recordings, market and distribute them, and are essentially the sole (and certainly the primary) outlet for musical works.'' *Id.* at ¶ 104.

[46] According to DiMA, ''[d]igital music distributors play a most important role relative to 'technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communications.' '' DiMA PCL at ¶ 52. They do this, DiMA contends, by offering ''millions of songs in comprehensive catalogs through simple-to-use and elegant Web sites that allow for easy browsing, as well as powerful search and cataloging tools * * * [and] compelling editorial content.'' *Id.* at ¶ 53. In addition, they contribute through servers that provide ''massive storage capabilities, bandwidth, and transmission facilities * * *.'' *Id.* at ¶ 54. In short, DiMA asserts that the Judges should consider the fact that ''DiMA member companies have developed an entirely new industry and educated consumers about entirely new ways to *pay for music* [as an alternative to piracy].'' *Id.* at ¶ 58.

5. Summary of Rates Determined

In conclusion, the Judges find that our consideration of the 801(b) policy factors indicates that both a nominal rate of 9.1 cents for physical products and permanent downloads and a nominal rate of 24 cents for ringtones are reasonable without further adjustment over the term of these licenses.

6. RIAA's Proposed General DPD Rate

As previously discussed, the parties to this proceeding are asking the Judges to establish royalty rates for physical phonorecords, permanent downloads and ringtones, the parties themselves having agreed to rates for limited downloads and interactive streaming. RIAA insists in its Proposed Conclusions of Law that we are obligated to establish a catch-all rate for DPDs (but not physical product) that are not permanent, limited downloads, interactive streaming or ringtones. RIAA PCL at ¶¶ 164–170. It concludes that such a catch-all rate—which it describes as a rate for ''general DPDs''—is required by 17 U.S.C. 115(c)(3)(C) of the Copyright Act which directs us to establish rates and terms ''for the activities specified by this section.'' RIAA submits that the correct rate for ''general DPDs'' should be the same as the one it has proposed for physical phonorecords and permanent downloads. For the reasons discussed below, we decline to adopt RIAA's proposal.

RIAA's interpretation of ''the activities specified by this section'' incorrectly conflates ''activities'' with its conception of musical products and services offered as digital phonorecord deliveries. The ''activities'' referred to in section 115 are the making and distribution of phonorecords, *see* 17 U.S.C. 115 (preamble), not musical products and services. Our obligation to set rates and terms for the making and distribution of phonorecords is amplified only with respect to the distinction that we must draw between phonorecords that are incidental to a transmission that constitutes a digital phonorecord delivery and ''digital phonorecord deliveries in general.'' 17 U.S.C. 115(c)(3)(C). Even RIAA does not suggest that the latter language creates a standalone category, separate from the music products and services currently offered or which *may* someday be offered, and known as a general DPD.[47] In sum, we cannot find any statutory obligation that requires us to set a rate for general DPDs.

Furthermore, and even more importantly, even if we were to accept RIAA's argument that such a rate must be set, RIAA (as well as DiMA and the Copyright Owners) has failed to present any evidence whatsoever to support a rate determination. All RIAA has given us is a proposal that the rate for general DPDs should be the same as that for physical products and permanent downloads, plus a couple of oblique references to Copyright Owners' witnesses mentioning the possible introduction of future hybrid musical products. RIAA PCL at ¶ 165. We cannot adopt rates for even one of these future products in the face of such an empty record, let alone a single rate applicable to a variety of such products, without acting arbitrarily and capriciously. *See Recording Industry Ass'n of America* v. *Librarian of Congress*, 176 F.3d 528, 535–36 (DC Cir. 1999) (Librarian acted improperly by adopting terms with no record evidence to support them); *accord, Nat'l Ass'n of Broadcasters* v. *Librarian of Congress*, 146 F. 3d 907, 924 (DC Cir. 1998) (Librarian must act with regard to the record). Nor do we see how a convincing record could be built at this time due to the speculative nature of the products and the consequent lack of evidentiary tools that we would possess to evaluate them in setting rates.

V. Terms

Like the webcasting and preexisting subscription and satellite digital audio radio services proceedings, the current proceeding requires the Copyright Royalty Judges to establish ''terms of royalty payments'' for the section 115 license. 17 U.S.C. 115(c)(3)(C). Unlike the prior proceedings, however, authority to set the terms is divided between the Judges and the Register of Copyrights.[48] RIAA and Copyright Owners agreed that the Judges' authority to adopt their proposals was limited to provisions related to notice of use of copyright owners' works and recordkeeping, though they disagreed as to whether the Judges have authority to adopt provisions related to late payments. On July 25, 2008, the Judges referred to the Register of Copyrights material questions of substantive law concerning the authority to adopt terms, and the Register delivered her decision on August 8, 2008. *See Memorandum Opinion on Material Questions of Substantive Law*, Docket No. RF 2008–1 (August 8, 2008); *see also*, 73 FR 48396 (August 19, 2008).

A. Proposals of the Parties

1. RIAA

RIAA initially proposed four terms in this proceeding. One of the requests proposed a term providing that when a DPD is not distributed directly by the compulsory licensee, it should be considered as distributed in the accounting period in which it is reported to the compulsory licensee, contrary to 37 CFR 201.19(a)(6) of the Register's rules which provides that a DPD is to be treated as made and distributed on the date that it is digitally transmitted. RIAA now considers this term as being outside the authority of the Judges to adopt and is no longer proposing it. *See* Second Amended Proposed Rates and Terms of the Recording Industry Association of America, Inc. at 7, n.2 (''RIAA Second Amended Proposal''). As this proposed term is no longer before us, the Judges do not consider it.

The other three terms are as follows. First, RIAA asks that we adopt a term permitting monthly and annual statements of account to be signed by a duly authorized agent of the compulsory licensee, notwithstanding 37 CFR 201.19(e)(6) and (f)(6)(i) which require that the signature be of a duly authorized officer of a corporation or, if the licensee is a partnership, a partner. RIAA PFF at ¶¶ 1770–71; RIAA Second Amended Proposal at 7. Second, RIAA requests that an audit performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor serve as acceptable verification in lieu of 37 CFR 201.19(f)(6) which requires that each annual statement of account be certified by a licensed Certified Public Accountant. RIAA PFF at ¶¶ 1772–76; RIAA Second Amended Proposal at 7. Third, RIAA requests that the Judges issue a regulation ''clarifying'' that the Section 115 license extends to all reproduction and distribution rights that may be necessary to engage in activities covered by the license, including (1) the making of reproductions by and for end users; (2) reproductions made on servers; and (3) incidental reproductions made under authority of the licensee in the normal course of engaging in such activities, including cached, network, and buffer

[47] The weakness of RIAA's interpretation of ''activities specified by this section'' is further underscored by its particular confinement to the category of DPDs. The sentence from which the phrase is drawn refers to a proceeding under chapter 8 to establish rates and terms for all of Section 115, not just DPDs. Pushing RIAA's argument to its logical conclusion would mean that we would have to set a general rate for both DPD and non-DPD phonorecords (*i.e.*, physical products).

[48] The Register's current regulations for the Section 115 license are set forth in 37 CFR 201.18–19.

reproductions. RIAA PFF at ¶¶ 1777–78; RIAA Second Amended Proposal at 7.

RIAA makes two additional requests in its Second Amended Proposal that, while not stylized as terms, are similar in nature to the third request described above. These terms are offered as a part of RIAA's alternative rate structure which seeks to convert its percentage of revenue rate into a penny rate. The first calls for an interpretation of the statute related to locked content. ''Locked content,'' according to RIAA

> is a recording that has been encrypted or degraded so as to be accessible in non-degraded form only for limited previewing absent a purchase transaction. For example, a computer hard drive or an MP3 player might ship with a thousand or more locked recordings that would be available for the consumer to buy and unlock.

RIAA PFF at ¶ 1674 (*citing* testimony of Andrea Finkelstein and Mark Eisenberg); *see also*, RIAA Second Amended Proposal at 6. RIAA requests that the Judges determine that a locked content product is considered distributed for purposes of the section 115 license, and the royalty becomes payable, when the product is unlocked by the consumer. RIAA PFF at ¶ 1676. The other term related to RIAA's alternative penny rate proposal is related to what RIAA describes as ''multiple instances.'' Specifically, RIAA seeks a determination from the Judges that when there are multiple fixations of the same sound recording on the same product or as a la carte downloads as part of a single transaction, the price of the transaction should be used to determine the applicable rate category and all fixations should be considered one for purposes of the Section 115 license. RIAA PFF at ¶ 1678; RIAA Second Amended Proposal at 6. This clarification of the statute is necessary, according to RIAA, so that products such as DualDisc, where the same sound recording appears on a disc multiple times to enable the disc to be played on multiple devices or at different levels of sound quality, are paid for at the single penny rate and not ''multiple instances'' for all reproductions of the same recording. RIAA PPF at ¶ 1679.

2. Copyright Owners

Copyright Owners propose five terms, one of which seeks a clarification of the statute. The centerpiece of Copyright Owners' requests, and the one to which it supplied the most testimony, is the application of a 1.5% per month late fee from the day payment should have been made to the day payment is actually received by a copyright owner. Copyright Owners PFF at ¶ 842; Copyright Owners Amended Proposed Rates and Terms at 3 (July 2, 2008). A requested term related to this proposal is the recovery of reasonable attorneys fees expended by copyright owners to collect past due royalties. Copyright Owners PFF at ¶ 842; Copyright Owners Amended Proposed Rates and Terms at 4. And a third proposed term, which Copyright Owners claim is related to the late payment issue, is a 3% pass-through assessment where a compulsory licensee authorizes a digital music service to make and distribute DPDs. Copyright Owners PFF at ¶ 842; Copyright Owners Amended Proposed Rates and Terms at 3–4. A pass-through charge is necessary, according to Copyright Owners, because pass-through licenses result in an inability of music publishers to audit music services, result in payment delays, and prevent music publishers from establishing direct business relationships with music services. Copyright Owners PFF at ¶¶ 862–865.

Copyright Owners' fourth request is related to the audits of compulsory licensees that they currently conduct. Specifically, Copyright Owners seek a term that requires the reporting for each specific activity licensed under Section 115 and, in the case of pass-through licenses, the identification of the online retailer through which the DPDs occurred. Copyright Owners PFF at ¶ 842; Copyright Owners Amended Proposed Rates and Terms at 4.

The fifth and final term [49] seeks a ''clarification'' of 17 U.S.C. 115(c)(2) as to when phonorecords are made and distributed and therefore when payment is calculated and becomes due. Copyright Owners request that we determine that the royalty fee becomes due on the date that a phonorecord is distributed, not the date on which it is manufactured. Copyright Owners PFF at ¶¶ 842, 867; Copyright Owners Amended Proposed Rates and Terms at 4.

3. DiMA

Consistent with DiMA's rate proposal of a percentage of revenue, DiMA proposes a definition of revenue which includes definitions of applicable receipts, a permanent digital phonorecord delivery, a licensee, a licensee's carriers and a licensed work. DiMA Second Amended Proposed Rates and Terms at 1–3. Because the Judges are not adopting a percentage of revenue rate structure, consideration of these proposed terms is not necessary. This leaves DiMA with one proposed term which is another request for ''clarification'' of the statute. DiMA asks the Judges to clarify that the section 115 license extends to, and includes full payment for, all reproductions necessary to engage in the activities permitted by the license, including masters, reproductions on servers, cached, network and buffer reproductions, and the making of reproductions by and for end users. *Id.*

B. Adopted Term: Late Fee

Section 803(c)(7) of the Copyright Act provides that a determination of the Copyright Royalty Judges may include terms with respect to late payment, and the Register of Copyrights has confirmed that we have authority to adopt terms for past due payments for this statutory license. *See* Memorandum Opinion on Material Questions of Substantive Law, RF 2008–1 at 11 (August 8, 2008), 73 FR 48399 (August 19, 2008). Consistent with our adoption of the same term for late payments in the *Webcaster II* and *SDARS* determinations, 72 FR 24084, 24107 (May 1, 2007) (*Webcaster II*), 73 FR 4080, 4099 (January 24, 2008) (*SDARS*), we are establishing a late payment fee of 1.5% per month measured from the date the payment was due as provided in the regulations of the Register. *See* 37 CFR 201.19(e)(7)(i).

RIAA argues that the marketplace for mechanical licenses with music publishers does not provide for late fees, noting their absence in Harry Fox Agency licenses[50] and certain licensing agreements executed by EMI Music Publishing and BMI Music Publishing, and submits that we are therefore precluded from adopting such a term. RIAA PFF at ¶¶ 1784–92; RIAA PCL at ¶¶ 219–20. Were the standard for considering terms under the section 115 license willing buyer/willing seller, we might be given pause. However, we are directed by the terms of this license to establish reasonable terms that are consistent with the section 801(b)

[49] Copyright Owners also requested a particular definition of revenue, which it identified as a term, for the operation of its rate proposal for ringtones. Copyright Owners PFF at ¶ 842; Copyright Owners Amended Proposed Rates and Terms at 4. However, since the Judges are not adopting Copyright Owners' rate proposal for ringtones and instead are adopting a penny rate, consideration of a definition of revenue is not necessary.

[50] Copyright Owners and RIAA presented conflicting testimony as to the extent that late payments occur under licenses issued by the Harry Fox Agency and to the extent that those late payments were covered by advances paid by certain record companies. *Compare* 5/19/2008 Tr. 7033–35 (Pedecine) (70 percent of total dollars owed was late, the average lateness of such payments was 80 days) with RIAA PFF at ¶¶ 1793, 1805 and 1812 (writers and publishers are the cause of most late payments and record companies pay advances to cover many late payment situations).

factors. RIAA does not argue that a 1.5% per month late fee is violative of one or more of the section 801(b) factors, nor that section 801(b) requires a downward adjustment of the fee. As we said in *SDARS*, ''[i]n determining an appropriate late fee, a balance must be struck between providing an effective incentive to the licensee to make payments timely on the one hand and not making the fee so high that it is punitive on the other hand.'' 73 FR at 4099 (also applying the section 801(b) factors). We determine that the 1.5% late fee achieves this balance.

In further resisting a late payment fee, RIAA argues that late payments are often not the fault of the record companies and are often the result of songwriters and producers in certain genres of music failing to agree as to the appropriate ''copyright splits''—*i.e.*, who and how many individuals have contributed copyrightable authorship to the creation of a musical work and are therefore entitled to royalties. RIAA PFF at ¶¶ 1793–1804. RIAA also faults music publishers for internal administrative failings which, according to RIAA, often result in record companies being unable to timely pay royalties to the correct recipients. RIAA PFF at ¶¶ 1793–1804. The reasons for why payments are late, however, represent the parties' disagreement with the payment requirements set forth in the statute and in the Register of Copyrights' regulations. *See* 37 CFR 201.19(e)(7), (f)(7). If users of the Section 115 license cannot possibly make payments in compliance with those requirements, then they must seek redress from the Congress or the Copyright Office. They have no bearing on our determination where we have not been presented with testimony that a 1.5% per month late fee is so burdensome and unfair as to escape the bounds of reasonableness as defined by Section 801(b).

C. Terms Not Adopted

Putting aside the question of the Judges' authority *vis-à-vis* the Register of Copyright to adopt particular types of terms, the Judges determine that there are immensely practical reasons for not adopting the remaining terms that the parties propose. Two of RIAA's proposed terms—permitting duly authorized agents to sign statements of account and permitting annual statements of account to be verified by non-certified auditors—are contrary to express provisions set forth in the Register's regulations. *See* 37 CFR 201.19(e)(6) and (f)(6)(i) (statement of account must be signed by officer of a corporation or a partner), 17 U.S.C. 115(c)(5) and 37 CFR 201.19(f)(6) (annual statement of account must be certified by licensed Certified Public Accountant). Were the Judges to adopt these two proposals, members of the public seeking to use the Section 115 license would be required to choose between the Judges' and the Register's regulations in completing their statements of account or to determine whether compliance with both sets of regulations was required.[51] Given that RIAA failed to produce compelling evidence that the Register's regulations are so burdensome as to require the adoption of contrary provisions, we decline to adopt RIAA's proposed terms.[52]

The same reasoning applies to Copyright Owners' request for the reporting of royalties earned for each specific configuration of a licensed product. The Register's regulations governing both the monthly and annual statements of account already provide that each report identify the configuration of the product involved. *See* 37 CFR 201.19(e)(3)(ii) (monthly statement), 37 CFR 201.19(f)(4) (annual statement). We likewise decline to adopt Copyright Owners' request for identification of a digital music service provider operating pursuant to a pass-through license. Copyright Owners suggested that such a requirement might assist copyright owners' auditing efforts but failed to demonstrate that the effectiveness of auditing is foreclosed by the lack of such information.

Copyright Owners ask us to adopt a 3% surcharge on royalties for all pass-through licensing arrangements arguing that such a provision is necessary because these arrangements frequently result in late payments and eliminate music publishers' opportunities to interact with pass-through licensees. Copyright Owners PFF at ¶¶ 842, 862. We have already adopted a late fee requirement and decline to adopt an additional one[53] because of the nature of the licensing arrangement, which is permitted by 17 U.S.C. 115(a)(3)(A). To the extent that the proposed fee is not another late charge but is a request for a higher royalty rate for pass-through licenses, we decline to adopt the proposal because Copyright Owners failed to present any credible testimony or marketplace evidence supporting the 3% figure. For the same reasons, we also decline to adopt Copyright Owners' request for attorneys fees on the collection of late payments. See Copyright Owners PFF at ¶¶ 842, 866. In addition, Section 115(c)(6) enumerates the remedy for noncompliance by a compulsory licensee, which does not include the attorneys fees requested by Copyright Owners.

The remaining proposals of the parties fall within the rubric of requests for ''clarification'' of the statute. DiMA seeks a determination as to the scope of the license with respect to copies made in the delivery of digital music. DiMA PFF at ¶ 240; DiMA Second Amended Proposed Rates and Terms at 4. RIAA makes the same request, albeit proposing slightly different language. RIAA also seeks a determination that product containing musical works is not distributed (described by RIAA as ''unlocked'') until accessed by the consumer, plus a determination that multiple reproductions contained within a single product are considered only one licensed instance—and generating only one royalty fee—under the statute. RIAA PFF at ¶¶ 1674–76, 1678–82; RIAA Second Amended Proposal at 6. And Copyright Owners seek a ruling that the royalty obligation of the statute is triggered when a product is manufactured *and* distributed, as opposed to only manufactured. Copyright Owners PFF at ¶¶ 842, 867; Copyright Owners Amended Proposed Rates and Terms at 4. All of these requests suffer from the same infirmity: they require the Judges to interpret the scope, operation and/or obligations of the Section 115 license, which is inconsistent with our authority in the proceeding to establish rates and terms of royalty payments. *Accord, Memorandum Opinion on Material Questions of Law,* Docket No. RF 2008–1 at 10 (August 8, 2008); see also, 73 FR 48399 (August 19, 2008). We therefore decline to adopt them.

VI. Determination and Order

Having fully considered the record, the Copyright Royalty Judges make the above Findings of Fact based on the record. Relying upon these Findings of Fact, the Copyright Royalty Judges unanimously adopt every portion of this Determination of the Rates and Terms for the making and distribution of phonorecords, including digital phonorecord deliveries (''DPDs''), under the compulsory license set forth in section 115 of the Copyright Act.

[51] We also believe that RIAA's proposal would add an unnecessary layer of complexity to the regulatory process, encouraging, if not requiring, compulsory licensees to constantly cross-check the Judges' and Register's regulations for conflicting provisions.

[52] Likewise, we make no recommendation to the Register to alter or amend her current regulations on this point.

[53] The surcharge is in effect a triple charge because the proposed fee is twice the amount of the late fee that we have adopted.

So Ordered.

James Scott Sledge,

Chief U.S. Copyright Royalty Judge.

William J. Roberts, Jr.,

Copyright Royalty Judge.

Stanley C. Wisniewski,

Copyright Royalty Judge.

Dated: November 24, 2008.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Final Regulations

■ For the reasons set forth in the preamble, the Copyright Royalty Judges are adding Part 385 to Chapter III of title 37 of the Code of Federal Regulations to read as follows:

PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

Subpart A—Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones

Sec.
385.1 General.
385.2 Definitions.
385.3 Royalty rates for making and distributing phonorecords.
385.4 Late payments.

Subpart B—Interactive Streaming, Other Incidental Digital Phonorecord Deliveries and Limited Downloads

Sec.
385.10 General.
385.11 Definitions.
385.12 Calculation of royalty payments in general.
385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.
385.14 Promotional royalty rate.
385.15 Timing of payments.
385.16 Reproduction and distribution rights covered.
385.17 Effect of rates.

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

Subpart A—Physical Phonorecord Deliveries, Permanent Digital Downloads and Ringtones

§ 385.1 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of digital phonorecord deliveries, in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* Licensees relying upon the compulsory license set forth in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to use of musical works within the scope of such agreements.

§ 385.2 Definitions.

For purposes of this subpart, the following definitions apply:

Copyright Owners are nondramatic musical work copyright owners who are entitled to royalty payments made under this subpart pursuant to the compulsory license under 17 U.S.C. 115.

Digital phonorecord delivery means a digital phonorecord delivery as defined in 17 U.S.C. 115(d).

Licensee is a person or entity that has obtained a compulsory license under 17 U.S.C. 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work, including by means of a digital phonorecord delivery.

Permanent digital download means a digital phonorecord delivery that is distributed in the form of a download that may be retained and played on a permanent basis.

Ringtone means a phonorecord of a partial musical work distributed as a digital phonorecord delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

§ 385.3 Royalty rates for making and distributing phonorecords.

(a) *Physical phonorecord deliveries and permanent digital downloads.* For every physical phonorecord and permanent digital download made and distributed, the royalty rate payable for each work embodied in such phonorecord shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every ringtone made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

§ 385.4 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received by the Copyright Owner after the due date set forth in (201.19(e)(7)(i) of this title. Late fees shall accrue from the due date until payment is received by the Copyright Owner.

Subpart B—Interactive Streaming, Other Incidental Digital Phonorecord Deliveries and Limited Downloads

§ 385.10 General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for interactive streams and limited downloads of musical works by subscription and nonsubscription digital music services in accordance with the provisions of 17 U.S.C. 115.

(b) *Legal compliance.* A licensee that makes or authorizes interactive streams or limited downloads of musical works through subscription or nonsubscription digital music services pursuant to 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this subpart, and any other applicable regulations.

§ 385.11 Definitions.

For purposes of this subpart, the following definitions shall apply:

Interactive stream means a stream of a sound recording of a musical work, where the performance of the sound recording by means of the stream is not exempt under 17 U.S.C. 114(d)(1) and does not in itself or as a result of a program in which it is included qualify for statutory licensing under 17 U.S.C. 114(d)(2). An interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

Licensee means a person that has obtained a compulsory license under 17 U.S.C. 115 and its implementing regulations.

Licensed activity means interactive streams or limited downloads of musical works, as applicable.

Limited download means a digital transmission of a sound recording of a musical work to an end user, other than a stream, that results in a specifically identifiable reproduction of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed 1 month from the time of the transmission (unless the service, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use for another time period not to exceed 1 month), or in the case of a subscription transmission, a period of time following the end of the applicable subscription no longer than a subscription renewal period or 3 months, whichever is shorter; or

(2) A specified number of times not to exceed 12 (unless the service, in lieu of

retransmitting the same sound recording as another limited download, separately and upon specific request of the end user made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

(3) A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D).

Offering means a service's offering of licensed activity that is subject to a particular rate set forth in § 385.13(a) (*e.g.*, a particular subscription plan available through the service).

Promotional royalty rate means the statutory royalty rate of zero in the case of certain promotional interactive streams and certain promotional limited downloads, as provided in § 385.14.

Publication date means January 26, 2009.

Record company means a person or entity that

(1) Is a copyright owner of a sound recording of a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the copyright owner of the sound recording.

Relevant page means a page (including a Web page, screen or display) from which licensed activity offered by a service is directly available to end users, but only where the offering of licensed activity and content that directly relates to the offering of licensed activity (*e.g.*, an image of the artist or artwork closely associated with such offering, artist or album information, reviews of such offering, credits and music player controls) comprises 75% or more of the space on that page, excluding any space occupied by advertising. A licensed activity is directly available to end users from a page if sound recordings of musical works can be accessed by end users for limited downloads or interactive streams from such page (in most cases this will be the page where the limited download or interactive stream takes place).

Service means that entity (which may or may not be the licensee) that, with respect to the licensed activity,

(1) Contracts with or has a direct relationship with end users in a case where a contract or relationship exists, or otherwise controls the content made available to end users;

(2) Is able to report fully on service revenue from the provision of the licensed activity to the public, and to the extent applicable, verify service revenue through an audit; and

(3) Is able to report fully on usage of musical works by the service, or procure such reporting, and to the extent applicable, verify usage through an audit.

Service revenue. (1) Subject to paragraphs (2) through (5) of the definition of ''Service revenue,'' and subject to U.S. Generally Accepted Accounting Principles, *service revenue* shall mean the following:

(i) All revenue recognized by the service from end users from the provision of licensed activity;

(ii) All revenue recognized by the service by way of sponsorship and commissions as a result of the inclusion of third-party ''in-stream'' or ''in-download'' advertising as part of licensed activity (*i.e.*, advertising placed immediately at the start, end or during the actual delivery, by way of interactive streaming or limited downloads, as applicable, of a musical work); and

(iii) All revenue recognized by the service, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a relevant page of the service or on any page that directly follows such relevant page leading up to and including the limited download or interactive streaming, as applicable, of a musical work; provided that, in the case where more than one service is actually available to end users from a relevant page, any advertising revenue shall be allocated between such services on the basis of the relative amounts of the page they occupy.

(2) In each of the cases identified in paragraph (1) of the definition of ''Service revenue,'' such revenue shall, for the avoidance of doubt,

(i) Include any such revenue recognized by the service, or if not recognized by the service, by any associate, affiliate, agent or representative of such service in lieu of its being recognized by the service;

(ii) Include the value of any barter or other nonmonetary consideration;

(iii) Not be reduced by credit card commissions or similar payment process charges; and

(iv) Except as expressly set forth in this subpart, not be subject to any other deduction or set-off other than refunds to end users for licensed activity that they were unable to use due to technical faults in the licensed activity or other bona fide refunds or credits issued to end users in the ordinary course of business.

(3) In each of the cases identified in paragraph (1) of the definition of ''Service revenue,'' such revenue shall, for the avoidance of doubt, exclude revenue derived solely in connection with services and activities other than licensed activity, provided that advertising or sponsorship revenue shall be treated as provided in paragraphs (2) and (4) of the definition of ''Service revenue.'' By way of example, the following kinds of revenue shall be excluded:

(i) Revenue derived from non-music voice, content and text services;

(ii) Revenue derived from other non-music products and services (including search services, sponsored searches and click-through commissions); and

(iii) Revenue derived from music or music-related products and services that are not or do not include licensed activity.

(4) For purposes of paragraph (1) of the definition of ''Service revenue,'' advertising or sponsorship revenue shall be reduced by the actual cost of obtaining such revenue, not to exceed 15%.

(5) Where the licensed activity is provided to end users as part of the same transaction with one or more other products or services that are not a music service engaged in licensed activity, then the revenue deemed to be recognized from end users for the service for the purpose of the definition in paragraph (1) of the definition of ''Service revenue'' shall be the revenue recognized from end users for the bundle less the standalone published price for end users for each of the other component(s) of the bundle; provided that, if there is no such standalone published price for a component of the bundle, then the average standalone published price for end users for the most closely comparable product or service in the U.S. shall be used or, if more than one such comparable exists, the average of such standalone prices for such comparables shall be used. In connection with such a bundle, if a record company providing sound recording rights to the service

(i) Recognizes revenue (in accordance with U.S. Generally Accepted Accounting Principles, and including for the avoidance of doubt barter or nonmonetary consideration) from a

person or entity other than the service providing the licensed activity and;

(ii) Such revenue is received, in the context of the transactions involved, as consideration for the ability to make interactive streams or limited downloads of sound recordings, then such revenue shall be added to the amounts expensed by the service for purposes of § 385.13(b). Where the service is the licensee, if the service provides the record company all information necessary for the record company to determine whether additional royalties are payable by the service hereunder as a result of revenue recognized from a person or entity other than the service as described in the immediately preceding sentence, then the record company shall provide such further information as necessary for the service to calculate the additional royalties and indemnify the service for such additional royalties. The sole obligation of the record company shall be to pay the licensee such additional royalties if actually payable as royalties hereunder; provided, however, that this shall not affect any otherwise existing right or remedy of the copyright owner nor diminish the licensee's obligations to the copyright owner.

Stream means the digital transmission of a sound recording of a musical work to an end user—

(1) To allow the end user to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a streaming cache reproduction; and

(3) That is also subject to licensing as a public performance of the musical work.

Streaming cache reproduction means a reproduction of a sound recording of a musical work made on a computer or other receiving device by a service solely for the purpose of permitting an end user who has previously received a stream of such sound recording to play such sound recording again from local storage on such computer or other device rather than by means of a transmission; provided that the user is only able to do so while maintaining a live network connection to the service, and such reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Subscription service means a digital music service for which end users are required to pay a fee to access the service for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether such payment is made for access to the service on a standalone basis or as part of a bundle with one or more other products or services, and including any use of such a service on a trial basis without charge as described in § 385.14(b).

§ 385.12 Calculation of royalty payments in general.

(a) *Applicable royalty.* Licensees that make or authorize licensed activity pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the minimum royalties and subscriber-based royalty floors for specific types of services provided in § 385.13, except as provided for certain promotional uses in § 385.14.

(b) *Rate calculation methodology.* Royalty payments for licensed activity shall be calculated as provided in paragraph (b) of this section. If a service includes different offerings, royalties must be separately calculated with respect to each such offering. Uses subject to the promotional royalty rate shall be excluded from the calculation of royalties due, as further described in this section and the following § 385.13.

(1) *Step 1:* Calculate the All-In Royalty for the Service. For each accounting period, the all-in royalty for each offering of the service is the greater of

(i) The applicable percentage of service revenue as set forth in paragraph (c) of this section (excluding any service revenue derived solely from licensed activity uses subject to the promotional royalty rate), and

(ii) The minimum specified in § 385.13 of the offering involved.

(2) *Step 2:* Subtract Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each offering of the service, subtract the total amount of royalties for public performance of musical works that has been or will be expensed by the service pursuant to public performance licenses in connection with uses of musical works through such offering during the accounting period that constitute licensed activity (other than licensed activity subject to the promotional royalty rate). While this amount may be the total of the service's payments for that offering for the accounting period under its agreements with performing rights societies as defined in 17 U.S.C. 101, it will be less than the total of such public performance payments if the service is also engaging in public performance of musical works that does not constitute licensed activity. In the latter case, the amount to be subtracted for public performance payments shall be the amount of such payments allocable to licensed activity uses (other than promotional royalty rate uses) through the relevant offering, as determined in relation to all uses of musical works for which the public performance payments are made for the accounting period. Such allocation shall be made on the basis of plays of musical works or, where per-play information is unavailable due to bona fide technical limitations as described in step 4 in paragraph (b)(4) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3:* Determine the Payable Royalty Pool. This is the amount payable for the reproduction and distribution of all musical works used by the service by virtue of its licensed activity for a particular offering during the accounting period. This amount is the greater of

(i) The result determined in step 2 in paragraph (b)(2) of this section, and

(ii) The subscriber-based royalty floor resulting from the calculations described in § 385.13.

(4) *Step 4:* Calculate the Per-Work Royalty Allocation for Each Relevant Work. This is the amount payable for the reproduction and distribution of each musical work used by the service by virtue of its licensed activity through a particular offering during the accounting period. To determine this amount, the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for such offering by the total number of plays of all musical works through such offering during the accounting period (other than promotional royalty rate plays) to yield a per-play allocation, and multiplying that result by the number of plays of each musical work (other than promotional royalty rate plays) through the offering during the accounting period. For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound

recordings of musical works with a playing time of over 5 minutes, each play on or after October 1, 2010 shall be counted as provided in paragraph (d) of this section. Notwithstanding the foregoing, if the service is not capable of tracking play information due to bona fide limitations of the available technology for services of that nature or of devices useable with the service, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the service for making royalty payment allocations for the use of individual sound recordings.

(c) *Percentage of service revenue.* The percentage of service revenue applicable under paragraph (b) of this section is 10.5%, except that such percentage shall be discounted by 2% (*i.e.*, to 8.5%) in the case of licensed activity occurring on or before December 31, 2007.

(d) *Overtime adjustment.* For licensed activity on or after October 1, 2010, for purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of plays as follows:

(1) 5:01 to 6:00 minutes—Each play = 1.2 plays

(2) 6:01 to 7:00 minutes—Each play = 1.4 plays

(3) 7:01 to 8:00 minutes—Each play = 1.6 plays

(4) 8:01 to 9:00 minutes—Each play = 1.8 plays

(5) 9:01 to 10:00 minutes—Each play = 2.0 plays

(6) For playing times of greater than 10 minutes, continue to add .2 for each additional minute or fraction thereof.

(e) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information and belief of the licensee at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(5) and § 201.19 of this title. Without limitation, a licensee's statements of account shall set forth each step of its calculations with sufficient information to allow the copyright owner to assess the accuracy and manner in which the licensee determined the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a minimum royalty or subscriber-based royalty floor pursuant to § 385.13 does or does not apply) and, for each offering reported, also indicate the type of licensed activity involved and the number of plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

§ 385.13 Minimum royalty rates and subscriber-based royalty floors for specific types of services.

(a) *In general.* The following minimum royalty rates and subscriber-based royalty floors shall apply to the following types of licensed activity:

(1) *Standalone non-portable subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings only in the form of interactive streams and only from a non-portable device to which such streams are originally transmitted while the device has a live network connection, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum II as described in paragraph (c) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings either in the form of interactive streams or limited downloads but only from a non-portable device to which such streams or downloads are originally transmitted, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of the subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 50 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable subscription service.* Except as provided in paragraph (a)(4) of this section, in the case of a subscription service through which an end user can listen to sound recordings in the form of interactive streams or limited downloads from a portable device, the minimum for use in step 1 of § 385.12(b)(1) is the lesser of subminimum I as described in paragraph (b) of this section for the accounting period and the aggregate amount of 80 cents per subscriber per month. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled subscription services.* In the case of a subscription service made available to end users with one or more other products or services as part of a single transaction without pricing for the subscription service separate from the product(s) or service(s) with which it is made available (*e.g.*, a case in which a user can buy a portable device and one-year access to a subscription service for a single price), the minimum for use in step 1 of § 385.12(b)(1) is subminimum I as described in paragraph (b) of this section for the accounting period. The subscriber-based royalty floor for use in step 3 of § 385.12(b)(3) is the aggregate amount of 25 cents per month for each end user who has made at least one play of a licensed work during such month (each such end user to be considered an ''active subscriber'').

(5) *Free nonsubscription/ad-supported services.* In the case of a service offering licensed activity free of any charge to the end user, the minimum for use in step 1 of § 385.12(b)(1) is subminimum II described in paragraph (c) of this section for the accounting period. There is no subscriber-based royalty floor for use in step 3 of § 385.12(b)(3).

(b) *Computation of subminimum I.* For purposes of paragraphs (a)(2), (3) and (4) of this section, and with reference to paragraph (5) of the definition of ''service revenue'' in § 385.11 if applicable, subminimum I for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used in the relevant offering of the service during the accounting period—

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make interactive streams or limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 17.36% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 14.53% of the amount expensed by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has obtained from a third-party record company the rights to make interactive streams or limited downloads of a

sound recording without the right to reproduce and distribute the musical work embodied therein, 21% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum I for an accounting period shall be 17% of the amount expensed by the service for such sound recording rights for the accounting period.

(c) *Computation of subminimum II.* For purposes of paragraphs(a)(1) and (5) of this section, subminimum II for an accounting period means the aggregate of the following with respect to all sound recordings of musical works used by the relevant service during the accounting period—

(1) In cases in which a record company is the licensee under 17 U.S.C. 115 and a third-party service has obtained from the record company the rights to make interactive streams and limited downloads of a sound recording together with the right to reproduce and distribute the musical work embodied therein, 18% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum II for an accounting period shall be 14.53% of the amount expensed by the service for such rights for the accounting period.

(2) In cases in which the relevant service is the licensee under 17 U.S.C. 115 and the relevant service has obtained from a third-party record company the rights to make interactive streams or limited downloads of a sound recording without the right to reproduce and distribute the musical work embodied therein, 22% of the total amount expensed by the service in accordance with U.S. Generally Accepted Accounting Principles, which for the avoidance of doubt shall include the value of any barter or other nonmonetary consideration provided by the service, for such sound recording rights for the accounting period, except that for licensed activity occurring on or before December 31, 2007, subminimum II for an accounting period shall be 17% of the amount expensed by the service for such sound recording rights for the accounting period.

(d) *Computation of subscriber-based royalty rates.* For purposes of paragraph (a) of this section, to determine the minimum or subscriber-based royalty floor, as applicable to any particular offering, the service shall for the relevant offering calculate its total number of subscriber-months for the accounting period, taking into account all end users who were subscribers for complete calendar months, prorating in the case of end users who were subscribers for only part of a calendar month, and deducting on a prorated basis for end users covered by a free trial period subject to the promotional royalty rate as described in § 385.14(b)(2), except that in the case of a bundled subscription service, subscriber-months shall instead be determined with respect to active subscribers as defined in paragraph (a)(4) of this section. The product of the total number of subscriber-months for the accounting period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the minimum or subscriber-based royalty floor, as applicable, for the accounting period.

§ 385.14 Promotional royalty rate.

(a) *General provisions.* (1) This section establishes a royalty rate of zero in the case of certain promotional interactive streaming activities, and of certain promotional limited downloads offered in the context of a free trial period for a digital music subscription service under a license pursuant to 17 U.S.C. 115. Subject to the requirements of 17 U.S.C. 115 and the additional provisions of paragraphs (b) through (e) of this section, the promotional royalty rate shall apply to a musical work when a record company transmits or authorizes the transmission of interactive streams or limited downloads of a sound recording that embodies such musical work, only if—

(i) The primary purpose of the record company in making or authorizing the interactive streams or limited downloads is to promote the sale or other paid use of sound recordings by the relevant artists, including such sound recording, through established retail channels or the paid use of one or more established retail music services through which the sound recording is available, and not to promote any other good or service;

(ii) Either—

(A) The sound recording (or a different version of the sound recording embodying the same musical work) is being lawfully distributed and offered to consumers through the established retail channels or services described in paragraph (a)(1)(i) of this section; or

(B) In the case of a sound recording of a musical work being prepared for commercial release but not yet released, the record company has a good faith intention of lawfully distributing and offering to consumers the sound recording (or a different version of the sound recording embodying the same musical work) through the established retail channels or services described in paragraph (a)(1)(i) of this section within 90 days after the commencement of the first promotional use authorized under this section (and in fact does so, unless it can demonstrate that notwithstanding its bona fide intention, it unexpectedly did not meet the scheduled release date);

(iii) In connection with authorizing the promotional interactive streams or limited downloads, the record company has obtained from the service it authorizes a written representation that—

(A) In the case of a promotional use commencing on or after October 1, 2010, except interactive streaming subject to paragraph (d) of this section, the service agrees to maintain for a period of no less than 5 years from the conclusion of the promotional activity complete and accurate records of the relevant authorization and dates on which the promotion was conducted, and identifying each sound recording of a musical work made available through the promotion, the licensed activity involved, and the number of plays of such recording;

(B) The service is in all material respects operating with appropriate license authority with respect to the musical works it is using for promotional and other purposes; and

(C) The representation is signed by a person authorized to make the representation on behalf of the service;

(iv) Upon receipt by the record company of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular service is in a material manner operating without appropriate license authority from such copyright owner, the record company shall within 5 business days withdraw by written notice its authorization of such uses of such copyright owner's musical works under the promotional royalty rate by that service;

(v) The interactive streams or limited downloads are offered free of any charge to the end user and, except in the case of interactive streaming subject to paragraph (d) of this section in the case

of a free trial period for a digital music subscription service, no more than 5 sound recordings at a time are streamed in response to any individual request of an end user;

(vi) The interactive streams and limited downloads are offered in a manner such that the user is at the same time (*e.g.*, on the same Web page) presented with a purchase opportunity for the relevant sound recording or an opportunity to subscribe to a paid service offering the sound recording, or a link to such a purchase or subscription opportunity, except—

(A) In the case of interactive streaming of a sound recording being prepared for commercial release but not yet released, certain mobile applications or other circumstances in which the foregoing is impracticable in view of the current state of the relevant technology; and

(B) In the case of a free trial period for a digital music subscription service, if end users are periodically offered an opportunity to subscribe to the service during such free trial period; and

(vii) The interactive streams and limited downloads are not provided in a manner that is likely to cause mistake, to confuse or to deceive, reasonable end users as to the endorsement or association of the author of the musical work with any product, service or activity other than the sale or paid use of sound recordings or paid use of a music service through which sound recordings are available. Without limiting the foregoing, upon receipt of written notice from the copyright owner of a musical work or agent of the copyright owner stating in good faith that a particular use of such work under this section violates the limitation set forth in this paragraph (a)(1)(vii), the record company shall promptly cease such use of that work, and within 5 business days withdraw by written notice its authorization of such use by all relevant third parties it has authorized under this section.

(2) To rely upon the promotional royalty rate, a record company making or authorizing interactive streams or limited downloads shall keep complete and accurate contemporaneous written records of such uses, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the service or services where each promotion is authorized (including the Internet address if applicable), the beginning and end date of each period of promotional activity authorized, and the representation required by paragraph (a)(1)(iii) of this section; provided that, in the case of trial subscription uses, such records shall instead consist of the contractual terms that bear upon promotional uses by the particular digital music subscription services it authorizes; and further provided that, if the record company itself is conducting the promotion, it shall also maintain any additional records described in paragraph (a)(1)(iii)(A) of this section. The records required by this paragraph (a)(2) shall be maintained for no less time than the record company maintains records of usage of royalty-bearing uses involving the same type of licensed activity in the ordinary course of business, but in no event for less than 5 years from the conclusion of the promotional activity to which they pertain. If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under this paragraph (a)(2) with respect to a specific promotion or relating to a particular sound recording of a musical work, the record company shall provide complete and accurate documentation within 10 business days, except for any information required under paragraph (a)(1)(iii)(A) of this section, which shall be provided within 20 business days, and provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the record company shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the record company does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the record company (but not any third-party service it has authorized) shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(3) If the copyright owner of a musical work or its agent requests a copy of the information to be maintained under paragraph (a)(1)(iii)(A) of this section by a service authorized by a record company with respect to a specific promotion, the service shall provide complete and accurate documentation within 20 business days, provided that if the copyright owner or agent requests information concerning a large volume of promotions or sound recordings, the service shall have a reasonable time, in view of the amount of information requested, to respond to any request of such copyright owner or agent. If the service does not provide required information within the required time, and upon receipt of written notice citing such failure does not provide such information within a further 10 business days, the uses will be considered not to be subject to the promotional royalty rate and the service (but not the record company) will be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(4) The promotional royalty rate is exclusively for audio-only interactive streaming and limited downloads of musical works subject to licensing under 17 U.S.C. 115. The promotional royalty rate does not apply to any other use under 17 U.S.C. 115; nor does it apply to public performances, audiovisual works, lyrics or other uses outside the scope of 17 U.S.C. 115. Without limitation, uses subject to licensing under 17 U.S.C. 115 that do not qualify for the promotional royalty rate (including without limitation interactive streaming or limited downloads of a musical work beyond the time limitations applicable to the promotional royalty rate) require payment of applicable royalties. This section is based on an understanding of industry practices and market conditions at the time of its development, among other things. The terms of this section shall be subject to de novo review and consideration (or elimination altogether) in future proceedings before the Copyright Royalty Judges. Nothing in this section shall be interpreted or construed in such a manner as to nullify or diminish any limitation, requirement or obligation of 17 U.S.C. 115 or other protection for musical works afforded by the Copyright Act, 17 U.S.C. 101 *et seq.* For the avoidance of doubt, however, except as provided in paragraph (a) of this section, statements of account under 17 U.S.C. 115 need not reflect interactive streams or limited downloads subject to the promotional royalty rate.

(b) *Interactive streaming and limited downloads of full-length musical works through third-party services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (b) apply to interactive streaming, and limited downloads (in the context of a free trial period for a digital music subscription service), authorized by record companies under the promotional royalty rate through third-party services (including Web sites) that is not subject to paragraphs (c) or (d) of

this section. Such interactive streams and limited downloads may be made or authorized by a record company under the promotional royalty rate only if—

(1) No cash, other monetary payment, barter or other consideration for making or authorizing the relevant interactive streams or limited downloads is received by the record company, its parent company, any entity owned in whole or in part by or under common ownership with the record company, or any other person or entity acting on behalf of or in lieu of the record company, except for in-kind promotional consideration used to promote the sale or paid use of sound recordings or the paid use of music services through which sound recordings are available;

(2) In the case of interactive streaming and limited downloads offered in the context of a free trial period for a digital music subscription service, the free trial period does not exceed 30 consecutive days per subscriber per two-year period; and

(3) In contexts other than a free trial period for a digital music subscription service, interactive streaming subject to paragraph (b) of this section of a particular sound recording is authorized by the record company on no more than 60 days total for all services (*i.e.*, interactive streaming under paragraph (b) of this section of a particular sound recording may be authorized on no more than a total of 60 days, which need not be consecutive, and on any one such day, interactive streams may be offered on one or more services); provided, however, that an additional 60 days shall be available each time the sound recording is re-released by the record company in a remastered form or as a part of a compilation with a different set of sound recordings than the original release or any prior compilation including such sound recording.

(4) In the event that a record company authorizes promotional uses in excess of the time limitations of paragraph (b) of this section, the record company, and not the third-party service it has authorized, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved. In the event that a third-party service exceeds the scope of any authorization by a record company, the service, and not the record company, shall be liable for any payment due for such uses; provided, however, that all rights and remedies of the copyright owner with respect to unauthorized uses shall be preserved.

(c) *Interactive streaming of full-length musical works through record company and artist services.* In addition to those of paragraph (a) of this section, the provisions of this paragraph (c) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate through a service (*e.g.*, a Web site) directly owned or operated by the record company, or directly owned or operated by a recording artist under the authorization of the record company, and that is not subject to paragraph (d) of this section. For the avoidance of doubt and without limitation, an artist page or site on a third-party service (*e.g.*, a social networking service) shall not be considered a service operated by the record company or artist. Such interactive streams may be made or authorized by a record company under the promotional royalty rate only if—

(1) The interactive streaming subject to this paragraph (c) of a particular sound recording is offered or authorized by the record company on no more than 90 days total for all services (i.e., interactive streaming under this paragraph (c) of a particular sound recording may be authorized on no more than a total of 90 days, which need not be consecutive, and on any such day, interactive streams may be offered on one or more services operated by the record company or artist, subject to the provisions of paragraph (b)(2) of this section); provided, however, that an additional 90 days shall be available each time the sound recording is re-released by the record company in a remastered form or as part of a compilation with a different set of sound recordings than prior compilations that include that sound recording;

(2) In the case of interactive streaming through a service devoted to one featured artist, the interactive streams subject to this paragraph (c) of this section of a particular sound recording are made or authorized by the record company on no more than one official artist site per artist and are recordings of that artist; and

(3) In the case of interactive streaming through a service that is not limited to a single featured artist, all interactive streaming on such service (whether eligible for the promotional royalty rate or not) is limited to sound recordings of a single record company and its affiliates and the service would not reasonably be considered to be a meaningful substitute for a paid music service.

(d) *Interactive streaming of clips.* In addition to those in paragraph (a) of this section, the provisions of this paragraph (d) apply to interactive streaming conducted or authorized by record companies under the promotional royalty rate of segments of sound recordings of musical works with a playing time that does not exceed the greater of:

(1) 30 seconds, or

(2) 10% of the playing time of the complete sound recording, but in no event in excess of 60 seconds. Such interactive streams may be made or authorized by a record company under the promotional royalty rate without any of the temporal limitations set forth in paragraphs (b) and (c) of this section (but subject to the other conditions of paragraphs (b) and (c) of this section, as applicable). For clarity, this paragraph (d) is strictly limited to the uses described herein and shall not be construed as permitting the creation or use of an excerpt of a musical work in violation of 17 U.S.C. 106(2) or 115(a)(2) or any other right of a musical work owner.

(e) *Activities prior to the publication date.* Notwithstanding paragraphs (a) through (d) of this section, in the case of licensed activity prior to the publication date, the promotional royalty rate shall apply to promotional interactive streams, and to limited downloads offered in the context of a free trial period for a digital music subscription service, that in either case are authorized by the relevant record company, if the condition set forth in paragraph (a)(1)(i) of this section is satisfied, subject only to the additional condition in paragraph (b)(1) of this section, and provided that a free trial period for a digital music subscription service authorized by the relevant record company shall be considered to be of 30 days' duration. In the event of a dispute concerning the eligibility of licensed activity prior to the publication date for the promotional royalty rate, a service asserting that its licensed activity is eligible for the promotional royalty rate shall bear the burden of proving that its licensed activity was authorized by the relevant record company and shall certify that the condition in paragraph (b)(1) of this section was satisfied.

§ 385.15 Timing of payments.

Payment for any accounting period for which payment otherwise would be due more than 180 days after the publication date shall be due as otherwise provided under 17 U.S.C. 115 and its implementing regulations. Payment for any prior accounting period shall be due 180 days after the publication date.

§ 385.16 Reproduction and distribution rights covered.

A compulsory license under 17 U.S.C. 115 extends to all reproduction and distribution rights that may be necessary for the provision of the licensed activity, solely for the purpose of providing such licensed activity (and no other purpose).

§ 385.17 Effect of rates.

In any future proceedings under 17 U.S.C. 115(c)(3)(C) and (D), the royalty rates payable for a compulsory license shall be established de novo.

Dated: November 24, 2008.

James Scott Sledge,

Chief, U.S. Copyright Royalty Judge.

[FR Doc. E9–1443 Filed 1–23–09; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2009–1]

Review of Copyright Royalty Judges Determination

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice; correction.

SUMMARY: The Register of Copyrights issues the following decision identifying and correcting erroneous resolutions of material questions of substantive law under title 17 that underlie or are contained in the Copyright Royalty Judges' final determination regarding adjustment of reasonable rates and terms of royalty payments for the making and distribution of phonorecords of musical works, Docket No. 2006–3 CRB DPRA. The Register concludes that the Copyright Royalty Judges erroneously did not refer two novel questions of law as required under the statute; that they were in error in their conclusions regarding both their and the Register's authority to review regulations submitted to them under an agreement by the participants; and that their conclusion that they could not review the agreement submitted by the participants led to the inclusion of regulations that constitute erroneous resolution by the CRJs of material questions of substantive law under title 17. This decision corrects such errors and shall be made part of the record of the proceeding (Docket No. 2006–3 CRB DPRA).

FOR FURTHER INFORMATION CONTACT: Tanya M. Sandros, Deputy General Counsel, and Stephen Ruwe, Attorney Advisor, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

The Copyright Royalty Judges (''CRJs'') are required by 17 U.S.C. 115(c)(3)(C) and Chapter 8 to make and issue determinations and adjustments of reasonable rates and terms of royalty payments for the making and distribution of phonorecords of musical works in accordance with the provisions of 17 U.S.C. 115. Under 17 U.S.C. 802(f)(1)(D), the Register of Copyrights may review for legal error the resolution by the CRJs of a material question of substantive law under title 17 that underlies or is contained in a final determination of the CRJs. If the Register of Copyrights concludes, after taking into consideration the views of the participants in the proceeding, that any resolution reached by the CRJs was in material error, the Register of Copyrights shall publish such decision correcting such legal errors in the **Federal Register**, together with a specific identification of the legal conclusion of the CRJs that is determined to be erroneous, which shall be made part of the record of the proceeding.

On November 24, 2008, the CRJs issued to the participants, posted to their Web site, and transmitted to the Register of Copyrights a copy of their final determination setting such rates and terms. *Final Determination of Rates and Terms in the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding*, Docket No. 2006–3 CRB DPRA (November 24, 2008). The Register of Copyrights, pursuant to section 802(f)(1)(D), has reviewed the CRJs' final determination. The Register concludes that the resolution of certain material questions of substantive law under title 17 that underlie or are contained in the final determination were in error and issues this decision correcting such errors.

In the course of their proceeding to set rates and terms of royalty payments for the making and distribution of phonorecords of musical works in accordance with the provisions of 17 U.S.C. 115, the CRJs addressed several material questions of substantive law that were properly referred to the Register of Copyrights under 17 U.S.C. 802(f)(1)(A)(ii) and 802(f)(1)(B). However, the Register determines that they erroneously did not refer two additional novel questions of law as required under the statute. The Register also finds that the CRJs were in error in their conclusions regarding both their and the Register's authority to review regulations submitted to them under an agreement by the participants. The CRJs' conclusion that they could not review these regulations led to the inclusion of regulations that constitute erroneous resolutions of material questions of substantive law under title 17, which as stated, are corrected herein.

The regulations ultimately contained in the CRJs' final determination establishing rates and terms of royalty payments for the activities under section 115, i.e. ''making and distributing phonorecords, including by means of digital phonorecord deliveries,'' are divided into two subparts. The first portion, Subpart A, is the product of the findings and deliberations of the CRJs, and delineates the rates and terms for three distinct categories of phonorecords under the section 115 license. These particular categories identify phonorecords made under specific conditions and are categorized as ''Physical phonorecord deliveries,'' ''Permanent digital downloads'' and ''Ringtones.'' *See* 37 CFR 385.1–385.4.[1] The second portion, Subpart B, is the product of settlement negotiations among the participants, and delineates the rates and terms for two additional distinct categories identifying phonorecords made under the section 115 license. These particular categories identify phonorecords made under specific conditions and are identified as ''Interactive streaming'' and ''Limited downloads.'' Subpart B also indicates specific conditions under which ''promotional royalty rates'' are applicable to ''Interactive streaming'' and ''Limited downloads.'' *See 37* CFR 385.10–385.17. The Register observes that although the participants informed the CRJs that their agreement would address Limited downloads and Interactive streaming, including all known incidental digital phonorecord deliveries, their agreement ultimately only addressed ''Interactive streaming'' and ''Limited downloads,'' thus addressing less activity than might reasonably have been expected.

The Register has also concluded that in setting forth rates and terms for these five distinct categories of phonorecords, the CRJs' final determination does not include rates and terms for certain ongoing activities which may be licensable under the section 115 license, *e.g.*, phonorecords made during the course of a non-interactive stream. Nevertheless, if a licensee makes and distributes phonorecords that do not fall within any of the five distinct categories of phonorecords for which specific rates have been set, the making and distribution of these phonorecords may still be covered by the section 115 license, so long as the licensee operates within the statutory terms of the license, including the provisions addressing Notice of Intention to Use and Statements of Account, but the licensee would incur no obligation to pay royalties for such activity during the relevant time period. However, under certain circumstances, which are dictated by section 803(d)(2)(B), royalty rates may be set retroactively in future proceedings.

Procedural Background of the CRJs' Proceeding

On January 9, 2006, the CRJs issued a Notice announcing commencement of this proceeding with a request for

[1] The Register cites to the regulations in the final determination, 37 CFR 385.1–385.17, by the references adopted by the CRJs. As of the date of this review, they have not been codified in the Code of Federal Regulations.

Petitions to Participate, which was published in the **Federal Register**. 71 FR 1453. In response to the Notice, the following parties submitted petitions to participate: Royalty Logic, Inc. (''RLI''); the Songwriters Guild of America (''SGA''); the National Music Publishers'' Association, Inc. (''NMPA''), the Songwriters Guild of America, and the Nashville Songwriters Association International, jointly (collectively, ''Copyright Owners''); Apple Computer, Inc.; America Online, Inc.; RealNetworks, Inc.; Napster, LLC; Sony Connect, Inc.; Digital Media Association (''DiMA''); Yahoo! Inc.; MusicNet, Inc.; MTV Networks, Inc.; and Recording Industry Association of America (''RIAA'').

On August 1, 2006, prior to the filing of written direct statements, RIAA sought from the CRJs a referral of a novel question of law to the Register of Copyrights (''Register''). *See Motion of [RIAA] Requesting Referral of a Novel Question of Substantive Law* (filed August 1, 2006). RIAA asserted that the CRJs were compelled to refer the novel question of law to the Register under section 802(f)(1)(B). After considering the views of all of the participants, the CRJs granted RIAA's motion in part and referred to the Register two novel questions of law regarding (1) whether ringtones—regardless of whether the ringtone is monophonic, polyphonic or a mastertone—constitute delivery of a digital phonorecord subject to statutory licensing under section 115 and (2) if so, what legal conditions and/or limitations would apply. *See Order Granting in Part the Request for Referral of a Novel Question of Law, Docket No. 2006–3 CRB DPRA (August 18, 2006)*. On October 16, 2006, the Register transmitted a Memorandum Opinion to the CRJs that addressed the novel questions of law. The Register's Memorandum Opinion was published in the **Federal Register** on November 1, 2006. 71 FR 64303.

On January 7, 2008, DiMA requested referral to the Register of what it described as a novel question of law as to whether ''interactive streaming'' constituted a digital phonorecord delivery (''DPD''), asserting that the CRJs were compelled to refer the novel question of law to the Register under section 802(f)(1)(B). *See Motion of [DiMA] Requesting Referral of a Novel Material Question of Substantive Law* (''DiMA Motion'') (January 7, 2008). Copyright Owners opposed DiMA's motion and RIAA took no position on it. The CRJs heard oral arguments on the motion on January 28, 2008. On February 4, 2008, the CRJs denied DiMA's motion, finding that the matter of what is ''interactive streaming'' presented a question of fact and not a question of law as required by section 802(f)(l)(B). *See Order Denying Motion of [DiMA], for a Referral of a Novel Material Question of Substantive Law, Docket No. 2006–3 CRB DPRA* (February 4, 2008).

Subsequent to the presentation of the rebuttal phase of their case, on May 15, 2008, the participants informed the CRJs that they had reached a settlement regarding the rates and terms for ''limited downloads and interactive streaming, including all known incidental digital phonorecord deliveries'' and agreed to submit the agreement to the CRJs at a later date. *See Joint Motion to Adopt Procedures for Submission of Partial Settlement* at 1 (filed May 15, 2008).

On July 2, 2008, after the evidentiary phase addressing the remaining issues in the proceeding, the participants filed their respective Proposed Findings of Fact and Conclusions of Law. The participants filed replies on July 18, 2008. Closing arguments occurred on July 24, 2008, after which time the record was closed.

On July 25, 2008, after closing arguments, the CRJs, on their own motion and under authority established in section 802(f)(1)(A)(ii), referred to the Register a material question of substantive law concerning the division of authority between the CRJs and the Register to establish terms under the section 115 statutory license. *See Order Referring Material Question of Substantive Law, Docket No. 2006–3 CRB DPRA* (July 25, 2008). On August 8, 2008, the Register transmitted a Memorandum Opinion to the CRJs that addressed the material question of substantive law. The Register's Memorandum Opinion was published in the **Federal Register** on August 19, 2008. 73 FR 48396.

On September 22, 2008, the participants filed their partial settlement with the CRJs, and it was published in the **Federal Register** on October 1, 2008. 73 FR 57033. Public comments were due on October 31, 2008. CTIA-The Wireless Association and the National Association of Broadcasters (''CTIA/NAB''), non-participants to the rate setting proceeding, jointly filed the only comment on the agreement. They argued that adoption of the settlement was beyond the CRJs' authority, contrary to law and bad policy. *See Comments of CTIA-The Wireless Association and the National Association of Broadcasters* (filed October 31, 2008).

On October 2, 2008, the CRJs issued their Initial Determination of Rates and Terms subject to review by the participants and the filing of motions for a rehearing. *See* 17 U.S.C. 803(c)(1) and (2)(A) and (b). On October 17, 2008, RIAA filed a motion for rehearing to reconsider the timing of the late payment fee of 1.5% per month. After reviewing the motion, the CRJs denied the motion for rehearing, by Order dated November 12, 2008. On November 24, 2008 the CRJs issued to the participants a copy of their *Final Determination of Rates and Terms in the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006–3 CRB DPRA* (''Final Determination''), and transmitted a copy to the Register of Copyrights. *See Final Determination of Rates and Terms in the Matter of Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, Docket No. 2006–3 CRB DPRA* (November 24, 2008).

On January 8, 2009, the Register requested the participants' views on potential legal errors contained in the CRJs' final determination. In response, the Register received written views from RIAA, Copyright Owners, and DiMA on January 15, 2009.

In accordance with the authority granted to the Register of Copyrights under 17 U.S.C. 802(f)(1)(D), the Register of Copyrights has reviewed the CRJs' determination of rates and terms of royalty payments under section 115 taking into account the views of the participants as reported in the CRJs' final determination and in response to a request from the Register for written comments on specific issues. *Request for Participants' Views Regarding Possible Legal ErrorsCcontained in the Copyright Royalty Judges' Final Determination* (January 8, 2009). The Register concludes that certain resolutions of material questions of substantive law under title 17 which underlie or are contained in the final determination of the CRJs are in error.

Review of Copyright Royalty Judges' Determination

1. Failure To Refer Novel Questions to the Register

Under 17 U.S.C. 802(f)(1)(B), in any case in which a novel material question of substantive law concerning an interpretation of those provisions of title 17 that are the subject of the proceeding is presented, the CRJs are required to request a written decision from the Register of Copyrights to resolve such a novel question. A ''novel question of law'' is a question of law that has not been determined in prior decisions, determinations, and rulings described in section 803(a) of the Copyright Act. *See*

17 U.S.C. 802(f)(1)(B)(ii). During the course of the proceeding, the CRJs referred two novel questions of substantive law to the Register, but they did not refer two additional novel material questions of substantive law concerning an interpretation of provisions of title 17. The CRJs' failure to refer a novel material question of substantive law is itself an erroneous legal resolution of ''a material question of substantive law under [title 17] that underlies or is contained in a final determination of the [CRJs].'' Therefore any failure to refer a novel material question is subject to the Register's review under section 802(f)(1)(D).

One such novel question arose amidst DiMA's motion for referral to the Register of what DiMA described as a novel question of substantive law as to whether ''interactive streaming'' constitutes a DPD under section 115. *See Motion of [DiMA] Requesting Referral of a Novel Material Question of Substantive Law* (filed January 7, 2008). After hearing the participants' arguments on the motion, the CRJs denied DiMA's motion, finding that the matter of what is ''interactive streaming'' presented a question of fact and not a question of law as required by section 802(f)(l)(B); a view shared by Copyright Owners. The CRJs accurately noted that the statute does not define or mention the term ''interactive streaming'' and that there is no agreement among the participants as to the precise meaning of the term. Additionally, the CRJs asserted that resolution of DiMA's question would require a certain amount of inquiry into the factual circumstances, and the types of digital transmissions, that may or may not result in reproductions of musical works that are licensable under section 115. *See Order Denying Motion of [DiMA], for a Referral of a Novel Material Question of Substantive Law, Docket No. 2006–3 CRB DPRA* (February 4, 2008).

The Register notes that when the CRJs are confronted with novel material questions of law they are not restricted to considering the motions and formulations of questions as submitted by the participants. Rather, they are required to refer any novel questions (or issues) of law ''concerning an interpretation of those provisions of [title 17] that are the subject of the proceeding.'' 17 U.S.C. 802(f)(1)(B).

While the issue of what is ''interactive streaming'' does appear to involve some degree of factual inquiry, it also raises at least one purely legal question that does not require resolution of specific factual disputes raised between the participants. For some time, the Office has recognized a general agreement among interested parties that streaming necessarily involves reproductions that are made on the receiving computer in order to better facilitate the actual performance of the work (often referred to as ''buffer'' copies). *See Notice of Inquiry* 66 FR 14099 (Mar. 9, 2001). The view that ''interactive streaming'' necessarily involves the making and delivery of buffer copies does not appear to be disputed among the participants to the proceeding. The purely legal question raised under such an undisputed understanding regarding ''interactive streaming'' is ''What constitutes a DPD?'' This question clearly requires an interpretation of a provision of title 17. Specifically, it requires an interpretation of the definition of ''digital phonorecord delivery'' as found in section 115(d).

Additionally, regardless of the factual issues surrounding DiMA's original motion for referral, the Register observes that when the CRJs considered two novel questions concerning the scope of the section 115 license with regard to ringtones—a term also not defined or even mentioned in title 17—the participants submitted briefs that revealed significant factual disagreement as to whether certain ringtones constituted derivative works. In spite of this disagreement, the questions regarding ringtones were properly referred to the Register. Moreover, the Register was able to provide a responsive and instructive decision on the legal questions which acknowledged that factual distinctions would continue to dictate whether various ringtone activities fell within the scope of the section 115 license without needing to resolve any dispute over specific factual situations. *See Memorandum Opinion on Material Questions of Law, Docket No. RF 2008–1* at 10 (August 8, 2008); *see also,* 73 FR 48396 (Aug. 19, 2008). Finally, the Register notes that section 802(f)(1)(B) does not confine the concept of novel question of substantive law to those involving interpretation of terms defined or mentioned in title 17.

Failure to refer the question of what constitutes a DPD to the Register has led to the adoption of a regulation that, on its face, overstates the scope of the section 115 license with respect to interactive streams. *See* 37 CFR 385.11 (defining an interactive stream as an incidental DPD). As discussed in a subsequent portion of this review, the CRJs may exercise their continuing jurisdiction to redraft the regulation to clarify that an interactive stream that delivers a reproduction of a sound recording that qualifies as a DPD is, for purposes of the license, an incidental DPD.

A second novel question was the subject of DiMA and RIAA's requests for a clarification of the statute. DiMA and RIAA, using slightly different language, requested a determination as to the scope of the license with respect to copies made to facilitate the delivery of digital music. *See DiMA PFF at ¶240* (July 2, 2008); *DiMA Second Amended Proposed Rates and Terms at 4* (July 2, 2008); *RIAA PFF at ¶1674–76, 1678–82* (July 2, 2008); *RIAA Second Amended Proposal at 6* (July 2, 2008). Citing to the Register's August 19, 2008, *Memorandum Opinion Responding to Material Questions of Law*, the CRJs concluded that DiMA and RIAA's requests would require interpretation of the scope, operation and/or obligations of the section 115 license, which is inconsistent with the CRJs' authority. *Final Determination* at 71–72, citing to *Memorandum Opinion on Material Questions of Law, Docket No. RF 2008–1* at 10 (Aug. 8, 2008); *see also*, 73 FR 48396, 48399 (August 19, 2008). The CRJs are correct in this conclusion. Furthermore, the CRJs are correct that such questions of scope are inconsistent with their authority. In making these observations, the CRJs appear to recognize that the participants' requests constituted a material question of substantive law. However, they do not appear to have recognized that the question was a novel one, and therefore required referral to the Register. Indeed, in the same Memorandum Opinion relied upon by the CRJs when they declined to interpret the scope of the license, the Register stated that ''In instances where particular rates are being requested for the creation of particular types of DPDs and there is some question whether these DPDs fall within the scope of the license, those questions must be resolved in the proceeding. When such a question has not been determined before, it is a novel question of law which should be referred to the Register under section 802(f)(1)(B).'' 73 FR at 48399.

Ultimately, the failure to refer this question is a harmless error because the Register has addressed the question and has determined, on an interim basis, that ''server copies and intermediate reproductions may come within the scope of the license. The Register note[d] that a person seeking to operate under the section 115 license must still satisfy the threshold requirements of the license. But, having done so, that licensee's coverage may extend to phonorecords other than those that are actually distributed provided that they

are made for the purpose of making and distributing a DPD.'' *Id.* at 66180.

Despite the fact that the failure to refer this question was ultimately harmless, had the CRJs referred the question, the participants and the CRJs could have adopted regulations that more clearly reflect the Register's clarification of the legal issue. *See* 37 CFR 201.18(a)(3); 201.19(a)(3); and 255.4. (Noting that ''a digital phonorecord delivery includes all phonorecords that are made for the purpose of making the digital phonorecord delivery.)''.

2. Erroneous Conclusion Regarding Authority Under Chapter and Section 115.

a. CRJs' authority to review.

Section 801(b)(7)(A) generally directs the CRJs to adopt as a basis for statutory terms and rates ''an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding between participants.'' In interpreting this provision, the CRJs concluded that ''[o]nly if an objection is received by one or more of the parties are we given any discretion over the settlement, and then we are limited to rejecting it if we determine that the settlement 'does not provide a reasonable basis for setting statutory rates and terms.''' *Final Determination* at 18–20, citing section 801(b)(7)(A)(ii) (emphasis added). RIAA, DiMA, and the Copyright Owners support the CRJs' interpretation of section 801(b)(7)(A). *Views of RIAA* at 6; *Views of Copyright Owners* at 9–10; and *Views of DiMA* at 1 (January 15, 2009). This interpretation, however, is in error.

While the provisions of section 801(b)(7)(A) do limit the circumstances under which the CRJs are able to decline to adopt aspects of an agreement, it does not foreclose the CRJs from ascertaining whether specific provisions are contrary to law. The noted limitations only apply to the CRJs' ability to adopt an agreement ''as a basis for statutory rates and terms,'' 17 U.S.C. 801(b)(7)(A), and, in doing so, they promote Congress's policy to encourage parties to negotiate statutory rates and terms. *See Views of RIAA* at 6 and Views of Copyright Owners at 11–12 (January 15, 2009).

The CRJs are not compelled to adopt a privately negotiated agreement to the extent it includes provisions that are inconsistent with the statutory license. Thus, while the CRJs are able to review the reasonableness of permissible terms and rates contained in an agreement only if a participant to the proceeding objects to the agreement, this provision does not preclude the CRJs from declining to adopt other portions of an agreement that would be contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law. Furthermore, nothing in the statute limits the CRJs from considering comments filed by non-participants which argue that proposed provisions are contrary to statutory law.

This conclusion is consistent with the CRJs' decision that it had the authority to decline to adopt language in the participants' agreement that stated that the rates in the agreement have no precedential effect and may not be introduced or relied upon in any governmental or judicial proceeding. 72 FR 61586. Moreover, courts have consistently held that agencies cannot adopt regulations that are contrary to law. *See, e.g.*, *Vasquez-Lopez* v. *Ashcroft*, 343 F.3d 961, 965 (9th Cir. 2003) (''The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.''), cited in *Joint Comment of CTIA–The Wireless Association and the National Association of Broadcasters* at 6, filed with Copyright Royalty Judges in response to their notice for comment on the participants agreement. 73 FR 57033 (Oct. 1, 2008).

Since the purpose of this proceeding is to establish rates and terms of payment for a statutory license, an agreement among the participants may only extend to establishing rates and terms which are permissible under the statute. Neither the participants nor the CRJs may add terms or conditions that alter or expand the statutory license. Hence, it was legal error for the CRJs to conclude that the restrictions on its authority to review the reasonableness of specific valid terms and rates also precluded its review of the legality of the provisions of the agreement as a threshold matter.

b. Register's authority to review.

The CRJs' erroneous conclusion that it had no authority to review broad aspects of the participants' agreement led them to also conclude that the settlement does not represent a resolution by the CRJs and that therefore the Register's review is not part of the procedure applicable to the relevant rates and terms established by the settlement provisions of section 802(f)(1)(D). *Final Determination* at 19–20. The CRJs, however, have no authority to determine whether the Register, in her review of the CRJs' final determination, has the authority to review for errors of law provisions in a settlement that is adopted by the CRJs. In reaching their conclusion, the CRJs argue that the provisions of the settlement do not constitute a finding of fact or resolution of law by the CRJs. However, as previously indicated, and despite their mistaken belief, the CRJs were not obligated to adopt *any* portion of an agreement that would be contrary to the provisions of the applicable license(s) or otherwise contrary to statutory law. By choosing to include provisions that they were able to reject, such provisions were freely adopted as resolutions by the CRJs.

Furthermore, section 801(b)(7)(A) requires the CRJs to ''*adopt* as a basis for statutory terms and rates or as a basis for the distribution of statutory royalty payments, an agreement concerning such matters reached among some or all of the participants in a proceeding,'' (emphasis added). By ''adopting'' an agreement, the CRJs necessarily accept the terms of the agreement and ''resolve'' any material question of substantive law that the adopted agreement purports to resolve.

c. CRJs' authority to determine rates for future activities.

The CRJs indicate that in this proceeding they were unable to adopt rates for future activities without acting arbitrarily and capriciously. *Final Determination* at 60–62 (November 24, 2008). The Register acknowledges that the CRJs decry the empty record in the instant case and finds no error in their decision not to set rates for future activities in this instance. However, to the extent the CRJs believe they lack the authority to set rates for future activities, the Register notes that the statute does not foreclose that possibility. Congress contemplated that the CRJs may set rates for particular activities, even prior to the inception of such activities.[2] Additionally, the Register observes that the CRJs have broad discretion in making their determinations. *See RIAA* v. *Copyright Royalty Tribunal*, 662 F.2d 1, 8 (D.C. Cir. 1981) (stressing that ''[t]he setting of the royalty rate is not a routine exercise in historical cost of service ratemaking for a public utility''). Furthermore, the Register notes that Congress directed the CRJs to set royalty rates based upon broad policy objectives that require judgments of an inescapably uncertain and predictive character. See 17 U.S.C.

[2] ''In cases where rates and terms have not, prior to the inception of an activity, been established for that particular activity under the relevant license, * * *'' 17 U.S.C. 803(d)(2)(B).

801(b)(1). For example, ''some of the statutory factors require the [Judges] to estimate the effect of the royalty rate on the future of the music industry,'' or to consider questions of ''fairness.'' *RIAA*, 662 F.2d at 8.

d. CRJs' authority to limit scope of the license by not setting certain rates.

The Register also observes that the consequence of the CRJs having set rates and terms for distinct categories of phonorecords, does not mean that the license is not available for additional activities under section 115. This observation is in contrast to the participants' views expressed in the closing arguments of the proceeding indicating that rights for categories of phonorecords for which no rate is set may only be cleared through negotiation. *See Closing Argument Transcripts* 7/24/08 at 7843–7844; 7954; 7975; and 7989.

As the Register observed in her response to the CRJs' referral of material questions of substantive law concerning the division of authority between the CRJs and the Register, ''[t]he CRJs do not have the authority to issue rules setting forth the scope of activities covered by the license.'' *Final Order, Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License* 73 FR 48399 (Aug. 19, 2008). Section 115 provides a license for the making and distribution of phonorecords, including DPDs. It does not condition coverage on whether a rate for the making and distribution of the phonorecords has been set. Consequently, failure to set a rate for any particular category of phonorecords cannot diminish or otherwise affect the availability of the license. Rather, when categories of phonorecords created in the course of particular ongoing activities within the scope of the license are not assigned a rate, the result is that there is no obligation to pay royalties for those particular activities during the relevant time period. Therefore, contrary to the conclusion of RIAA, there is no ''gap'' in coverage for DPDs that do not qualify as permanent digital downloads, limited downloads or interactive streams. *See Views of RIAA* at 5 (January 15, 2009). However, future proceedings may retroactively apply rates to a particular activity under section 115 in cases where rates and terms have not, prior to the inception of that activity, been established for the particular activity. Such retroactive rates and terms shall then apply from the inception of the particular activity. *See* Infra section 3(b) regarding the final determination's treatment of ''retroactive rates'' under 17 U.S.C. 803(d)(2)(B).

3. Problematic provisions in the regulations promulgated in the final determination.

In addressing the following regulatory provisions contained in the final determination, the Register acknowledges that both RIAA and Copyright Owners have argued that section 385.10 of the regulations satisfactorily addresses instances in which the rates and terms are, on their face, contrary to the statute. *See Views of RIAA* at 8 (January 15, 2009); Views of Copyright Owners at 15 (January 15, 2009). While section 385.10 states that rates and terms shall be ''in accordance with the provisions of 17 U.S.C. 115'' and requires that a licensee shall ''comply with the requirements of that section,'' such a provision is insufficient to address regulatory language that directly conflicts with the statute. The following regulations either conflict with statutory provisions in title 17 or could be read to alter or expand the statutory license. Prior determinations of the Librarian of Congress have considered and rejected similar terms that would have altered or expanded the statutory licenses as contrary to law. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 FR 45269 (July 8, 2002) (The Librarian concluded that neither the CARP nor the Librarian had the authority to adopt a regulation, whether as a condition of the license or not, that would foreclose a legal remedy for a breach of a legal obligation). Therefore, consistent with prior decisions specified in 803(a), and under the authority conferred by 802(f)(1)(D), the Register finds the following terms erroneous to the extent indicated herein.

a. Interactive streams constitute DPDs.

Section 385.11 of the regulations set forth in the final determination, which states that ''[an] interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)'' is erroneous. This articulation of what constitutes a DPD equates a means of transmission to the reproduction and delivery of a phonorecord. However, regulations cannot alter statutory terms of the section 115 license regarding what constitutes a DPD.

The statutory criteria as to what constitutes a DPD are set forth in the notice announcing an Interim Rule in which the Office explains that a DPD requires a reproduction of a sound recording that must meet all three criteria specified in the statutory definition: (1) It must be delivered, (2) it must be a phonorecord, and (3) it must be specifically identifiable. 73 FR 66173, 66176 (Nov. 7, 2008). Moreover, this Copyright Office rulemaking proceeding also addressed the question of interactive and non-interactive streams, noting that the determination of what constitutes a DPD is not dictated by the characterization of the transmission that delivers the phonorecord as interactive or non-interactive. Nevertheless, the Office did acknowledge that ''it may be more common for interactive streams to result in DPDs and that it may be relatively uncommon for non-interactive streams to do so. However, if phonorecords are delivered by a transmission service, then under the last sentence of 115(d) it is irrelevant whether the transmission that created the phonorecords is interactive or non-interactive.'' *Id.* at 66180. In other words, a stream—whether interactive or non-interactive—may or may not result in a DPD depending on whether all the aforementioned criteria are met. A regulation that provides categorically that ''[a]n interactive stream is an incidental digital phonorecord delivery under 17 U.S.C. 115 (c)(3)(C) and (D)'', without regard to whether any of those required criteria have been met, articulates an erroneous conclusion of law.

Hence, in light of the Office's analysis accompanying its adoption of a more particularized definition of a DPD, the proposed regulation which states that all interactive streams, as defined by the agreement, are DPDs, is overbroad because it would include interactive streams that do not result in the delivery of a DPD. The Office recognizes, however, that the regulation may not have been intended to set a rate for interactive streams that do not result in the delivery of a phonorecord and that the problem may be the result of inartful drafting of the regulation rather than an erroneous conclusion over what constitutes a DPD, an observation confirmed by RIAA. *Views of RIAA* at 4 (January 15, 2009). Nevertheless, because the regulatory text can easily be misinterpreted as stating that all interactive streams are incidental DPDs, and therefore subject to the license, the ambiguity in the regulatory text should be clarified. In either case, the problem is corrected by construing the regulation as referring only to those DPDs made and delivered during the course of an interactive stream. Under the CRJs' continuing jurisdiction, the regulation may be redrafted to clarify that an interactive stream that delivers a reproduction of a sound recording that

qualifies as a DPD is for purposes of the license, an incidental DPD.

b. Limited retroactive effect of rates.

Section 385.14(e) of the regulations set forth in the final determination provides, in pertinent part, that ''in the case of licensed activity prior to the publication date, the promotional royalty rate shall apply to promotional interactive streams, and to limited downloads offered in the context of a free trial period for a digital music subscription service.'' Such retroactive application of promotional royalty rates is erroneous to the extent that it is overbroad in reaching—and retroactively setting rates for—promotional activity where rates applicable to the activity were set for the previous rate period. Neither the CRJs nor the participants have the power to engage in retroactive rate setting other than that which is expressly authorized by the statute. As indicated in the Register's August 19, 2008 Memorandum Opinion responding to a material question of law, ''retroactive rulemaking is in most cases beyond the power of an agency'' *Memorandum Opinion on Material Questions of Law, Docket No.* RF 2008–1 at 10 (August 8, 2008), Citing to *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988). The *Bowen* court elaborated on retroactive rulemaking indicating that ''[r]etroactivity is not favored by the law'' and that where rules may have retroactive effect, the ''power is conveyed by Congress in express terms.'' *Bowen*, 488 U.S. at 208 (1988).

In the case of rates and terms set by the CRJs, title 17 establishes circumstances under which rates may be retroactively applied to activities under the section 115 license. Section 803(d)(2)(B) states that ''[i]n cases where rates and terms have not, prior to the inception of an activity, been established for that particular activity under the relevant license, such rates and terms shall be retroactive to the inception of activity under the relevant license covered by such rates and terms.''

With respect to limited downloads, the previous rate-setting proceeding established royalty fees that clearly applied to limited downloads, whether such downloads were promotional or not. See 37 CFR 255.5 (1999) (setting rates for DPDs ''except for digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, as specified in 17 U.S.C. 115(c)(3)(c) and (D)''). As the regulations adopted by the CRJs recite, ''A limited download is a general digital phonorecord delivery under 17 U.S.C. 115(c)(3)(C) and (D)'' Section 385.11 (definition of ''Limited download,'' para. 3). Thus limited downloads—whether or not for promotional purposes—that took place between the effective date of the rates established in 1999 and the effective date of the rates under review here are governed by the rates set in 1999.[3] This error is corrected by clarifying that such promotional royalty rates do not apply retroactively to limited downloads offered in the context of a free trial period for a digital music subscription service. Under the CRJs' continuing jurisdiction, the regulations may be redrafted to conform with this clarification.

With respect to interactive streams, the regulations adopted by the CRJs characterize interactive streams as incidental DPDs (see section 385.11 (definition of ''Interactive stream'')), and the Register accepts that characterization. The 1999 rate-setting proceeding did not set rates for incidental DPDs. Instead, the setting of rates for incidental DPDs was ''deferred'' for consideration until the next adjustment proceeding. See 37 CFR 255.6 (1999). The question thus arises whether, in light of the deferral of setting of rates for incidental DPDs, the retroactive application of the promotional royalty rate to promotional interactive streams would constitute a material error of law. The Register observes that both the meaning of the previous ''deferral'' of setting rates for incidental DPDs, (an activity whose inception appears to have occurred prior to the previous rate setting), as well as the statutory language, which was enacted after the previous proceeding, present complex issues which have not been fully briefed by the parties in any context. Section 803(d)(2)(B) could be read to authorize the retroactive setting of rates for incidental DPDs when no such rates had been previously set, even in cases where the issue could and perhaps should have been addressed in the previous rate-setting proceeding. On the other hand, the Register questions whether permitting the retroactive setting of rates under such circumstances is wise or consistent with the intent of Congress when it enacted the Copyright Royalty and Distribution Reform Act of 2003 (which among other things, amended Chapter 8 to include section 803(d)(2)(B). *See* H.R. Rep. 108–408 (2004), at 101 (remarks of co-sponsor and subcommittee ranking member Rep. Howard Berman: ''The series of interrelated changes ensures that all rates and terms for statutory licenses will be set prospectively, not retroactively, and eliminate, therefore, the possibility that a time period covered by a statutory license will commence before the establishment of rates and terms.''). However, given the lack of any evidence or in-depth argument on these questions and the compressed period of time allotted by section 802(f)(1)(D) for review by the Register of the CRJs' determination, the Register declines to come to a conclusion regarding application of the promotional royalty rate to promotional interactive streams.

c. Timing of payment.

Section 385.15 of the regulations states that ''[p]ayment for any accounting period for which payment otherwise would be due more than 180 days after the publication date shall be due as otherwise provided under 17 U.S.C. 115 and its implementing regulations. Payment for any prior accounting period shall be due 180 days after the publication date.'' This provision erroneously alters the timing of payment already established in section 115. Specifically, section 115(c)(5) states that ''[r]oyalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding;'' and it is this provision in the law that governs the payment schedule for use of the statutory license. While the Register understands the participants' reasons for adopting a term that would delay the first payment under the new rate schedule, there is no precedent for this practice, contrary to the RIAA's interpretation of a term adopted in a past rate setting proceeding. *See Views of RIAA* at 11 (January 15, 2009).

Prior determinations of the Librarian of Congress have considered and rejected as contrary to law similar terms on the basis that such terms would have altered or nullified provisions in the statutory licenses. For example, in 1998, the Librarian, upon the recommendation of the Register, rejected a term of payment which would have altered a payment schedule already established by law and delayed the first payment for six months. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings,* 63 FR at 25410, citing section 114(f)(5)(B). In that proceeding, the relevant statutory provision required ''any royalty payments in arrears [to] be made on or before the twentieth day of

[3] The Register finds so support for Copyright Owners' assertion that the previous rate for DPDs aplied only to permanent downloads. *See Views of Copyright Owners* at 17 (January 15, 2009).

the month next succeeding the month in which the royalty fees are set.'' Because the proposed term would not have required payment to be made in accordance with this provision, the Librarian rejected the term as contrary to law. Similarly, in a 2002 proceeding to set rates and terms for the digital performance of sound recordings and the making of ephemeral reproductions, the Librarian accepted the Register's recommendation to adopt September 1, 2002, as the effective date of the rates and terms for the statutory license rather than use the publication date of the Librarian's order. The purpose in setting a later effective date was to delay the adoption of the new rates and terms for a period of time as a way to reduce the financial burden on licensees who had to pay royalties that had accrued since 1998, and to ensure that the date that had been adopted for the first payment, October 20, 2002, complied with the statutory provision that required payments in arrears to be paid ''on a date certain in the month following the month in which the rate is set.'' 67 FR at 45271 (July 8, 2002). Had the rates and terms become effective on the publication date, this provision would have been contrary to law. Consequently, in both cases, the Register recommended that the Librarian adjust the effective date for the adopted rates and terms under his authority in 17 U.S.C. 802(g)(2002) to align the date for the first payment adopted through the rate setting proceeding with the date for making the first payment as specified in the statutory license.

The CRJs have the same authority to determine the date the adopted rates and terms take effect. 17 U.S.C. 803(d)(2)(B). This provision first establishes that ''[i]n [other] cases where rates and terms do not expire on a specified date, successor rates and terms shall take effect on the first day of the second month that begins after the publication of the determination of the Copyright Royalty Judges in the **Federal Register**.'' It then continues, ''except as otherwise provided in this title, or by the Copyright Royalty Judges, or as agreed by the participants in the proceeding that would be bound by the rates and terms.'' If the purpose of the regulation on timing of payments was to provide relief to licensees from an onerous first payment, altering the effective date of the license period would be one way to provide the licensees some relief in meeting its royalty obligation when payment becomes due. *See, e.g.*, *Determination of Reasonable Rates and Terms for the Digital Public Performance of Sound Recordings,* 63 FR at 25412 (May 8, 1998) (adjusting the effective date of the rate setting determination to provide licensees with time to adjust their business operations to meet obligation to make timely payment of arrears). The Register takes no position, however, on whether the effective date should be adjusted, noting that such a decision is within the discretion of the CRJs and the participants themselves.

d. Statements of account.

Section 385.14(a)(4) of the regulations set forth in the final determination, which provides, in pertinent part, that ''[f]or the avoidance of doubt, however, except as provided in paragraph (a) of this section, statements of account under 17 U.S.C. 115 need not reflect interactive streams or limited downloads subject to the promotional royalty rate'' is erroneous. Regulations cannot alter statutory terms of the section 115 license regarding Statements of Account. Title 17 authorizes the Register to ''prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section.'' 17 U.S.C. 115(c)(5). The CRJs cannot alter requirements issued by the Register regarding statements of account. As indicated in the Register's response to the CRJs' referral of material questions of substantive law concerning the division of authority between the CRJs and the Register, ''[a]uthority to issue regulations regarding these statements of account is the exclusive domain of the Register.'' *Final Order, Division of Authority Between the Copyright Royalty Judges and the Register of Copyrights under the Section 115 Statutory License* 73 FR 48398, (August 19, 2008).

Additionally, section 115(c)(5) indicates that ''[t]he regulations [of the Register] covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.'' 17 U.S.C. 115(c)(5). There is no statutory authority for an exception to this requirement for certain types of ''phonorecords'' or for the participants to alter this provision by agreement. As previously referenced, prior determinations of the Librarian of Congress have considered and rejected similar terms that altered or expanded the statutory licenses. *See* supra at section 3(c) citing 63 FR 25394, and 63 FR at 45269.

The problem is corrected by clarifying that licensees are required to operate within the Register's Statements of Account and Notice of Intention to Use regulations, even if such regulations foreclose the application of certain provisions included in the CRJs' final determination. Any agreement among a licensee and a copyright owner to adopt terms that alter the statutory conditions and terms necessarily means that the licensee is operating under a private license rather than the statutory license. *Harry Fox Agency, Inc.* v. *Mills Music, Inc.,* 543 F. Supp. 844, 851–852 (S.D.N.Y. 1982). Under the CRJs' continuing jurisdiction, the regulations may be redrafted to clarify that licensees must comply with the Register's regulations addressing Statements of Account.

CRJs' Continuing Jurisdiction

The Register notes that the CRJs enjoy continuing jurisdiction to amend their final determination. Under section 803(c)(4), ''[t]he Copyright Royalty Judges may issue an amendment to a written determination to correct any technical or clerical errors in the determination or to modify the terms, but not the rates, of royalty payments in response to unforeseen circumstances that would frustrate the proper implementation of such determination. Such amendment shall be set forth in a written addendum to the determination that shall be distributed to the participants of the proceeding and shall be published in the **Federal Register**.'' This authority may be exercised to codify the corrections identified and made herein by the Register through her authority under section 802(f)(1)(D).

Conclusion

Having reviewed the CRJs' resolution for legal error, pursuant to the requirements established in section 802(f)(1)(D), the Register issues this written decision correcting the above referenced legal errors not later than 60 days after the date on which the final determination by the CRJs was issued. This decision shall be made part of the record of the proceeding (Docket No. 2006–3 CRB DPRA), and the conclusions of substantive law involving and interpretation of title 17 contained herein shall be binding as precedent upon the CRJs in subsequent proceedings.

Dated: January 16, 2009.

Marybeth Peters,

Register of Copyrights.

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Federal Register

Monday,
January 26, 2009

Part III

Securities and Exchange Commission

17 CFR Parts 230, 232, 239, et al.

Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, and 274

[Release Nos. 33–8998; IC–28584; File No. S7–28–07]

RIN 3235–AJ44

Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting amendments to the form used by mutual funds to register under the Investment Company Act of 1940 and to offer their securities under the Securities Act of 1933 in order to enhance the disclosures that are provided to mutual fund investors. The amendments require key information to appear in plain English in a standardized order at the front of the mutual fund statutory prospectus. The Commission is also adopting rule amendments that permit a person to satisfy its mutual fund prospectus delivery obligations under section 5(b)(2) of the Securities Act by sending or giving the key information directly to investors in the form of a summary prospectus and providing the statutory prospectus on an Internet Web site. Upon an investor's request, mutual funds are also required to send the statutory prospectus to the investor. These amendments are intended to improve mutual fund disclosure by providing investors with key information in plain English in a clear and concise format, while enhancing the means of delivering more detailed information to investors. Finally, the Commission is adopting additional amendments that are intended to result in the disclosure of more useful information to investors who purchase shares of exchange-traded funds on national securities exchanges.

DATES: *Effective Date:* March 31, 2009.

Compliance Date: See Part III.D. of this release for information on compliance dates.

FOR FURTHER INFORMATION CONTACT: Kieran G. Brown, Senior Counsel; Sanjay Lamba, Senior Counsel; Devin F. Sullivan, Attorney; or Mark T. Uyeda, Assistant Director, Office of Disclosure Regulation, at (202) 551–6784, or, with respect to exchange-traded funds, Adam B. Glazer, Senior Counsel, Office of Regulatory Policy, at (202) 551–6792, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5720.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (''Commission'') is adopting amendments to rules 159A,[1] 482,[2] 485,[3] 497,[4] and 498[5] under the Securities Act of 1933 (''Securities Act'') and rules 304[6] and 401[7] of Regulation S–T.[8] The Commission is also adopting amendments to Form N–1A,[9] the form used by open-end management investment companies to register under the Investment Company Act of 1940 (''Investment Company Act'') and to offer securities under the Securities Act; Form N–4,[10] the form used by insurance company separate accounts organized as unit investment trusts and offering variable annuity contracts to register under the Investment Company Act and to offer securities under the Securities Act; and Form N–14,[11] the form used by registered management investment companies and business development companies to register under the Securities Act securities to be issued in business combinations.

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I. Executive Summary

Today, the Commission is adopting an improved mutual fund disclosure framework that it originally proposed in November 2007.[12] This improved disclosure framework is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the improved disclosure framework is the provision to all investors of streamlined and user-friendly information that is key to an investment decision.

To implement the new disclosure framework, we are adopting amendments to Form N–1A that will require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. We are also adopting a new option for satisfying prospectus delivery obligations with respect to mutual fund securities under the Securities Act. Under the option, key information will be sent or given to investors in the form of a summary prospectus (''Summary Prospectus''), and the statutory prospectus will be provided on an Internet Web site.[13] Funds that select this option will also be

[1] 17 CFR 230.159A.
[2] 17 CFR 230.482.
[3] 17 CFR 230.485.
[4] 17 CFR 230.497.
[5] 17 CFR 230.498.
[6] 17 CFR 232.304.
[7] 17 CFR 232.401.
[8] 17 CFR 232.10 *et seq.*
[9] 17 CFR 239.15A and 274.11A.
[10] 17 CFR 239.17b and 274.11c.
[11] 17 CFR 239.23.

[12] Investment Company Act Release No. 28064 (Nov. 21, 2007) [72 FR 67790 (Nov. 30, 2007)] (''Proposing Release'').

[13] A ''statutory prospectus'' is a prospectus that meets the requirements of Section 10(a) of the Securities Act [15 U.S.C. 77j(a)].

required to send the statutory prospectus to the investor upon request.

In addition, the Commission is adopting amendments to Form N–1A relating to exchange-traded funds (''ETFs'') that we proposed in a separate release in March 2008.[14] These amendments are intended to result in the disclosure of more useful information to investors who purchase shares of exchange-traded funds on national securities exchanges.

II. Background

Millions of individual Americans invest in shares of open-end management investment companies (''mutual funds''),[15] relying on mutual funds for their retirement, their children's education, and their other basic financial needs.[16] These investors face a difficult task in choosing among the more than 8,000 available mutual funds.[17] Fund prospectuses, which have been criticized by investor advocates, representatives of the fund industry, and others as being too long and complicated, often prove difficult for investors to use efficiently in comparing their many choices.[18] Current Commission rules require mutual fund prospectuses to contain key information about investment objectives, risks, and expenses that, while important to investors, can be difficult for investors to extract. Prospectuses are often long, both because they contain a wealth of detailed information, which our rules require, and because prospectuses for multiple funds are often combined in a single document. Too frequently, the language of prospectuses is complex and legalistic, and the presentation formats make little use of graphic design techniques that would contribute to readability.

Numerous commentators have suggested that investment information that is key to an investment decision should be provided in a streamlined document with other more detailed information provided elsewhere.[19] Furthermore, recent investor surveys indicate that investors prefer to receive information in concise, user-friendly formats.[20]

Similar opinions were voiced at a roundtable held by the Commission in June 2006, at which representatives from investor groups, the mutual fund industry, analysts, and others discussed how the Commission could change the mutual fund disclosure framework so that investors would be provided with better information. Significant discussion at the roundtable concerned the importance of providing mutual fund investors with access to key fund data in a shorter, more easily understandable format.[21] The participants focused on the importance of providing mutual fund investors with shorter disclosure documents, containing key information, with more detailed disclosure documents available to investors and others who choose to review additional information.[22] There was consensus among the roundtable participants that the key information that investors need to make an investment decision includes information about a mutual fund's investment objectives and strategies, risks, costs, and performance.[23]

[14] *See* Investment Company Act Release No. 28193 (Mar. 11, 2008) [73 FR 14618 (Mar. 18, 2008)] (''ETF Proposing Release'').

[15] An open-end management investment company is an investment company, other than a unit investment trust or face-amount certificate company, that offers for sale or has outstanding any redeemable security of which it is the issuer. *See* Sections 4 and 5(a)(1) of the Investment Company Act [15 U.S.C. 80a–4 and 80a–5(a)(1)].

[16] Investment Company Institute, *2008 Investment Company Fact Book,* at 70 (2008) (''2008 ICI Fact Book''), available at *http://www.ici.org/pdf/2008_factbook.pdf* (88 million individual investors own mutual funds).

[17] *Id.* at 16 (in 2007, there were 8,752 mutual funds).

[18] *See, e.g.,* Don Phillips, Managing Director, Morningstar, Inc., Transcript of U.S. Securities and Exchange Commission Interactive Data Roundtable, at 26 (June 12, 2006), available at *http://www.sec.gov/spotlight/xbrl/xbrlofficialtranscript0606.pdf* (''June 12 Roundtable Transcript'') (stating that current prospectus is ''bombarding investors with way more information than they can handle and that they can intelligently assimilate''). A Webcast archive of the June 12 Interactive Data Roundtable is available at *http://www.connectlive.com/events/secxbrl/. See also* Investment Company Institute, *Understanding Preferences for Mutual Fund Information,* at 8 (Aug. 2006), available at *http://ici.org/pdf/rpt_06_inv_prefs_summary.pdf* (''ICI Investor Preferences Study'') (noting that sixty percent of recent fund investors describe mutual fund prospectuses as very or somewhat difficult to understand, and two-thirds say prospectuses contain too much information); Associated Press Online, *Experts: Investors Face Excess Information* (May 25, 2005) (''There is broad agreement * * * that prospectuses have too much information * * * to be useful.'' (quoting Mercer Bullard, President, Fund Democracy, Inc.)); Thomas P. Lemke and Gerald T. Lins, *The ''Gift'' of Disclosure: A Suggested Approach for Managed Investments,* The Investment Lawyer, at 19 (Jan. 2001) (stating that the fund prospectus ''typically contains more information than the average investor needs'').

[19] *See, e.g.*, Charles A. Jaffe, *Improving Disclosure of Funds Can Be Done*, The Fort Worth Star-Telegram (May 7, 2006) (''Bring back the profile prospectus, and make its use mandatory * * *. A two page-summary of [the] key points [in the profile]—at the front of the prospectus—would give investors the bare minimum of what they should know out of the paperwork.''); *Experts: Investors Face Excess Information, supra* note 18 (stating ''a possible middle ground in the disclosure debate is to rely more heavily on so-called profile documents which provide a two-page synopsis of a fund'' (attributing statement to Mercer Bullard, President, Fund Democracy, Inc.)); *Mutual Funds: A Review of the Regulatory Landscape*, Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the Comm. on Financial Services, U.S. House of Representatives, 109th Cong. (May 10, 2005), at 24 (''To my mind, a new and enhanced mutual fund prospectus should have two core components. It should be short, addressing only the most important factors about which typical fund investors care in making investment decisions, and it should be supplemented by additional information available electronically, specifically through the Internet, unless an investor chooses to receive additional information through other means.'' (Testimony of Barry P. Barbash, then Partner, Shearman & Sterling LLP)); Thomas P. Lemke and Gerald T. Lins, *The ''Gift'' of Disclosure: A Suggested Approach for Managed Investments, supra* note 18, at 19 (information that is important to investors includes goals and investment policies, risks, costs, performance, and the identity and background of the manager).

In addition, a mutual fund task force organized by the National Association of Securities Dealers, Inc. (''NASD'') supported the use of a ''profile plus'' document, on the Internet, that would include, among other things, basic information about a fund's investment strategies, risks, and total costs, with hyperlinks to additional information in the prospectus. *See* NASD Mutual Fund Task Force, *Report of the Mutual Fund Task Force: Mutual Fund Distribution* (Mar. 2005), available at *http://www.finra.org/web/groups/rules_regs/documents/rules_regs/p013690.pdf* (''NASD Mutual Fund Task Force Report''). The name of NASD has been changed to the Financial Industry Regulatory Authority, Inc. (''FINRA'').

[20] *See* ICI Investor Preferences Study, *supra* note 18, at 29 (''Nearly nine in 10 recent fund investors say they prefer a summary of the information they want to know before buying fund shares, either alone or along with a detailed document * * *. Just 13 percent prefer to receive only a detailed document.''); Barbara Roper and Stephen Brobeck, Consumer Federation of America, *Mutual Fund Purchase Practices*, at 13–14 (June 2006), available at *http://www.consumerfed.org/pdfs/mutual_fund_survey_report.pdf* (survey respondents more likely to consult a fund summary document rather than a prospectus or other written materials).

[21] *See, e.g.*, Henry H. Hopkins, Vice President and Chief Legal Counsel, T. Rowe Price Group, Inc., June 12 Roundtable Transcript, *supra* note 18, at 31 (''[S]hareholders prefer receiving a concise summary of fund information before buying.'').

[22] *See, e.g.*, Don Phillips, Managing Director, Morningstar, Inc., *id.* at 27 (stating that mutual fund investors need two different documents, including a simplified print document and a tagged electronic document); Paul Schott Stevens, President and Chief Executive Officer, Investment Company Institute, *id.* at 72–73 (urging the Commission to consider permitting mutual funds to ''deliver a clear, concise disclosure document * * * much like the profile prospectus'' with a statement that additional disclosure is available on the funds' Web site or upon request in paper).

[23] *See, e.g.*, Barbara Roper, Director of Investor Protection, Consumer Federation of America, *id.* at 20 (noting that there is ''agreement to the point of near unanimity about the basic factors that investors should consider when selecting a mutual fund. These closely track the content of the original fund profile with highest priority given to investment objectives and strategies, risks, costs, and past performance particularly as it relates to the volatility of past returns.''). *See also* Paul G. Haaga, Jr., Executive Vice President, Capital Research and Management Company, *id.* at 90 (stating that the Commission should ''specify some minimum amounts of information'' to provide investors with ''something along the lines of the [fund] profile'');

Continued

The roundtable participants also discussed the potential benefits of increased Internet availability of fund disclosure documents, which include, among other things, facilitating comparisons among funds and replacing ''one-size-fits-all'' disclosure with disclosure that each investor can tailor to his or her own needs.[24] In recent years, access to the Internet has greatly expanded,[25] and significant strides have been made in the speed and quality of Internet connections.[26] The Commission has already harnessed the power of these technological advances to provide better access to information in a number of areas. Recently, for example, we created a program that permits issuers, on a voluntary basis, to submit to the Commission financial information and, in the case of mutual funds, key prospectus information, in an interactive data format that facilitates automated retrieval, analysis, and comparison of the information.[27] More recently, we proposed rules that would require mutual funds to provide the risk/return summary section of their prospectuses, and companies to provide their financial statements, to the Commission in interactive data format.[28] In addition, we recently adopted rules that provide all shareholders with the ability to choose whether to receive proxy materials in paper or via the Internet.[29]

As suggested by the participants at the June 2006 roundtable, advances in technology also offer a promising means to address the length and complexity of mutual fund prospectuses by streamlining the key information that is provided to investors, ensuring that access to the full wealth of information about a fund is immediately and easily accessible, and providing the means to present all information about a fund online in an interactive format that facilitates comparisons of key information, such as expenses, across different funds and different share classes of the same fund.[30] Technology has the potential to replace the current one-size-fits-all mutual fund prospectus with an approach that allows investors, their financial intermediaries, third-party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

In November 2007, the Commission proposed an improved mutual fund disclosure framework that was intended to address the concerns that have been raised about mutual fund prospectuses and to make use of technological advances to enhance the provision of information to mutual fund investors. The Commission received approximately 155 comment submissions.[31] The commenters generally supported the proposals, with some commenters suggesting specific changes to the proposals. Commission staff also arranged for investor focus group testing of the proposed Summary Prospectus.[32] Today, the Commission is adopting the proposed amendments with modifications to respond to the focus group testing and to address commenters' recommendations.

We are adopting amendments to Form N–1A that will require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. This key information is required to be presented in plain English in a standardized order. Our intent is that this information will be presented succinctly, in three or four pages, at the front of the prospectus.

We are also adopting a new option for satisfying prospectus delivery obligations with respect to mutual fund securities under the Securities Act. Under the option, key information will be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus will be provided on an Internet Web site. Upon an investor's request, funds will also be required to send the statutory prospectus to the investor. Our intent in providing this option is that funds take full advantage of the Internet's search and retrieval capabilities in order to enhance the provision of information to mutual fund investors.

The disclosure framework that we are adopting has the potential to

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Henry H. Hopkins, Vice President and Chief Legal Counsel, T. Rowe Price Group, Inc., *id.* at 31 (''The profile is an excellent, well organized disclosure document whose content requirements were substantiated by SEC-sponsored focus groups and an industry pilot program.'').

[24] *See, e.g.*, Paul Schott Stevens, President and Chief Executive Officer, Investment Company Institute, *id.* at 70–71 (stating that the Internet can serve as ''far more than a stand-in for paper documents * * *. It can * * * put investors in control when it comes to information about their investments.''); Don Phillips, Managing Director, Morningstar, Inc., *id.* at 49 (discussing ''the ability to use the Internet as a tool for comparative shopping'').

[25] Recent surveys show that Internet use among adults is at an all time high with approximately three quarters of Americans having access to the Internet. *See A Typology of Information and Technology Users*, Pew Internet & American Life Project, at 2 (May 2007), available at *http://www.pewinternet.org/pdfs/PIP_ICT_Typology.pdf; Internet Penetration and Impact*, Pew Internet & American Life Project, at 3 (Apr. 2006), available at *http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf*. Further, while some have noted a ''digital divide'' for certain groups, *see, e.g.*, Susannah Fox, *Digital Divisions*, Pew Internet & American Life Project, at 1 (Oct. 5, 2005) (noting that certain groups lag behind in Internet usage, including Americans age 65 and older, African-Americans, and those with less education), others have noted that this divide may be diminishing for those groups. *See, e.g., Mutual Fund Shareholders' Use of the Internet, 2006*, Investment Company Institute, Research Fundamentals, at 7 (Oct. 2006), available at *http://www.ici.org/stats/res/fm-v15n6.pdf* (''Recent increases in Internet access among older shareholders * * * have narrowed the generational gap considerably. Today, shareholders age 65 or older are more than twice as likely to have Internet access than in 2000.''); Michel Marriott, *Blacks Turn to Internet Highway, and Digital Divide Starts to Close*, The New York Times (Mar. 31, 2006), available at: *http://www.nytimes.com/2006/03/31/us/31divide.html?ex=1301461200&en=6fd4e942aaaa04ad&ei=5088* (''African-Americans are steadily gaining access to and ease with the Internet, signaling a remarkable closing of the 'digital divide' that many experts had worried would be a crippling disadvantage in achieving success.'').

[26] *See* John B. Horrigan, *Home Broadband Adoption 2007*, Pew Internet & American Life Project, at 1 (June 2007), available at *http://www.pewinternet.org/pdfs/PIP_Broadband%202007.pdf* (47% of all adult Americans had a broadband connection at home as of early 2007).

[27] *See* Investment Company Act Release No. 27884 (July 11, 2007) [72 FR 39290 (July 17, 2007)] (adopting rule amendments to enable mutual funds voluntarily to submit supplemental tagged information contained in the risk/return summary section of their prospectuses); Securities Act Release No. 8529 (Feb. 3, 2005) [70 FR 6556 (Feb. 8, 2005)] (adopting rule amendments to enable registrants voluntarily to submit supplemental tagged financial information).

[28] Investment Company Act Release No. 28298 (June 10, 2008) [73 FR 35442 (June 23, 2008)]; Securities Act Release No. 8924 (May 30, 2008) [73 FR 32794 (June 10, 2008)].

[29] Exchange Act Release No. 56135 (July 26, 2007) [72 FR 42222 (Aug. 1, 2007)].

[30] A mutual fund may issue more than one class of shares that represent interests in the same portfolio of securities with each class, among other things, having a different arrangement for shareholder services or the distribution of securities, or both. *See* rule 18f–3 under the Investment Company Act [17 CFR 270.18f–3].

[31] In response to the ETF Proposing Release, the Commission received seven comment submissions that addressed the proposed ETF amendments to Form N–1A.

[32] The Commission engaged a consultant to conduct focus group interviews and a telephone survey concerning investors' views and opinions about various disclosure documents filed by companies, including mutual funds. During this process, investors participating in focus groups were asked questions about a hypothetical Summary Prospectus. Investors participating in the telephone survey were asked questions relating to several disclosure documents, including mutual fund prospectuses. We have placed in the comment file (available at *http://www.sec.gov/comments/s7-28-07/s72807.shtml*) for the proposed rule the following documents from the investor testing that relate to mutual fund prospectuses and the proposed Summary Prospectus: (1) The consultant's report concerning focus group testing of the hypothetical Summary Prospectus and related disclosures (''Focus Group Report''); (2) transcripts of focus groups relating to the hypothetical Summary Prospectus and related disclosures (''Focus Group Transcripts''); (3) disclosure examples used in these focus groups; and (4) an excerpt from the consultant's report concerning the telephone survey of individual investors (''Telephone Survey Report'').

revolutionize the provision of information to the millions of investors who rely on mutual funds for their most basic financial needs. It is intended to help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to access readily key information that is important to an informed investment decision. At the same time, by harnessing the power of technology to deliver information in better, more useable formats, the disclosure framework can help those investors, their intermediaries, third-party analysts, the financial press, and others to locate and compare facts and data from the wealth of more detailed disclosures that are available.

III. Discussion

A. Amendments to Form N–1A

The Commission is adopting, with modifications to address commenters' suggestions, amendments to Form N–1A that will require the statutory prospectus of every mutual fund to include a summary section at the front of the prospectus consisting of key information presented in plain English in a standardized order.[33] Commenters and investors participating in focus groups arranged by Commission staff generally supported the proposed summary presentation and agreed that it will address investors' preferences for concise, user-friendly information.[34] The summary section will provide investors with key information about the fund that investors can use to evaluate and compare the fund. This summary will be located in a standardized, easily accessible place and will be available to all investors, regardless of whether the fund uses a Summary Prospectus and whether the investor is reviewing the prospectus in a paper or electronic format.

As in our proposal, the information required in the summary section of the prospectus will be the same as that required in the new Summary Prospectus, and it is key information that is important to an investment decision. We believe, and commenters generally agreed,[35] that the key information that is important to an investment decision is the same, whether an investor is reviewing the summary section of a statutory prospectus or a short-form disclosure document. For that reason, we are requiring the same information in the summary section of the statutory prospectus and in the Summary Prospectus. In each case, our intent is that funds prepare a concise summary (on the order of three or four pages) that will provide key information.

In addition, with the exception of some information that is common to multiple funds, we are requiring, as proposed, that the summary section be presented separately for each fund covered by a multiple fund prospectus and that the information for multiple funds not be integrated.[36] This requirement is intended to assist investors in finding important information regarding the particular fund in which they are interested. Multiple fund prospectuses contribute substantially to prospectus length and complexity, which act as barriers to understanding. We have concluded that requiring a self-contained summary section for each fund will significantly aid investors' ability to use multiple fund prospectuses effectively.

The Commission is committed to encouraging statutory prospectuses that are simpler, clearer, and more useful to investors. The prospectus summary section is intended to provide investors with streamlined disclosure of key mutual fund information at the front of the statutory prospectus, in a standardized order that facilitates comparisons across funds. We are adopting the following amendments to Form N–1A in order to implement the summary section.

1. General Instructions to Form N–1A

We are adopting, substantially as proposed, amendments to the General Instructions to Form N–1A to address the new summary section of the statutory prospectus. These amendments address plain English and organizational requirements.

Plain English

We are amending, as proposed, the General Instructions to state that the summary section of the prospectus must be provided in plain English under rule 421(d) under the Securities Act.[37] Rule 421(d) requires an issuer to use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors sections of its prospectus.[38] The amended instruction will serve as a reminder that the new prospectus summary section is subject to rule 421(d). The use of plain English principles in the new summary section will further our goal of encouraging funds to create useable summaries at the front of their prospectuses. The prospectus, in its entirety, also will remain subject to the requirement that the information be presented in a clear, concise, and understandable manner.[39]

Organizational Requirements

We are also adopting amendments to the organizational requirements of the General Instructions, with one modification to address commenters' suggestions. The amendments will require mutual funds to disclose the summary information in numerical order at the front of the prospectus and not to precede this information with any information other than the cover page or table of contents.[40] Commenters generally supported standardizing the order and content of the summary section, agreeing that a standardized summary section will enhance investor understanding and the ability to compare funds.[41] Information included

[33] The Commission is also adopting amendments to Form N–1A relating to exchange-traded funds. *See* discussion *infra* Part III.A.4.

[34] *See, e.g.*, Letter of AARP (Feb. 28, 2008) (''AARP Letter''); Letter of Capital Research and Management Company (Feb. 28, 2008) (''Capital Research Letter''); Letter of Fund Democracy, Consumer Federation of America, and Consumer Action (Feb. 28, 2008) (''Fund Democracy *et al.* Letter''); Letter of Investment Company Institute (Feb. 28, 2008) (''ICI Letter''); Letter of Mutual Fund Directors Forum (Feb. 28, 2008) (''MFDF Letter''); Letter of Morningstar, Inc. (Feb. 27, 2008) (''Morningstar Letter''); Focus Group Report, *supra* note 32, at 5.

[35] *See, e.g.*, Letter of Bo Li (Feb. 28, 2008) (''Bo Li Letter''); Letter of Data Communiqué, Inc. (Feb. 27, 2008) (''Data Communiqué Letter''); Letter of Firehouse Communications LLC (Feb. 29, 2008) (''Firehouse Letter''); Letter of L.A. Schnase (Feb. 26, 2008) (''Schnase Letter''). *But see* Letter of Kathleen K. Clarke (Mar. 4, 2008) (''Clarke Letter'').

[36] General Instruction C.3.(c)(ii) of Form N–1A.

[37] General Instruction B.4.(c) of Form N–1A; rule 421(d) [17 CFR 230.421(d)].

Commenters generally supported the use of plain English in the summary section. *See, e.g.*, AARP Letter, *supra* note 34; Letter of CFA Institute (Feb. 28, 2008) (''CFA Institute Letter''); Letter of Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (Mar. 17, 2008) (''ABA Letter''); Letter of Investment Company Institute and Securities Industry and Financial Markets Association (Feb. 28, 2008) (''ICI and SIFMA Letter'').

[38] Rule 421(d) lists the following plain English principles: (1) Short sentences; (2) definite, concrete, everyday words; (3) active voice; (4) tabular presentation or bullet lists for complex material, wherever possible; (5) no legal jargon or highly technical business terms; and (6) no multiple negatives.

[39] Pursuant to rule 421(b) [17 CFR 230.421(b)], the following standards must be used when preparing prospectuses: (1) present information in clear, concise sections, paragraphs, and sentences; (2) use descriptive headings and subheadings; (3) avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus; and (4) avoid legal and highly technical business terminology. We note that these standards provide funds with flexibility, for example, in determining whether or not to use headings in a question-and-answer format.

[40] General Instruction C.3.(a) to Form N–1A.

[41] *See, e.g.*, Letter of Evergreen Investments (Feb. 28, 2008) (''Evergreen Letter''); Letter of Financial Services Institute (Feb. 28, 2008) (''Financial Services Institute Letter'').

in the summary section need not be repeated elsewhere in the prospectus. While a fund may continue to include information in the prospectus that is not required, a fund may not include any such additional information in the summary section of the prospectus.[42]

As noted above, we are, with one exception, requiring as proposed that a multiple fund prospectus present the summary information for each fund sequentially and not integrate the information for more than one fund.[43] That is, a multiple fund prospectus will be required to present all of the summary information for a particular fund together, followed by all of the summary information for each additional fund. For example, a multiple fund prospectus will not be permitted to present the investment objectives for several funds followed by the fee tables for several funds. A multiple fund prospectus will also be required to identify clearly the name of the particular fund at the beginning of the summary information for that fund.

Many commenters agreed that multiple fund prospectuses should present the summary information for each fund separately.[44] Some commenters stated that requiring a separate summary for each fund will better achieve the Commission's goal of keeping summaries short, which should help facilitate comparisons across funds.[45] Commenters also stated that multiple fund prospectuses often confuse investors and make reviewing key information for a single fund more difficult.[46]

A number of commenters, however, expressed reservations about the Commission's proposal to prohibit multiple fund summary sections, requesting that the Commission permit integrated summaries for multiple funds in at least some circumstances.[47] Some commenters suggested that integrated summary information would allow investors to better compare all funds within a fund family, or at least certain categories of funds within a fund family.[48] Categories of funds cited included international funds, asset allocation funds, and U.S. Treasury Funds.[49] In addition, some commenters argued that prohibiting multiple fund summaries would lead to unnecessary duplication of information and longer statutory prospectuses.[50]

A number of investors in our focus groups expressed the view that multiple fund presentations of mutual fund information could be helpful in facilitating useful comparisons among funds.[51] Some of these investors stated that multiple fund presentations could be used as a screening tool to determine which funds to research in more detail.[52] Some investors in our focus groups, however, indicated that combining too many funds within a single summary can result in confusing complexity.[53] The investors in our focus groups did not express a consensus on a specific limit on the number of funds or page length that would be appropriate in multiple fund presentations.

While we believe that multiple fund presentations can, in limited circumstances, be useful in helping investors to compare funds, we have determined that prohibiting multiple fund summary sections is more consistent with the goal of achieving concise, readable summaries for investors. The requirement that summary information be separately presented for each fund in a multiple fund prospectus is intended to address the problem of lengthy and complex multiple fund prospectuses in the least intrusive manner possible. Multiple fund prospectuses contribute substantially to prospectus length and complexity, which act as barriers to investor understanding. We have concluded that permitting information for multiple funds to be integrated in the summary section would undermine our goal of providing mutual fund investors with concise and readable key information.

We note, however, that our rules do not restrict in any way the use of multiple fund presentations in advertising and sales materials, whether those materials are provided along with the Summary Prospectus or separately.[54] Funds have complete flexibility to prepare and present comparative information to investors regarding any grouping of multiple funds that they believe is useful, and also to provide automated tools on their Web sites permitting investors to choose which funds to compare. As a result, we do not believe that the prohibition on multiple fund summaries in the statutory prospectus will impair in any significant manner funds' ability to provide useful, comparative information to investors.

We are adopting one exception to the requirement that multiple fund prospectuses not integrate the summary information for more than one fund in order to eliminate duplicative information and reduce prospectus length. Two commenters recommended that the Commission permit summary information that is identical for multiple funds to be presented once, at the end of all the individual summaries within a multiple fund statutory prospectus.[55] We agree with these commenters that permitting integration of information that is likely to be uniform for multiple funds will further our goal of concise, user-friendly summary sections. Therefore, a multiple fund prospectus

[42] General Instruction C.3.(b) of Form N–1A. *See, e.g.*, CFA Institute Letter, *supra* note 37; Letter of Great-West Retirement Services (Feb. 28, 2008) (''Great-West Letter''); ICI Letter, *supra* note 34; Letter of The Vanguard Group, Inc. (Feb. 28, 2008) (''Vanguard Letter'') (supporting prohibition on including information in the summary section that is not required).

[43] General Instruction C.3.(c)(ii) of Form N–1A. *See supra* note 36 and accompanying text.

[44] *See, e.g.*, CFA Institute Letter, *supra* note 37; Letter of Coalition of Mutual Fund Investors (Feb. 13, 2008) (''CMFI Letter''); Fund Democracy *et al.* Letter, *supra* note 34; Evergreen Letter, *supra* note 41; MFDF Letter, *supra* note 34; Letter of the National Association of Personal Financial Advisors (Feb. 28, 2008) (''NAPFA Letter''); Letter of Oppenheimer Funds (Feb. 28, 2008) (''Oppenheimer Letter'').

[45] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34; Data Communiqué Letter, *supra* note 35. *See also* ICI Letter, *supra* note 34 (stating that some of its members believe that requiring a separate summary for each fund will better facilitate the Commission's goals of keeping documents short and facilitating comparisons across funds).

[46] *See, e.g.*, Data Communiqué Letter, *supra* note 35; CMFI Letter, *supra* note 44; Oppenheimer Letter, *supra* note 44.

[47] *See, e.g.*, Letter of AIM Investments (Feb. 27, 2008) (''AIM Letter'') (favoring integrated summaries for target date, asset allocation or lifestyle funds, and variable annuity funds); Capital Research Letter, *supra* note 34 (favoring integrated summaries for target date and variable annuity funds).

[48] *See, e.g.*, AIM Letter, *supra* note 47; Letter of American Century Investments (Feb. 28, 2008) (''American Century Letter''); Clarke Letter, *supra* note 35; ICI Letter, *supra* note 34; Letter of Putnam Investments (Feb. 28, 2008) (''Putnam Letter''); Letter of Russell Investments (Feb. 28, 2008) (''Russell Letter'').

[49] *See, e.g.*, Letter of T. Rowe Price Associates, Inc. (Feb. 28, 2008) (''T. Rowe Letter'') (favoring integrated summaries for certain categories of funds and citing focus group research conducted by T. Rowe Price concerning integrated versus single-fund summaries).

[50] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; Letter of Dechert LLP (Mar. 3, 2008) (''Dechert Letter''); Putnam Letter, *supra* note 48; Russell Letter, *supra* note 48. *See also* ICI Letter, *supra* note 34 (members split, with some noting that an integrated summary may be more useful to investors in certain circumstances, in particular for groups of funds an investor may wish to compare, and others believing that a separate document for each fund would better accomplish goals of keeping the document short and facilitating comparisons across funds).

[51] *See* Focus Group Report, *supra* note 32, at 9.

[52] *See* Focus Group Transcripts, *supra* note 32, at 20.

[53] *Id.* at 19 (''I thought there were too many in the [multiple fund prospectus]. It just really makes your head spin when you have to read all that.''), 22, 46.

[54] *See* rule 482 under the Securities Act [17 CFR 230.482] and rule 34b–1 under the Investment Company Act [17 CFR 270.34b–1] (investment company advertising rules).

[55] *See* Capital Research Letter, *supra* note 34; ICI Letter, *supra* note 34.

will be permitted to integrate the information required by any of new Item 6 (purchase and sale of fund shares), Item 7 (tax information), and Item 8 (financial intermediary compensation) if it is identical for all funds covered in the prospectus.[56] This information is often uniform across multiple funds unlike, for example, information about investment objectives, costs, performance, or portfolio managers. If the information required by any of Items 6 through 8 is integrated, the integrated information will be required to immediately follow the separate individual fund summaries containing the other non-integrated information. In addition, a statement containing the following information will be required in each individual fund summary section in the location where the information that is integrated, and presented later, would have appeared.

For important information about [purchase and sale of fund shares,] [tax information,] and [financial intermediary compensation], please turn to [identify section heading and page number of prospectus].

As proposed, the instructions will permit a fund with multiple share classes, each with its own cost structure, to present the summary information separately for each class, to integrate the information for multiple classes, or to use another presentation that is consistent with disclosing the summary information in a standard order at the beginning of the prospectus.[57] Commenters generally supported, or did not express a view with respect to, allowing multiple class summary sections; and some commenters noted that such sections would assist investors in choosing the class most appropriate for their circumstances.[58] We are not requiring the integration of information for multiple classes of a fund, which two commenters argued was important to facilitate cost comparisons.[59] We are retaining flexibility in this area because we believe that whether a multiple class presentation is helpful or overwhelming depends on the particular circumstances. We note, however, that our ongoing interactive data initiative is intended, among other things, to facilitate cost comparisons by investors across multiple classes of a single fund, as well as across different funds.[60]

Page Limits

As proposed, we are not imposing page limits on the summary section. We emphasize, however, that it is our intent that funds prepare a concise summary (on the order of three or four pages) that will provide key information. Commenters differed regarding whether the Commission should impose page limits on the summary.

Several commenters supported page limits. One commenter expressed concern that, in the absence of a page limit, the summary section would tend to expand over time, which would undermine its usefulness.[61] Another commenter noted that, absent page limits, lengths of summary sections would vary widely, hindering investors' ability to compare funds.[62]

While we share these commenters' concerns, especially with respect to the possibility of summary sections getting longer over time, we believe that these concerns are outweighed by the concerns of other commenters that page limits could constrain appropriate disclosure and lead funds to omit material information.[63] We also agree with a commenter who noted that the prohibition of multiple fund summary sections should help to limit their length.[64]

Elimination of Separate Purchase and Redemption Document

As proposed, we are eliminating the provisions of Form N–1A that permit a fund to omit detailed information about purchase and redemption procedures from the prospectus and to provide this information in a separate document that is incorporated into and delivered with the prospectus, as well as a similar provision in the requirements for the statement of additional information (''SAI'').[65] We have concluded that this option is unnecessary in light of the new Summary Prospectus which could be used, at a fund's option, along with any additional sales materials, including a document describing purchase and redemption procedures.[66] The elimination of these provisions does not otherwise alter the information about purchase and redemption procedures that must appear in the fund's prospectus and SAI, and this information will continue to be required in those documents.

Variable Contract and Retirement Plan Funds

Finally, we are modifying the proposal to permit funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit certain information required in the new summary section. This modification addresses commenters' concerns that certain information is not relevant to those funds.[67] Specifically, we are amending the General Instructions to Form N–1A to permit funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit the information required by new summary section Item 6 (purchase and sale of fund shares).[68] Existing Form N–1A permits funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit certain information regarding the purchase and sale of fund shares that is not relevant in these contexts.[69] The amendment we are making extends the same treatment to the purchase and sale information in the new summary section.

2. Exchange Ticker Symbols

We requested comment on whether we should require or permit a fund to include its ticker symbol in the summary, or on the front or back cover page of the statutory prospectus or SAI or elsewhere. Many commenters suggested that the Commission should require or permit funds to disclose their exchange ticker symbols.[70] We agree

[56] General Instruction C.3.(c)(iii) of Form N–1A. This exception will not be available to Summary Prospectuses delivered pursuant to new rule 498 because a Summary Prospectus may describe only one fund. *See* discussion *infra* Part III.B.2.a.

[57] General Instruction C.3.(c)(ii) of Form N–1A.

[58] *See, e.g.*, Clarke Letter, *supra* note 35; Data Communiqué Letter, *supra* note 35; Great-West Letter, *supra* note 42; Oppenheimer Letter, *supra* note 44.

[59] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34; Letter of Brock Hastie (Jan. 8, 2008) (''Hastie Letter'').

[60] *See supra* note 28 and accompanying text.

[61] *See* Letter of Independent Directors Council (Feb. 15, 2008) (''IDC Letter'').

[62] *See* Firehouse Letter, *supra* note 35. *See also* Letter of Jeffrey C. Keil (Jan. 9, 2008) (''Keil Letter'') (suggesting that summaries might garner more investor attention if limited to two or three pages).

[63] *See, e.g.*, Letter of Janus Capital Group (Feb. 28, 2008) (''Janus Letter''); CMFI Letter, *supra* note 44.

[64] *See* Data Communiqué Letter, *supra* note 35.

[65] Instruction 6 to current Item 1(b) of Form N–1A; current Item 6(g) of Form N–1A; Instruction to current Item 18(a) of Form N–1A.

[66] *See* discussion *infra* Part III.B.1. Most commenters did not address this proposed change. *But see* Clarke Letter, *supra* note 35 (supporting change); Schnase Letter, *supra* note 35 (opposing change).

[67] *See* Letter of EQ Advisors Trust/AXA Premier VIP Trust (Feb. 28, 2008) (''EQ/AXA Letter''); Letter of Committee of Annuity Insurers (Feb. 28, 2008) (''CAI Letter'').

[68] General Instruction C.3.(d)(i) of Form N–1A.

[69] General Instruction C.3.(d)(i) of existing Form N–1A. We note that Item 7 of the summary section, which requires tax information that may not be relevant in the context of retirement plans and variable insurance contracts, expressly states that the disclosures are only required to be made, *as applicable*.

[70] *See, e.g.*, CMFI Letter, *supra* note 44; Data Communiqué Letter, *supra* note 35; Firehouse Letter, *supra* note 35; Hastie Letter, *supra* note 59; Letter of William E. Kent (Dec. 26, 2007) (''Kent

Continued

with these commenters that requiring exchange ticker symbols to be included in fund disclosure documents would make it easier for investors to find information about particular funds and share classes of funds. Accordingly, we are requiring that a fund include its exchange ticker symbol on the cover pages of the statutory prospectus and SAI.[71] Specifically, a fund will be required to disclose the exchange ticker symbol of the fund's shares or, if the prospectus or SAI relate to one or more classes of the fund's shares, adjacent to each such class, the exchange ticker symbol of that class.

3. Information Required in Summary Section

We are adopting the required content of the summary section substantially as proposed, except that, having considered commenters' concerns and the views of investors expressed in focus groups, we have determined not to require disclosure of a fund's portfolio holdings. The summary section of a mutual fund statutory prospectus will consist of the following information: (1) Investment objectives; (2) costs; (3) principal investment strategies, risks, and performance; (4) investment advisers and portfolio managers; (5) brief purchase and sale and tax information; and (6) financial intermediary compensation. These items will appear in the same order that we proposed. We have modified the requirements for some items to address comments and views expressed in the focus groups.

a. Elimination of Proposed Portfolio Holdings Requirement

The Commission has determined not to require the summary section to include the list of the fund's 10 largest holdings which we proposed.[72] As proposed, the top 10 holdings list would have been updated in the statutory prospectus on an annual basis and in the Summary Prospectus on a quarterly basis.[73]

Commenters were split regarding whether the top 10 portfolio holdings should be required in the summary section. We are persuaded by the commenters who pointed out the limited utility of the proposed top 10 holdings list.[74] Commenters expressed the view that top 10 holdings information may mislead investors because the top 10 holdings may not accurately represent a fund's overall holdings[75] and because the top 10 holdings information may become stale.[76] Commenters also pointed out that portfolio holdings information is already widely available through other sources, such as shareholder reports and other Commission filings,[77] as well as fund Web sites and sales materials.[78]

We continue to believe that information concerning a fund's portfolio holdings may provide investors with a greater understanding of a fund's stated investment objectives and strategies and may assist investors in making more informed asset allocation decisions. In light of the limited utility of top 10 holdings information, however, and the widespread availability of portfolio holdings information from other sources, we have determined not to require this information in the summary section. Some commenters and investors in our focus groups suggested that we instead require disclosure about the current allocation of a fund's portfolio by asset type, such as a pie chart that would graphically display this information.[79] We have determined not to require this information because we have concluded that it is subject to the same concerns about staleness as top 10 holdings information and because of the widespread availability of portfolio holdings information from other sources. Nonetheless, where a fund's asset allocation strategy is a principal investment strategy of the fund, the fund should clearly disclose this strategy,[80] and we would encourage the use of graphical representations as a potentially helpful communications tool.

In reaching our determination with respect to portfolio holdings information, we carefully considered the views of investors expressed in our focus groups. Many investors in the focus groups expressed significant interest in portfolio holdings information.[81] At the same time, like the commenters, a number of the investors participating in our focus groups pointed out that top 10 portfolio holdings information changes frequently and can quickly become outdated, and some participants acknowledged that the top 10 holdings information can sometimes account for a relatively small portion of a fund's holdings.[82] We concluded that investors' interest in this information is outweighed by its potential to mislead and confuse in the context of the summary section of a prospectus. Because this information is widely available through other sources, we are persuaded that investors' interest in this information can be satisfied through these other sources.

b. Order of Information

We are adopting the order of the information required in the summary

Letter''); NAPFA Letter, *supra* note 44; Letter of Art Ticknor (Feb. 6, 2008) (''Ticknor Letter'').

[71] Item 1(a)(2) of Form N–1A; Item 14(a)(2) of Form N–1A. Exchange ticker symbols will also be required on the cover page, or at the beginning of, the Summary Prospectus. Rule 498(b)(1)(ii).

[72] Proposed Item 5 of Form N–1A.

[73] Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)] generally requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information in the prospectus must be as of a date not more than sixteen months prior to such use. The effect of this provision is to require mutual funds to update their prospectuses annually to reflect current cost, performance, and other financial information. *See* proposed rule 498(b)(2)(iii) (proposed Summary Prospectus quarterly updating requirement).

[74] *See, e.g.*, AIM Letter, *supra* note 47; Letter of Cornell Securities Law Clinic (Feb. 28, 2008) (''Cornell Law Clinic Letter''); Evergreen Letter, *supra* note 41; Letter of Foreside Compliance Services, LLC (Feb. 28, 2008) (''Foreside Letter''); Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48.

Other commenters supported including the top 10 portfolio holdings in the summary section. *See, e.g.*, CMFI Letter, *supra* note 44; Data Communiqué Letter, *supra* note 35; Firehouse Letter, *supra* note 35; Letter of Jill Gross (Feb. 28, 2008); Letter of Richard K. Hopkins (Feb. 15, 2008) (''Hopkins Letter''); Letter of Richard McCormick (Feb. 11, 2008) (''McCormick Letter''); Letter of William Mahavier (Feb. 10, 2008) (''Mahavier Letter''); Letter of Dan Meador (Feb. 12, 2008); NAPFA Letter, *supra* note 44; Letter of Bruce R. Bent (Feb. 28, 2008) (''Bent Letter'').

[75] *See, e.g.*, Dechert Letter, *supra* note 50 (top 10 holdings information could mislead investors of a diversified fund where top 10 holdings represent a relatively small percentage of the fund's holdings); ICI Letter, *supra* note 34 (noting that a fund's top 10 holdings may be misleading for funds in a master-feeder structure, funds of funds, fixed income funds, index funds, money market funds, exchange-traded funds, and new funds); Letter of New York City Bar (Feb. 25, 2008) (''NYC Bar Letter'') (arguing that for certain types of funds, such as money market funds, fixed income funds, and index funds, top 10 holdings information may be misleading); Letter of Leslie L. Ogg (Feb. 1, 2008) (''Ogg Letter'') (noting that top 10 holdings information can be misleading for multi-manager funds, funds of funds, long-short funds, and funds using derivative instruments).

[76] *See, e.g.*, AIM Letter, *supra* note 47; CAI Letter, *supra* note 67; Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Dechert Letter, *supra* note 50; ICI Letter, *supra* note 34; IDC Letter, *supra* note 61; Janus Letter, *supra* note 63; NYC Bar Letter, *supra* note 75; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48.

[77] Form N–CSR [17 CFR 249.331; 17 CFR 274.128] (form used by investment companies semi-annually to file certified shareholder reports); Form N–Q [17 CFR 249.332; 17 CFR 274.130] (form used by investment companies to file schedule of portfolio holdings for first and third quarters).

[78] *See, e.g.*, AIM Letter, *supra* note 47; EQ/AXA Letter, *supra* note 67; Evergreen Letter, *supra* note 41; Russell Letter, *supra* note 48; T. Rowe Letter, *supra* note 49.

[79] *See, e.g.*, Cornell Law Clinic Letter, *supra* note 74; Oppenheimer Letter, *supra* note 44; Focus Group Report, *supra* note 32, at 6.

[80] Items 4(a) and 9 of Form N–1A (requiring disclosure of principal investment strategies).

[81] Focus Group Report, *supra* note 32, at 7; Focus Group Transcripts, *supra* note 32, at 12.

[82] Focus Group Report, *supra* note 32, at 7; Focus Group Transcripts, *supra* note 32, at 13–14, 78.

section, as proposed. This includes moving the fee table forward from its current location, which follows information about investment strategies, risks, and past performance. We continue to believe that the change to the location of the fee table will enhance the prominence of this information, which is important to address continuing concerns about investor understanding of mutual fund costs.[83] Several commenters agreed that relocation of the fee table will place fee information in a more prominent location and encourage investors to give greater attention to costs and cost comparisons.[84] While several commenters suggested alternative orders for the information in the summary section, there was no consensus by commenters regarding any alternative.[85]

A number of commenters, largely from the fund industry, opposed relocating the fee table. These commenters argued that moving the fee table forward inappropriately overemphasizes costs over other more important information and that the fee table should not come between investment objectives and principal investment strategies and risks.[86] Some of these commenters argued that the fee table should not be moved forward, because it is important for investors to first and foremost understand a fund and its risks, and that a fund's objectives, strategies, and risks provide necessary context for fees. Some commenters also argued that moving the fee table forward is unnecessary because the short length of the summary section will make the fee table sufficiently prominent.

We are not persuaded by these commenters. We continue to believe, along with a number of commenters, that placement of the fee table in a more prominent location will encourage investors to give greater attention to costs. The fee table and example are designed to help investors understand the costs of investing in a fund and compare those costs with the costs of other funds. Placing the fee table and example at the front of the summary section reflects the importance of costs to an investment decision.[87] Moving the fee table forward also eliminates the possibility that the fee table could be obscured by other information.[88]

c. Investment Objectives and Goals

We are adopting, as proposed, the requirement that the summary section begin with disclosure of a fund's investment objectives or goals, which commenters generally supported.[89] As proposed, a fund also will be permitted to identify its type or category (*e.g.*, that it is a money market fund or balanced fund).[90]

d. Fee Table

We are adopting, with modifications to address commenters' concerns and views expressed by investors in the focus groups, the fee table and example. The fee table and example disclose the costs of investing and immediately follow the fund's investment objectives.[91]

Breakpoint Discounts

We are requiring, substantially as proposed, that mutual funds that offer discounts on front-end sales charges for volume purchases (so-called ''breakpoint discounts'') include brief narrative disclosure alerting investors to the availability of those discounts.[92] Commenters generally supported the disclosure about breakpoint discounts, although many commenters, as well as focus group investors, provided suggestions for revising the narrative proposed.[93] We are modifying the proposal in two ways to address these comments.

First, we are adding to the required narrative a description of where investors can find additional information regarding breakpoint discounts.[94] Specifically, the narrative will be required to state that further information is available from the investor's financial professional, as well as identify the section heading and page number of the fund's prospectus and SAI where more information can be found. This information is intended to address the views of both commenters and investors in the focus groups that it would be helpful for more detailed information about breakpoint discounts to be readily available to investors.[95]

Second, we are clarifying the instruction that the dollar level at which investors may qualify for breakpoint discounts that is required to be disclosed in the new item is the minimum level of investment required to qualify for a discount as disclosed in the table required by current Item 7(a)(1) of Form N–1A.[96] This change makes clear that the required dollar threshold to be disclosed is the same as disclosure that is already required in Form N–1A. This change, together with the added narrative about additional information, addresses commenters' concerns that the breakpoints disclosure does not capture the complexity and variety of policies regarding breakpoint discounts.[97]

Parenthetical to ''Annual Fund Operating Expenses''

We are adopting, substantially as proposed, revisions to the heading ''Annual Fund Operating Expenses'' in the fee table. Specifically, we are revising the parenthetical following the

[83] *See* Barbara Roper, Director of Investor Protection, Consumer Federation of America, June 12 Roundtable Transcript, *supra* note 18, at 21; James J. Choi, David Laibson, & Brigitte C. Madrian, National Bureau of Economic Research, *Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds*, at 6 (May 2006), available at *http://www.nber.org/papers/w12261.pdf*.; Focus Group Transcripts, *supra* note 32, at 6 (''[The hypothetical summary prospectus] shows the fee right up there, what they charge, so that would appeal to me.'').

[84] *See, e.g.*, Letter of Roy J. Biegel (Feb. 14, 2008) (''Biegel Letter''); CFA Institute Letter, *supra* note 37; Foreside Letter, *supra* note 74; Letter of Fund Democracy and Consumer Federation of America (Apr. 17, 2008); NAPFA Letter, *supra* note 44; Letter of Charles Sikorovsky (Feb. 29, 2008) (''Sikorovsky Letter''). *See also* Focus Group Transcripts, *supra* note 32, at 10 (investors expressed view that fund costs are important); Letter of Investment Company Institute (Mar. 14, 2008) (''ICI Survey'') (finding that 95% of respondents believed that fees are important).

[85] *See, e.g.*, Letter of Ward C. Bourn (Feb. 27, 2008); Capital Research Letter, *supra* note 34; Evergreen Letter, *supra* note 41; Financial Services Institute Letter, *supra* note 41; Vanguard Letter, *supra* note 42.

[86] *See, e.g.*, AIM Letter, *supra* note 47; Evergreen Letter, *supra* note 41; Letter of Fidelity Investments (Feb. 28, 2008) (''Fidelity Letter''); ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48; T. Rowe Letter, *supra* note 49.

[87] For example, a 1% increase in annual fees reduces an investor's return by approximately 18% over 20 years.

[88] *See* Sikorovsky Letter, *supra* note 84 (stating that if an investment manager can in any way ''hide'' fees from an investor, the document has failed to fulfill its function).

[89] *See, e.g.*, AARP Letter, *supra* note 34; Firehouse Letter, *supra* note 35; ICI and SIFMA Letter, *supra* note 37; Letter of Christine A. Nelson (Feb. 12, 2008); Schnase Letter, *supra* note 35. *See also* ICI Survey, *supra* note 84 (providing survey results that found investment objectives was one of the most important pieces of information to investors).

[90] Item 2 of Form N–1A.

[91] Item 3 of Form N–1A.

[92] Item 3 of Form N–1A; Instruction 1(b) to Item 3 of Form N–1A.

[93] *See, e.g.*, AIM Letter, *supra* note 47; CFA Institute Letter, *supra* note 37; Fund Democracy *et al.* Letter, *supra* note 34; Letter of Manuela A. De Leon (Feb. 7, 2008); ICI Letter, *supra* note 34; Keil Letter, *supra* note 62; NAPFA Letter, *supra* note 44; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48; Focus Group Report, *supra* note 32, at 8.

[94] Item 3 of Form N–1A.

[95] *See, e.g.*, CMFI Letter, *supra* note 44 (summary should indicate where additional information about breakpoint discounts is available); NAPFA Letter, *supra* note 44 (same); Focus Group Transcripts, *supra* note 32, at 17 (participant observes that ''I'll go to the long-form and look that up and then make my decision.'').

[96] Instruction 1(b) to Item 3 of Form N–1A. Item 7 of Form N–1A is being renumbered as Item 12 in this rulemaking.

[97] *See, e.g.*, AIM Letter, *supra* note 47; ICI Letter, *supra* note 34; Russell Letter, *supra* note 48; Letter of Securities Industry and Financial Markets Association (Feb. 28, 2008) (''SIFMA Letter'').

heading to read ''expenses that you pay each year as a percentage of the value of your investment'' in place of ''expenses that are deducted from Fund assets.'' [98] In recent years, we have taken significant steps to address concerns that investors do not understand that they pay costs every year when they invest in mutual funds, including requiring disclosure of these costs in shareholder reports.[99] Our revision further addresses those concerns by making clear that the expenses in question are paid by investors as a percentage of the value of their investments in the fund.

Many commenters supported the Commission's proposed revision.[100] We have deleted the word ''ongoing'' from the beginning of the parenthetical language to address commenters' concerns that this term incorrectly suggests that fund operating expenses are the same each year.[101] We are not modifying the parenthetical to address the views of some industry commenters that the statement incorrectly implies that shareholders directly pay fund expenses, when in fact expenses are paid out of fund assets.[102] The purpose of the revision is to make clear to investors that they, in fact, bear these expenses, and the proposed language conveys this fact. Our conclusion is supported by commenters representing investor groups.[103]

Portfolio Turnover Rate

We are adopting, with two modifications, the requirement that funds, other than money market funds, include brief disclosure regarding portfolio turnover immediately following the fee table example.[104] A fund will be required to disclose its portfolio turnover rate for the most recent fiscal year as a percentage of the average value of its portfolio. This numerical disclosure will be accompanied by a brief explanation of the effect of portfolio turnover on transaction costs and fund performance. Some concerns have been expressed in recent years regarding the degree to which investors understand the effect of portfolio turnover, and the resulting transaction costs, on fund expenses and performance.[105] The requirement to provide brief portfolio turnover disclosure in the summary section of the prospectus is intended to address these concerns, and the proposed disclosure received support from a significant number of commenters.[106] Because we believe that it is important to address investors' lack of understanding of the effect of portfolio turnover and transaction costs on fund expenses and performance, we disagree with commenters opposing the disclosure of portfolio turnover rate on the grounds that such information is too complicated or unnecessary for the summary section.[107]

We are modifying the proposed required explanation of the effect of portfolio turnover to require that the explanation also address the adverse tax consequences that may result from a higher portfolio turnover rate when fund shares are held in a taxable account. We agree with commenters who suggested that adverse tax consequences, as well as higher transaction costs, should be expressly addressed by the explanation.[108] We are also making a technical revision to the final sentence of the proposed required explanation.[109]

We have determined not to adopt two significant suggestions that were made by commenters: First, that we require the impact of transaction costs to be reflected in a fund's expense ratio in the fee table and, second, that we require disclosure of portfolio turnover rates over a period greater than one year. While we believe that both of these suggestions have considerable merit, we have concluded that it is not feasible to implement either at the present time as discussed further below.

Several commenters expressed the view that the Commission should require that transaction costs be reflected in a fund's expense ratio in the fee table and that this disclosure would be more meaningful to investors than the rate of portfolio turnover.[110] The comments on this rulemaking, however, do not provide an adequate basis for prescribing a specific and accurate methodology for reflecting transaction costs in a fund's expense ratio.[111] We do agree with the commenters that portfolio turnover rate is an imperfect measure of portfolio transaction costs. While a higher portfolio turnover rate tends to result in higher transaction costs and a lower portfolio turnover rate tends to result in lower transaction costs, there is not necessarily a direct correlation between portfolio turnover rate and portfolio transaction costs. Nonetheless, in the absence of a basis for prescribing a better measure, we believe that portfolio turnover rate, though imperfect, is an appropriate indicator of transaction costs for purposes of the summary section.

A number of commenters argued that disclosing a portfolio turnover rate over a one-year period would not yield a representative portfolio turnover rate because portfolio turnover rates vary significantly over time depending on a variety of factors, including the need to meet redemption requests, unexpected cash inflows due to sharp swings in

[98] Item 3 of Form N–1A.

[99] Item 27(d)(1) of Form N–1A; Investment Company Act Release No. 26372 (Feb. 27, 2004) [69 FR 11244 (Mar. 9, 2004)] (adopting disclosure of costs in shareholder reports). *See also General Accounting Office Report on Mutual Fund Fees: Additional Disclosure Could Encourage Price Competition*, at 66–81 (June 2000), available at *http://www.gao.gov/archive/2000/gg00126.pdf* (discussing lack of investor awareness of the fees they pay and investor focus on mutual fund sales charges rather than recurring fees).

[100] *See, e.g.*, CFA Institute Letter, *supra* note 37; Clarke Letter, *supra* note 35; Fund Democracy *et al.* Letter, *supra* note 34.

[101] *See, e.g.*, CFA Institute Letter, *supra* note 37; Clarke Letter, *supra* note 35; Fund Democracy *et al.* Letter, *supra* note 34; Evergreen Letter, *supra* note 41; Letter of Fenimore Asset Management (Feb. 28, 2008); Fidelity Letter, *supra* note 86; MFDF Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44; T. Rowe Letter, *supra* note 49.

[102] *See, e.g.*, Evergreen Letter, *supra* note 41; ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44; Putnam Letter, *supra* note 48; Russell Letter, *supra* note 48; T. Rowe Letter, *supra* note 49.

[103] *See* Fund Democracy *et al.* Letter, *supra* note 34.

[104] Instruction 5 to Item 3 of Form N–1A.

[105] *See* Investment Company Act Release No. 26313 (Dec. 18, 2003) [68 FR 74820 (Dec. 24, 2003)] (request for comment regarding ways to improve disclosure of transaction costs); Report of the Mutual Fund Task Force on Soft Dollars and Portfolio Transaction Costs (Nov. 11, 2004), available at *http://www.finra.org/web/groups/rules_regs/documents/rules_regs/p012356.pdf*.

[106] *See, e.g.*, Biegel Letter, *supra* note 84; CFA Institute Letter, *supra* note 37; CMFI Letter, *supra* note 44; Fund Democracy *et al.* Letter, *supra* note 34; IDC Letter, *supra* note 61; Mahavier Letter, *supra* note 74; NAPFA Letter, *supra* note 44; Schnase Letter, *supra* note 35; Vanguard Letter, *supra* note 42. *See also* ICI Letter, *supra* note 34 (stating that it does not oppose the disclosure).

[107] *See, e.g.*, American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Evergreen Letter, *supra* note 41; Foreside Letter, *supra* note 74; McCormick Letter, *supra* note 74; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48.

[108] *See* Fund Democracy *et al.* Letter, *supra* note 34; Letter from Representative Donald A. Manzullo (Feb. 26, 2008) (''Manzullo Letter'').

[109] Item 3 of Form N–1A. We are deleting the reference to portfolio turnover rate as a percentage of the average value of the fund's ''whole'' portfolio in the explanation to reflect the fact that the rate is calculated without reference to securities whose maturities at the time of acquisition are one year or less. *See* Instruction 4(d)(ii) to current Item 8(a) of Form N–1A (describing how to calculate portfolio turnover rate; current Item 8 is being renumbered as Item 13).

[110] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34; Letter from Representative George Miller, Senator Edward M. Kennedy, Representative Robert E. Andrews, Senator Tom Harkin, and Senator Herb Kohl (Mar. 13, 2008) (''Miller Letter'').

[111] In addition, in 2003 the Commission issued a concept release that sought public comment on a number of issues related to the disclosure of mutual fund transaction costs. *See* Investment Company Act Release No. 26313, *supra* note 105, 68 FR at 74820. While most commenters who responded to the concept release felt that there should be greater transparency of mutual fund transaction costs, there was a wide range of opinions on what should be disclosed.

markets, or the occurrence of a significant event not likely to repeat in future years, such as a fund merger or a new portfolio manager restructuring the fund's holdings.[112] These commenters suggested that the Commission address this concern by, for example, requiring funds to disclose year-by-year turnover rates for a longer period (*e.g.*, 5–10 years) or an average turnover rate over a longer period of time (*e.g.*, five years).[113] We believe that requiring year-by-year turnover rates for multiple years in the summary section would not further our goal of providing concise, user-friendly disclosure, particularly in light of the fact that there is not necessarily a direct correlation between portfolio turnover and transaction costs. We note that portfolio turnover rates for each of the past five years are already required elsewhere in the prospectus.[114] We do not believe that there is a sufficient basis in the comments to require disclosure of an average turnover rate over a longer period of time (*e.g.*, five years). Doing so would require us to address a number of questions that have not been subject to adequate comment in this rulemaking, including devising a calculation methodology and addressing questions of comparability across funds that have been in existence for different periods of time.

Expense Reimbursement and Fee Waiver Arrangements

Finally, we are adopting, with modifications to address commenters' recommendations, the proposed amendments to the requirement that a fund disclose in its fee table gross operating expenses that do not reflect the effect of expense reimbursement or fee waiver arrangements, which result in reduced expenses being paid by the fund.[115] The adopted amendments will permit a fund to place two additional captions directly below the ''Total Annual Fund Operating Expenses'' caption in cases where there are expense reimbursement or fee waiver arrangements that will reduce any fund operating expenses for no less than one year from the effective date of the fund's registration statement.[116] We have eliminated the proposed requirement that the reimbursement or waiver arrangement has reduced operating expenses in the past, as suggested by two commenters, because this is irrelevant to the impact that the arrangements will have in the future.[117] The purpose of the permitted line items is to show investors how the arrangements will affect expenses in the future and not how they have affected expenses in the past.[118]

One caption will show the amount of the expense reimbursement or fee waiver, and a second caption will show the fund's net expenses after subtracting the fee reimbursement or expense waiver from the total fund operating expenses. Funds that disclose these arrangements will also be required to disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, including the expected termination date, and briefly describe who can terminate the arrangement and under what circumstances. We are adding an express requirement that the expected termination date of the arrangement be disclosed in order to address a commenter's concern that investors should be informed in cases where the commitment on a fee waiver becomes shorter than one year.[119]

In computing the fee table example, a fund will be permitted to reflect any expense reimbursement or fee waiver arrangements that will reduce any operating expenses for no less than one year from the effective date of the fund's registration statement.[120] This adjustment may be reflected only in the periods for which the expense reimbursement or fee waiver arrangement is expected to continue. For example, if such an arrangement were expected to continue for one year, then, in the computation of 10-year expenses in the fee table example, the arrangement could only be reflected in the first of the 10 years.[121]

Commenters made several suggestions with respect to cost disclosure that we have determined not to implement at this time. First, a number of commenters suggested that the fee table in the summary section should simply disclose the total fees and expenses and should omit certain line item breakdowns of expenses that are currently required in the statutory prospectus.[122] Commenters argued that a more abbreviated presentation, such as a fund's total expense ratio, is preferable because they argued that the current breakdown of fees is not crucial information to an investor's investment decision.[123] We believe that this idea deserves further consideration, and we will consider it for possible future rulemaking.

Second, some commenters suggested that we consider alternative terms to describe sales loads or rule 12b–1 fees[124] because the terms are not easily understood by most investors.[125] We have concluded that it is more appropriate to consider these changes in the context of a full reconsideration of

[112] *See, e.g.*, CMFI Letter, *supra* note 44; Firehouse Letter, *supra* note 35; IDC Letter, *supra* note 61.

[113] *See, e.g.*, CMFI Letter, *supra* note 44; Mahavier Letter, *supra* note 74.

[114] Item 13(a) of Form N–1A.

[115] Instruction 3(d)(i) and 6(a) to Item 3 of Form N–1A. In an expense reimbursement arrangement, the adviser reimburses the fund for expenses incurred. Under a fee waiver arrangement, the adviser agrees to waive a portion of its fees in order to limit fund expenses.

[116] Instruction 3(e) to Item 3 of Form N–1A. A fund may not include the additional captions if the expense reimbursement or fee waiver arrangement may be terminated without agreement of the fund's board of directors (*e.g.*, unilaterally by the fund's investment adviser) during the one-year period. If a fee waiver or expense reimbursement arrangement, in fact, terminates less than a year after the effective date of a fund's registration statement, the fund generally would be required to supplement or ''sticker'' its prospectus to reflect the termination. The ''sticker'' would be filed with the Commission in accordance with rule 497 under the Securities Act.

[117] Instruction 3(e) to Item 3. We are also making a similar change in the instructions to the fee table example. Instruction 4(a) to Item 3. *See, e.g.*, Dechert Letter, *supra* note 50; Evergreen Letter, *supra* note 41.

[118] Because expense reimbursement and fee waiver arrangements of new funds will be disclosed in the same manner as existing funds as a result of the elimination of the proposed requirement described in the text, we are eliminating current Instruction 5(b) (renumbered as Instruction 6(b) in the Proposing Release) to Item 3 of Form N–1A, which pertains to new funds, rather than adopting the proposed revision to the Instruction.

[119] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34.

[120] Instruction 4(a) to Item 3 of Form N–1A. We have modified this instruction from the proposal to eliminate the requirement that the arrangement has reduced fund operating expenses during the most recently completed calendar year. This modification is consistent with the modification that is described at notes 117 and 118 and the accompanying text.

We are also adopting, as proposed, a technical amendment to the instructions to the expense example to eliminate language permitting funds to reflect the impact of the amortization of initial organization expenses in the expense example numbers. *Id.* This language is unnecessary because initial organization expenses must be expensed as incurred and may no longer be capitalized. *See* American Institute of Certified Public Accountants, Statement of Position 98–5, *Reporting on the Costs of Start-Up Activities* (Apr. 3, 1998).

[121] A fund may not reflect the arrangement in any period during which the arrangement may be terminated without agreement of the fund's board of directors (*e.g.*, unilaterally by the fund's investment adviser).

[122] *See, e.g.*, Capital Research Letter, *supra* note 34; Evergreen Letter, *supra* note 41; Fund Democracy *et al.* Letter, *supra* note 34.

[123] *See* Fund Democracy *et al.* Letter, *supra* note 34.

[124] ''Rule 12b–1 fees'' or ''12b–1 fees'' are fees paid out of fund assets pursuant to a distribution plan adopted under rule 12b–1 under the Investment Company Act [17 CFR 270.12b–1].

[125] *See, e.g.*, Miller Letter, *supra* note 110; CFA Institute Letter, *supra* note 37; Manzullo Letter, *supra* note 108; Letter of Investor Rights Clinic at Pace University School of Law (Feb. 28, 2008) (''Pace Letter'').

sales charges and rule 12b–1 rather than in the current rulemaking.[126]

Finally, some commenters suggested that the fee table require some form of comparison of the fund's fees to a relevant benchmark based on the fees of similar funds.[127] The Commission shares the commenters' view that the ability to compare fees across mutual funds is extremely important to investors. To facilitate this comparison, we have designed the summary section to provide investors with key information in a standardized order. We also note that the Commission's ongoing interactive data initiative is intended to provide investors and other users with the tools necessary to facilitate comparisons of fee information. The Commission recently proposed rules that would, if adopted, require mutual funds to file the information in their fee tables in an interactive data format that would facilitate automated analysis of the information and comparison to other funds.[128] The interactive data format would allow users of fee table information to download cost and performance information directly into spreadsheets and analyze it using commercial off-the-shelf software.

e. Investments, Risks, and Performance

Following the fee table and example, we are requiring, substantially as proposed, that a fund disclose its principal investment strategies and risks.[129] This includes the current bar chart and table illustrating the variability of returns and showing the fund's past performance.

We are modifying the narrative that is required to accompany the bar chart and performance table in one respect to address the views expressed by both focus group investors and commenters. A fund that makes updated performance information available on a Web site or at a toll-free (or collect) telephone number will be required to include a statement explaining this and providing the Web site address and/or telephone number.[130] A number of investors in focus groups expressed the view that the availability of updated performance information, particularly at a Web site, would be helpful.[131] In addition, many industry commenters noted that funds routinely make updated performance information available to investors either by Internet Web site or by telephone and suggested that the summary section direct investors to this information.[132] Particularly in light of our determination not to require quarterly updating of the Summary Prospectus, which is discussed below,[133] we believe that it will be helpful to investors for the summary section to indicate where updated performance information may be found.

We are not modifying the required bar chart and performance table to add additional comparative information as suggested by several commenters.[134] Currently, funds are required to include an appropriate broad-based securities market index in the performance table.[135] We have determined not to require additional comparative performance information at this time because we are concerned that it would tend to undermine our goal of a concise, user-friendly summary of key information by contributing to the length and complexity of the summary section. Further, as with cost information,[136] we believe that it is preferable for investors and other users of the prospectus to be given the flexibility to make a variety of performance benchmark comparisons. Our ongoing interactive data initiative is intended to provide the tools necessary to facilitate dynamic comparisons of this type, and we note that the information in the bar chart and performance table is covered by our recently proposed rules that would, if adopted, require mutual funds to file information in an interactive data format.[137]

f. Management

We are adopting, as proposed, the requirement that the summary section include the name of each investment adviser and sub-adviser of the fund, followed by the name, title, and length of service of the fund's portfolio managers.[138] A fund will not be required to identify a sub-adviser whose sole responsibility is limited to day-to-day management of cash instruments unless the fund is a money market fund or other fund with a principal investment strategy of regularly holding cash instruments.[139] Also, a fund having three or more sub-advisers, each of which manages a portion of the fund's portfolio, will not be required to identify each sub-adviser, except that the fund will be required to identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the fund's net assets. For this purpose, a significant portion of a fund's net assets generally will be deemed to be 30% or more of the fund's net assets.[140] The portfolio managers required to be listed will be the same ones with respect to which information is currently required in the prospectus.[141]

Several commenters opposed requiring funds to disclose portfolio managers.[142] Two of these commenters argued that the identity and length of service of portfolio managers do not rise to the level of importance necessary to warrant inclusion in the summary.[143] However, the Commission continues to believe, along with other

[126] The Commission last year hosted a roundtable that brought together representatives from mutual funds, financial services companies, and investor advocacy groups to discuss issues relating to rule 12b–1. *See* Commission Roundtable on Rule 12b–1 (Jun. 19, 2007) available at *http://www.sec.gov/spotlight/rule12b-1.htm.* Following the roundtable, we sought public comment on these topics and have received almost 1,500 comment letters.

[127] *See, e.g.*, AARP Letter, *supra* note 34; Fund Democracy *et al.* Letter, *supra* note 34; Letter of Gary M. Keenan (Feb. 14, 2008).

[128] *See* Investment Company Act Release No. 28298, *supra* note 28, 73 FR at 35442.

[129] Item 4 of Form N–1A. To conform to other changes we are adopting to Form N–1A, the Instructions to Item 4 contain technical revisions that (1) amend cross-references to other Items in Form N–1A; and (2) eliminate language related to the presentation of performance information for more than one fund, given the requirement that information for each fund be presented separately. Instructions 2(e) and 3 to Item 4(b)(2) of Form N–1A.

[130] Item 4(b)(2)(i) of Form N–1A.

[131] *See* Focus Group Report, *supra* note 32, at 11; *see, e.g.*, Focus Group Transcripts, *supra* note 32, at 49, 78.

[132] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Fidelity Letter, *supra* note 86; ICI Letter, *supra* note 34; Janus Letter, *supra* note 63; Oppenheimer Letter, *supra* note 44; Putnam Letter, *supra* note 48; Russell Letter, *supra* note 48; T. Rowe Letter, *supra* note 49.

[133] *See* discussion *infra* Part III.B.2.c.

[134] *See, e.g.*, Letter of Scott Hastings (Feb. 11, 2008) (suggesting comparative disclosure of the portfolio manager's stated benchmark); Morningstar Letter, *supra* note 34 (same).

[135] Current Item 2(c)(2)(iii) of Form N–1A; Instruction 5 to current Item 22(b)(7) of Form N–1A. A fund is also permitted to include information for one or more other indexes. Instruction 6 to current Item 22(b)(7) of Form N–1A. If an additional index is included, a fund is required to disclose information about the additional index in the narrative explanation accompanying the bar chart and table (*e.g.*, by stating that the information shows how the fund's performance compares with the returns of an index of funds with similar investment objectives).

[136] *See supra* note 127 and accompanying text.

[137] *See* Investment Company Act Release No. 28298, *supra* note 28, 73 FR at 35442.

[138] Item 5 of Form N–1A. Additional disclosures regarding investment advisers and portfolio managers that are currently required in the prospectus will continue to be required, but not in the summary section. Item 10(a) of Form N–1A.

[139] Instruction 1 to Item 5(a) of Form N–1A. A fund will continue to be required to provide the name, address, and experience of all sub-advisers elsewhere in the prospectus. Item 10(a)(1)(i) of Form N–1A.

[140] Instruction 2 to Item 5(a) of Form N–1A.

[141] Item 10(a)(2) of Form N–1A.

[142] *See, e.g.*, Capital Research Letter, *supra* note 34; ICI Letter, *supra* note 34; Vanguard Letter, *supra* note 42.

[143] *See* ICI Letter, *supra* note 34; Russell Letter, *supra* note 48.

commenters,[144] that investors in a fund should be provided basic information about the individuals who significantly affect the fund's investment operations.

Some commenters noted that funds are often managed by teams and that disclosing the individuals making up such teams would make the summary section too long and would not add substantive disclosure.[145] We note that, as is currently the case, disclosure will be required only with respect to the members of a management team who are jointly and primarily responsible for the day-to-day management of the fund's portfolio.[146] We agree with other commenters that investors have the same interest in the identity of the individuals who are primarily responsible for management, regardless of whether a fund is managed by an individual portfolio manager or a team.[147]

g. Purchase and Sale of Fund Shares

We are adopting, with modifications to address exchange-traded funds,[148] the proposed requirement that the summary section disclose the fund's minimum initial or subsequent investment requirements and the fact that the fund's shares are redeemable, and identify the procedures for redeeming shares (*e.g.*, on any business day by written request, telephone, or wire transfer).[149] Commenters generally did not express a view with respect to this requirement.[150]

h. Tax Information

We are adopting, as proposed, the requirements for tax information in the summary section. A fund will be required to state, as applicable, that it intends to make distributions that may be taxed as ordinary income or capital gains or that the fund intends to distribute tax-exempt income. A fund that holds itself out as investing in securities generating tax-exempt income will be required to provide, as applicable, a general statement to the effect that a portion of the fund's distributions may be subject to federal income tax.[151] Commenters generally expressed no views on these requirements.[152]

i. Financial Intermediary Compensation

The Commission is adopting the proposed requirement that the summary section of the prospectus conclude with disclosure regarding financial intermediary compensation. Commenters generally supported this requirement,[153] and we are modifying the requirement in two ways to address views expressed during investor focus groups and the concerns of commenters. Specifically, we are requiring the following statement, which could be modified provided that the modified statement contains comparable information:[154]

Payments to Broker-Dealers and Other Financial Intermediaries

If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may create a conflict of interest by influencing the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's Web site for more information.

This disclosure will be new to fund prospectuses and is intended to identify the existence of compensation arrangements with selling broker-dealers or other financial intermediaries, alert investors to the potential conflicts of interest arising from these arrangements, and direct investors to their salesperson or the financial intermediary's Web site for further information. It is intended to address, in part, concerns that mutual fund investors lack adequate information about certain distribution-related costs that create conflicts for broker-dealers and their associated persons.[155]

We have added a provision permitting a fund to omit the financial intermediary disclosure if neither the fund nor any of its related companies pay financial intermediaries for the sale of fund shares or related services.[156] This addresses the concerns of a number of commenters who expressed the view that the Commission should not require the narrative disclosure from funds to which the disclosure does not apply.[157] According to one commenter, such funds include, for example, no-load funds and funds sold directly to investors.[158]

We have also modified the proposed statement to clarify that payments to a broker-dealer or other financial intermediary may create a conflict of interest by influencing the broker-dealer or other intermediary to recommend a

[144] *See, e.g.*, AARP Letter, *supra* note 34; Evergreen Letter, *supra* note 41; Financial Services Institute Letter, *supra* note 41. *See also* Focus Group Transcripts, *supra* note 32, at 11; *id.* at 30–31 (importance of fund managers); ICI Survey, *supra* note 84, at 8 (61% of respondents believed that the name of the portfolio manager was very important or somewhat important).

[145] *See, e.g.*, Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Ogg Letter, *supra* note 75.

[146] Instruction 2 to Item 5(b) of Form N–1A. In addition, if more than five persons are jointly and primarily responsible for the day-to-day management of a fund's portfolio, the fund need only provide the required information for the five persons with the most significant responsibility.

[147] *See* Evergreen Letter, *supra* note 41; Keil Letter, *supra* note 62.

[148] *See* discussion *infra* Part III.A.4. We are also making a technical amendment to current Item 6(b) of Form N–1A (which is being renumbered as Item 11(b)) to remove the requirement to disclose a fund's minimum initial or subsequent investment requirements because we have added this requirement to Item 6(a) of the summary section.

[149] Item 6 of Form N–1A. We are modifying the proposal to permit funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit this information. *See supra* note 68 and accompanying text.

[150] Three commenters supported the proposal. *See* Letter of Alison W. Beirlein (Feb. 26, 2008); Foreside Letter, *supra* note 74; Schnase Letter, *supra* note 35. Three commenters opposed the proposal. *See* Bent Letter, *supra* note 74; Clarke Letter, *supra* note 35; Letter of MFS Investment Management (Feb. 28, 2008) (''MFS Letter'').

[151] Item 7 of Form N–1A.

[152] One commenter opposed mandating the tax information. *See* Clarke Letter, *supra* note 35.

[153] *See, e.g.*, Data Communiqué Letter, *supra* note 35; Firehouse Letter, *supra* note 35; Fund Democracy *et al.* Letter, *supra* note 34; ICI Letter, *supra* note 34; Keil Letter, *supra* note 62; NAPFA Letter, *supra* note 44; Schnase Letter, *supra* note 35; SIFMA Letter, *supra* note 97; Letter of USAA Investment Management Company (Feb. 28, 2008) (''USAA Letter''); Vanguard Letter, *supra* note 42; Letter of Wachovia Securities, LLC (Aug. 29, 2008). *But see* Letter of Capital Research and Management Company (Aug. 29, 2008) (opposing the financial intermediary disclosure requirement).

[154] Item 8 of Form N–1A.

[155] The Commission has recognized these concerns in a separate initiative in which the Commission proposed to require, among other things, disclosure of mutual fund distribution-related costs and conflicts of interest by selling broker-dealers and other financial intermediaries at the point of sale. Securities Act Release No. 8544 (Feb. 28, 2005) [70 FR 10521 (Mar. 4, 2005)]; Securities Act Release No. 8358 (Jan. 29, 2004) [69 FR 6438 (Feb. 10, 2004)]. One commenter to that proposal recommended use of a short-form ''profile plus'' disclosure document that would include, among other things, basic information about such potential conflicts of interest. *See* Letter of NASD (Mar. 31, 2005) available at *http://www.sec.gov/rules/proposed/s70604/nasd033005.pdf.* We intend to consider additional steps to enhance investor access to information prior to making an investment decision. See *infra* notes 200 and 201 and accompanying text.

[156] Item 8 of Form N–1A.

[157] *See, e.g.*, CAI Letter, *supra* note 67; ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44; T. Rowe Letter, *supra* note 49; USAA Letter, *supra* note 153; Vanguard Letter, *supra* note 42. We note that Item 8 permits a fund to modify the narrative statement provided that the modified statement contains comparable information. For example, a fund that is offered as an underlying investment option for a variable annuity contract could modify the narrative statement to reflect payments made to the sponsoring insurance company for distribution and other services.

[158] *See* ICI Letter, *supra* note 34. We note, however, that no-load funds and directly-sold funds will be required to include the narrative disclosure in certain circumstances. For example, the disclosure will be required if a no-load fund pays servicing fees to a fund supermarket.

fund over another investment. This modification, made in response to investor comments from our focus groups, is intended to increase awareness of potential conflicts of interest.[159] We are, therefore, revising the narrative to expressly notify investors that a conflict of interest may exist with respect to the broker-dealer's recommendation.

We have determined not to add a requirement that the disclosure include standardized language enumerating the types of compensation that may be provided to financial intermediaries, as suggested by one commenter.[160] Rather, we are adopting a statement that will alert investors generally to the payment of compensation and the potential conflicts arising from that payment. An investor could then obtain further detail from his or her salesperson or the intermediary's Web site. As discussed further below, we intend to consider additional steps in the future that would further enhance investors' access to information about broker and intermediary compensation and conflicts of interest.

4. Exchange-Traded Funds

In March of this year, the Commission proposed several amendments to Form N–1A to accommodate the use of the form by ETFs.[161] Most ETFs are organized and registered as open-end funds. Unlike traditional mutual funds, however, they sell and redeem individual shares (''ETF shares'') only in large aggregations called ''creation units'' to certain financial institutions. ETFs register offerings and sales of ETF shares under the Securities Act and list their shares for trading under the Securities Exchange Act of 1934 (''Exchange Act'').[162] As with any listed security, investors trade ETF shares at market prices.

The proposed amendments for ETF prospectuses were designed to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than financial institutions that purchase creation units directly from the ETF. The proposed amendments for ETF prospectuses also addressed the need to modify the summary section of ETF prospectuses to include the amended ETF disclosures. Today, we are adopting the proposed amendments for ETF prospectuses with changes to respond to issues raised by commenters on the summary prospectus proposing release and the ETF proposing release.[163]

a. Purchasing and Redeeming Shares

We are amending Form N–1A to eliminate the requirement that ETF prospectuses disclose information on how to buy and redeem shares directly from the ETF because it is not relevant to investors who are secondary market purchasers of ETF shares.[164] We proposed to require ETF prospectuses to state the number of shares contained in a creation unit (*i.e.*, the aggregate number of shares an ETF will issue or that is necessary to redeem from the ETF), that individual shares can only be bought and sold on the secondary market through a broker-dealer, and that shareholders may pay more than net asset value (''NAV'') when they buy ETF shares and receive less than NAV when they sell shares because shares are bought and sold at current market prices.[165] We also proposed to amend the fee table disclosure in Form N–1A to exclude fees and expenses for purchases or redemptions of creation units and instead to modify the narrative explanation preceding the example in the fee table to state that investors in ETF shares may pay brokerage commissions that are not reflected in the example.[166] Commenters who addressed the proposed amendments generally supported this approach.[167] We are adopting the amendments largely as proposed, with minor changes to conform to the final amendments to the summary section.[168] ETFs still will be required to include disclosure on how creation units are offered to the public in the SAI.[169]

Consistent with our proposal, the alternative disclosures in Items 3 and 6 of Form N–1A will not be available to ETFs with creation units of less than 25,000 shares.[170] Although only certain financial institutions purchase and redeem creation units directly from an ETF, individual or retail investors may be more likely to transact in creation units through one of these financial institutions if the creation unit size is less than 25,000 shares.[171] Because there is greater potential for retail

[159] *See* Focus Group Report, *supra* note 32, at 8 (stating that participants felt that new investors may not be aware of the potential conflict of interest); Focus Group Transcripts, *supra* note 32, at 16, 41.

[160] 160 *See* NAPFA Letter, *supra* note 44 (requesting standardized language describing possible forms of compensation, such as surrender fees, payment for shelf space, commissions paid for fund transactions, principal mark-ups and mark-downs, fees derived from bid-ask spreads, and payments for marketing support and/or education of registered representatives).

[161] *See* ETF Proposing Release, *supra* note 14, 73 FR at 14618.

[162] For a description of how ETFs operate, *see id.* at 14620–21. ETFs currently operate pursuant to exemptive orders granted by the Commission. The final amendments define an ETF as a fund or class of a fund, the shares of which are traded on a national securities exchange, and that has formed and operates pursuant to an exemptive order granted by the Commission or in reliance on an exemptive rule adopted by the Commission. General Instruction A of Form N–1A. The final ETF definition in Form N–1A eliminates from the proposed definition the cross-reference to proposed rule 6c–11, which, if adopted, would codify many of the exemptive orders granted to ETFs. *See* ETF Proposing Release, *supra* note 14, 73 FR at 14621–30. We have made this technical change to the ETF definition because the Commission has not adopted proposed rule 6c–11.

[163] The amendments we proposed in the ETF Proposing Release incorporated most of the comments from Barclays Global Fund Advisors (''BGFA'') in response to the Proposing Release. *See* Letter of BGFA (Feb. 28, 2008) (''BGFA Letter''). BGFA also requested guidance on how disclosure requirements in future exemptive orders will be integrated into the summary section of the prospectus. We are unable to provide guidance in this release because we do not know what additional disclosure requirements, if any, would be required for ETFs that form and operate pursuant to future exemptive orders. Additional disclosure requirements, if any, will be included in those exemptive orders.

[164] Item 6(c)(ii) of Form N–1A.

[165] *See* proposed Item 6(h)(3) and (4) of current Form N–1A; proposed Instruction 3 to Item 6(h) of current Form N–1A.

[166] Proposed Instruction 1(e)(i) to current Item 3 of Form N–1A. One commenter to the ETF Proposing Release requested that we require ETFs to include spread costs in the fee table. *See* Letter of BGFA (May 16, 2008) (File No. S7–07–08) (''BGFA Letter on ETF Proposing Release''). This information is required to be disclosed pursuant to rule 11Ac1–5(b) of the Exchange Act [17 CFR 240.11Ac1–5(b)] and is publicly available to investors and the market, which considers the effect of spreads. We did not follow the commenter's suggestion because we believe that disclosure regarding additional spreads in an ETF prospectus, particularly in the summary section, would not be meaningful to most investors and may be confusing.

[167] See, *e.g.*, BGFA Letter on ETF Proposing Release, *supra* note 166, Letter of Investment Company Institute (May 19, 2008) (File No. S7–07–08) (''ICI Letter on ETF Proposing Release'').

[168] Item 6(c)(i) of Form N–1A; Instruction 1(e)(i) to Item 3 of Form N–1A. Item 6(c)(i)(B) requires disclosure that ETF shares may trade at a price greater than NAV (premium) or less than NAV (discount). The final amendments, like the proposed amendments, also will require each ETF to identify the exchange ticker symbol(s) and principal U.S. market(s) on which the shares are traded. Item 1(a)(2) of Form N–1A; rule 498(b)(1)(ii) 17 CFR 230.498(b)(1)(ii). We also are adopting a conforming amendment to the expense example in ETF annual and semi-annual reports. Instruction 1(e)(i) to Item 27(d) of Form N–1A.

[169] Item 23(a) of Form N–1A. Consistent with our proposal, we are not amending this disclosure to include information on creation unit redemption, which Item 11 requires and which we are eliminating for ETFs. *See* Item 11(g) of Form N–1A.

[170] Instruction (1)(e)(ii) to Item 3 of Form N–1A; Item 6(c)(ii) of Form N–1A. We also are adopting a conforming amendment to the expense example in ETF annual and semi-annual reports. Instruction 1(e)(ii) to Item 27(d) of Form N–1A.

[171] ETFs directly sell and redeem creation units only to investors (''authorized participants''), usually brokerage houses, with which the ETF has a contractual agreement. *See, e.g.*, Investment Company Act Release No. 27963 (Aug. 31, 2007) [72 FR 51475 (Sept. 7, 2007)]. The authorized participant may act as a principal in the transaction or as agent for another, typically an institutional investor.

investors to transact (indirectly) in creation units as they decrease in size, we are requiring any ETF that sells and redeems its shares in creation units of 25,000 or less to include in its prospectus information on how to purchase and redeem creation units and the costs associated with those transactions.[172]

b. Total Return

At the suggestion of commenters, we are not adopting our proposal that ETFs include disclosure of market price returns in addition to returns based on NAV.[173] Like any other fund that files Form N–1A, an ETF must disclose returns based on NAV.[174] All commenters who addressed this proposal opposed it.[175] They disagreed that these returns would be more relevant to an investor's experience in the ETF than returns based on NAV because market price (which we proposed to define as closing price) is not tied to an investor's particular purchase price.[176] One commenter suggested that while NAV also does not represent any single investor's experience, it provides a better metric of performance than market price.[177] After consideration of these comments, we agree with these commenters that market price returns would not more closely represent the experience of any particular investor and may confuse investors, particularly when disclosed next to NAV returns.[178] We therefore are not requiring ETFs to disclose market price returns in Form N–1A.[179]

We also are not adopting our proposal that would have required an index-based ETF to compare its performance to its underlying index rather than a benchmark index.[180] Commenters on the ETF proposing release stated that we should not change the disclosure requirement for index-based ETFs without changing the requirement for all index funds.[181] We agree that the proposed change should be considered with respect to all index funds, not just index-based ETFs, and therefore, we are not adopting this amendment but may consider future rulemaking.[182]

c. Premium/Discount Information

We are adopting, as proposed, the amendments to the form to require each ETF to disclose to investors information about the extent and frequency with which market prices of fund shares have tracked the fund's NAV.[183] Each ETF will be required to disclose in its prospectus the number of trading days during the most recently completed calendar year and quarters since that year on which the market price of the ETF shares was greater than the fund's NAV and the number of days it was less than the fund's NAV (premium/discount information).[184] This disclosure is designed to alert investors to the relationship between NAV and the market price of the ETF's shares, and that investors may purchase or sell ETF shares at prices that do not correspond to NAV. In addition, this disclosure will provide historical information regarding the frequency of these deviations.

Commenters on the ETF proposing release were divided as to whether this specific premium/discount information would be useful to investors, although all who commented suggested the information need only be provided on the ETF's Web site.[185] Based on these comments, it appears that specific premium/discount information may not be generally useful to all ETF investors. For that reason, an ETF may omit the disclosure of specific premium/discount information in its prospectus or annual report if the fund provides the information on its Internet Web site and discloses in the prospectus or annual report an Internet address where

[172] We have not, as one commenter to the ETF Proposing Release suggested, used a dollar value of a creation unit as the threshold for disclosure. *See* ICI Letter on ETF Proposing Release, *supra* note 167. We do not want to establish a threshold that may change (and as a consequence require amended disclosure) as a result of fluctuations in portfolio value rather than direct action by the ETF. We also disagree with one commenter who opined that the proposed threshold would create a de facto minimum of 25,000 shares for creation units and suggested that the threshold for exemptions from disclosure be set at 1,000 shares. *See* Letter of James J. Angel (May 16, 2008) (File No. S7–07–08). Other commenters, including ETF sponsors, explained they supported the proposed exemption from disclosure on the purchase and redemption of creation units because the information would confuse retail investors rather than because the disclosures were particularly costly or burdensome. *See* BGFA Letter on ETF Proposing Release, *supra* note 166; ICI Letter on ETF Proposing Release, *supra* note 167; Letter of Xshares Advisors LLC (May 20, 2008) (File No. S7–07–08) (''Xshares Letter''). Thus, it seems unlikely that an exemption from these disclosures would outweigh the other factors an ETF considers in determining the appropriate size of a creation unit, and we have not reduced the threshold for the exemption. *See* ICI Letter on ETF Proposing Release, *supra* note 167 (''[T]he appropriate size of a creation unit may vary depending on a number of factors, such as the type and availability of component securities, the expected uses of the product, and the likely Authorized Participants.'').

[173] *See* ETF Proposing Release, *supra* note 14, 73 FR at 14623 n. 163 and preceding, accompanying, and following text.

[174] *See* Item 13(a) of Form N–1A.

[175] *See* ICI Letter on ETF Proposing Release, *supra* note 167; BGFA Letter on ETF Proposing Release, *supra* note 166; Xshares Letter, *supra* note 171.

[176] *See* ICI Letter on ETF Proposing Release, *supra* note 167; Xshares Letter, *supra* note 172.

[177] ICI Letter on ETF Proposing Release, *supra* note 167 (''[NAV] provides a consistent metric calculated as of the same time each day in accordance with the fund's valuation policies and procedures, and is not subject to the influence of outlier bids or offers.'').

[178] *See id.*; BGFA Letter on ETF Proposing Release, *supra* note 166.

[179] Similarly, we are not adopting our proposed conforming amendments to the total return information in ETF annual reports. *See* ETF Proposing Release, *supra* note 14, 73 FR at 14633 nn. 171–172 and accompanying text.

[180] *See* ETF Proposing Release, *supra* note 14, 73 FR 14633 at nn. 173–174.

[181] *See, e.g.*, ICI Letter on ETF Proposing Release, *supra* note 167; Xshares Letter, *supra* note 171.

[182] We also are not, as one commenter suggested, eliminating the required disclosure concerning portfolio turnover information for index-based ETFs. *See* BGFA Letter, *supra* note 166. Although most ETFs may sell and redeem their creation units in kind (*i.e.*, for a basket of assets), they still engage in portfolio transactions in order to conform the portfolio to changes in the index. We believe that information regarding portfolio turnover also may be relevant to an investor who is comparing an investment in an index-based ETF to an investment in an open-end index fund.

[183] Item 11(g)(2) of Form N–1A. *See* ETF Proposing Release, *supra* note 14, 73 FR at 14632 nn. 166–169 and accompanying and following text. ETFs currently are required to disclose on their Internet Web sites the prior business day's last determined NAV, the market closing price of the fund's shares or the midpoint of the bid-ask spread at the time of the calculation of NAV (''bid-ask price''), and the premium/discount of that price to NAV. *See, e.g.*, WisdomTree Investments, Inc. *et al.*, Investment Company Act Release Nos. 27324 (May 18, 2006) [71 FR 29995 (May 24, 2006)] (notice) and 27391 (June 12, 2006) (order); PowerShares Exchange Traded Fund Trust *et al.*, Investment Company Act Release Nos. 25961 (Mar. 4, 2003) [68 FR 11598 (Mar. 11, 2003)] (notice) and 25985 (Mar. 28, 2003) (order).

[184] Consistent with our proposal, the final amendments require ETFs to present premiums or discounts as a percentage of NAV. Instruction 2 to Item 11(g)(2) of Form N–1A. *See* ETF Proposing Release, *supra* note 14, 73 FR at 14632 nn. 166–169 and accompanying and following text. ETFs also will have to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Instruction 3 to Item 11(g)(2) of Form N–1A. Consistent with the proposal, the final amendments require ETFs to include a table with premium/discount information in their annual reports for the five recently completed fiscal years. Item 27(b)(7)(iv) of Form N–1A. We are including instructions similar to those in Item 11 to assist funds in meeting this disclosure obligation. Instructions to Item 27(b)(7)(iv) of Form N–1A.

[185] *See* Xshares Letter, *supra* note 172 (''[W]e believe that the disclosure of [premium/discount] information is useful to investors and support this requirement.''); Letter of NYSE Arca (May 28, 2008) (File No. S7–07–08) (asserting generally that disclosure of premium/discount information required on the Web site, together with other available index or portfolio information provides necessary information to investors to assess ETF pricing against the underlying index or portfolio). *But see* BGFA Letter on ETF Proposing Release, *supra* note 166 (''[T]he concept of premium/discount may not be an instructive way of thinking about ETF share prices in the secondary market * * * BGFA's Internet Web site experience suggests investors do not value this information highly.''); ICI Letter on ETF Proposing Release, *supra* note 167 (premium/discount information is not particularly useful and investors do not regularly seek it).

investors can locate the information.[186] Because ETFs may choose to provide this disclosure on their Web sites instead of in their prospectuses, we have added a requirement that the prospectus disclose that ETF shares may trade at a premium or discount.[187] This approach is designed to require disclosure of the information, but avoid duplicative disclosures that may result in additional regulatory burdens. Commenters who addressed the issue strongly supported permitting ETFs to include historical premium/discount information on their Web sites instead of in their prospectuses and annual reports.[188] Our amendments allow ETFs to choose the most cost-effective method of providing this disclosure to their investors.

For purposes of calculating premium/discount information, we are adopting, with a modification, the proposed definition of ''market price.''[189] Commenters objected to our proposed definition of market price as the closing price because of stale pricing concerns.[190] These commenters suggested that ETFs instead be permitted to use the mid-point between the highest bid and the lowest offer at the time the fund's NAV is calculated.[191] To address these concerns, the final amendments define the term ''market price'' to mean the closing price on the principal market on which ETF shares trade or within the range between the highest offer and the lowest bid if that price more accurately reflects the current market value of the fund's shares at the time the Fund calculates its NAV.[192]

5. Conforming and Technical Amendments to Form N–1A

The foregoing amendments to Form N–1A require adding new items to the form and revising and renumbering certain existing items. We are adopting conforming amendments to Form N–1A, consistent with these revisions and renumbering, in order to update the table of contents and the various references to Form N–1A items contained within the form. We are also adopting technical amendments to Form N–1A to update the Commission's telephone number and address.[193]

B. New Delivery Option for Mutual Funds

1. Use of Summary Prospectus and Satisfaction of Statutory Prospectus Delivery Requirements

The Commission is adopting, with modifications to address commenters' concerns, the proposal to replace rule 498[194] with a new rule that permits the obligation under the Securities Act to deliver a statutory prospectus with respect to mutual fund securities to be satisfied by sending or giving a Summary Prospectus and providing the statutory prospectus online. In addition, the new rule will require a fund to send the statutory prospectus in paper or by e-mail upon request. The Summary Prospectus is required to contain the key information that is included in the new summary section of the statutory prospectus in the same order that is required in the statutory prospectus.

The new rule is intended to create a disclosure regime that is tailored to the unique needs of mutual fund investors in a manner that provides ready access to the information that investors need, want, and choose to review in connection with a mutual fund purchase decision. The rule provides for a layered approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by e-mail. This is intended to provide investors with better ability to choose the amount and type of information to review, as well as the format in which to review it (online or paper). In addition, the provision of a Summary Prospectus containing key information about the fund, coupled with online provision of more detailed information, should aid investors in comparing funds.[195] In short, we believe that the new rule will result in funds providing investors with more useable information than they receive today in a format that investors are more likely to use and

[186] Item 11(g)(2) of Form N–1A; Item 27(b)(7)(iv) of Form N–1A. Although the time period required in the disclosure is different in the prospectus and annual report, ETFs will be able to omit both disclosures by providing on their Internet Web sites only the premium/discount information required by Item 11(g)(2) (the most recently completed fiscal year and quarters since that year). *Id.* In order to rely on the exemptive orders that permit them to operate, ETFs also must disclose on their Web sites each day the premium and discount of the market closing price or the bid/ask price against the NAV as a percentage of NAV. *See supra* note 183. Investors in ETFs that choose not to disclose the required premium/discount information in their prospectuses or annual reports would be able to review historic and daily premium/discount information on the ETF's Web site.

[187] Item 6(c)(i)(B) of Form N–1A.

[188] *See, e.g.*, BGFA Letter on ETF Proposing Release, *supra* note 166 (''Duplicative disclosure strikes us as unnecessary and burdensome * * *. Because data in a prospectus speaks of the prospectus date and therefore does not include the most recent information, we believe Internet Web site disclosure is preferable to prospectus disclosure. Accordingly, we believe that it would be sufficient to reference the availability of the information on the Internet Web site in a prospectus.'').

[189] General Instruction A of Form N–1A. *See* ETF Proposing Release, *supra* note 14, 73 FR at 14632 nn. 164–165 and accompanying text for a discussion of the proposed definition of ''market price.''

[190] *See, e.g.*, Letter of Chapman and Cutler LLP (May 19, 2008) (File No. S7–07–08) (''Chapman Letter''); ICI Letter on ETF Proposing Release, *supra* note 167 (noting that the closing price may be less accurate because the last trade occurred at a much earlier time than the NAV calculation).

[191] *See, e.g.*, Chapman Letter, *supra* note 190; ICI Letter on ETF Proposing Release, *supra* note 167. *See also, e.g.*, Claymore Exchange-Traded Fund Trust, Investment Company Act Release No. 27469 (Aug. 28, 2006) [71 FR 51869 (Aug. 31, 2006)] (exemptive order permitting ETF to operate in which ETF has used the mid-point price, rather than the closing price, in circumstances when closing price may be less accurate because the last trade occurred at a much earlier point in the day than NAV calculation). One commenter also noted that the principal trading market for an ETF may shift during the trading day and, therefore, that the rule should use the market price on the various principal U.S. markets on which the ETF shares trade during a regular trading session. *See* Chapman Letter, *supra* note 190. We have not incorporated this suggestion in our amendments. We note that rules of the national securities exchanges use the term ''principal market.'' *See, e.g.*, NYSE Arca Rule 6.1(b)(27) (in its rule that applies to options trading on the exchange, defining ''primary market'' in respect of an underlying stock or ETF share to mean ''the principal market in which the underlying stock or [ETF share] is traded.''). We have included the term ''trading'' to be clear that the term does not refer to the principal listing market. In addition, expanding the rule to various principal trading markets may be confusing and could create the potential that funds will seek the market that provides the best bid/offer.

[192] Definition of ''Market Price'' in General Instruction A of Form N–1A (''Market Price'' refers to the last reported sale price at which ETF shares trade on the principal U.S. market on which the fund's shares are traded during a regular trading session or, if it more accurately reflects the current market value of the fund's shares at the time the fund uses to calculate its NAV, a price within the range of the highest bid and lowest offer on the principal U.S. market on which the fund's shares are traded during a regular trading session.''). *See* Codification of Financial Reporting Policies, Section 404.03.b.ii, ''Valuation of Securities—Securities Listed or Traded on a National Securities Exchange,'' reprinted in SEC Accounting Rules (CCH) ¶ 38,221, at 38.424–25. *See also* Fair Value Measurements, Statement of Financial Accounting Standards No. 157, § 24 (Fin. Accounting Standards Bd. 2006).

[193] Cover page to Form N–1A; Item 1(b)(3) of Form N–1A.

[194] As adopted in 1998, rule 498 permits mutual funds to offer investors a disclosure document called a ''profile,'' which summarizes key information about the fund. An investor deciding to purchase fund shares based on the information in a profile is required to receive the fund's statutory prospectus with the security or confirmation of purchase. Investment Company Act Release No. 23065 (Mar. 13, 1998) [63 FR 13968 (Mar. 23, 1998)]. The amendments we are adopting today result in the elimination of the profile.

[195] A recent survey indicated that 90% of investors surveyed had access to the Internet. *See* Telephone Survey Report, *supra* note 32, at 115. It also indicated over half (56%) rely on the Internet to some extent (ranging from ''a little'' to ''completely'') in making investment decisions. *Id.* at 116. The survey report further indicated that 53% of respondents who own mutual funds accessed investment information via the Internet. *Id.* at 6.

understand. Under the new rule, an investor could choose to receive the statutory prospectus in the same paper format that would be provided under our prior rules.

The new rule provides that any obligation under Section 5(b)(2) of the Securities Act [196] to have a statutory prospectus precede or accompany the carrying or delivery of a mutual fund security in an offering registered on Form N–1A is satisfied if (1) a Summary Prospectus is sent or given no later than the time of the carrying or delivery of the fund security;[197] (2) the Summary Prospectus is not bound together with any materials, except as described below; (3) the Summary Prospectus that is sent or given satisfies the rule's requirements at the time of the carrying or delivery of the fund security; and (4) the conditions set forth in the rule, which require a fund to provide the Summary Prospectus, statutory prospectus, and other information on the Internet in the manner specified in the rule, are satisfied.[198] As discussed in more detail below, we have changed the proposed condition that the Summary Prospectus be given ''greater prominence'' than accompanying materials into a requirement of the rule, rather than a condition to satisfaction of delivery obligations under section 5(b)(2) of the Securities Act. We have also clarified that any particular Summary Prospectus is not required to be given ''greater prominence'' than any other Summary Prospectuses or statutory prospectuses. As adopted, we are also permitting the Summary Prospectuses and statutory prospectuses of multiple underlying funds of a variable insurance contract to be bound with each other and with the statutory prospectus for the contract.

Section 5(b)(2) of the Securities Act makes it unlawful to deliver a security for purposes of sale or for delivery after sale ''unless accompanied or preceded'' by a statutory prospectus. Under the rule, delivery of the statutory prospectus for purposes of section 5(b)(2) is accomplished by sending or giving a Summary Prospectus and by providing the statutory prospectus and other required information online. Failure to comply with the rule's requirements for sending or giving a Summary Prospectus and providing the statutory prospectus and other information online would mean that the rule could not be relied on to meet the section 5(b)(2) prospectus delivery obligation. Absent satisfaction of the section 5(b)(2) obligation by other available means,[199] a Section 5(b)(2) violation would result. The rule also requires a fund to send the statutory prospectus upon request. This requirement is not a condition to reliance on the rule, and failure to send the requested statutory prospectus will result in a violation of the rule (as opposed to a violation of section 5(b)(2)).

Section 5(b)(2) does not require delivery of the statutory prospectus prior to delivery of the security or confirmation of the transaction. As a result, mutual fund investors too often receive the statutory prospectus after the purchase transaction when the investment decision is complete. The rules we are adopting will, in practice, require any fund that is relying on the Summary Prospectus to meet its obligations under section 5(b)(2) to post both its Summary Prospectus and statutory prospectus on the Internet at all times. This will result in significantly enhanced access by investors to information about the fund prior to the time of making an investment decision. Several commenters observed that it would be helpful if investors could review a Summary Prospectus prior to making an investment decision.[200] We intend to consider additional steps in the future that would further enhance investors' access to the Summary Prospectus, other information about the fund, and enhanced information about broker and intermediary compensation and conflicts of interest before the investment decision. For example, we continue to consider appropriate disclosures at the point of sale by financial intermediaries, including whether there should be an obligation to direct investors to the online availability of the Summary Prospectus and offer investors a copy of the Summary Prospectus.[201]

The rule we are adopting also provides that a communication relating to an offering registered on Form N–1A that is sent or given after the effective date of a mutual fund's registration statement (other than a prospectus permitted or required under Section 10 of the Securities Act) shall not be deemed a prospectus under Section 2(a)(10) of the Securities Act if (1) it is proved that prior to or at the same time with the communication a Summary Prospectus was sent or given to the person to whom the communication was made; (2) the Summary Prospectus is not bound together with any materials, except as described below; (3) the Summary Prospectus that was sent or given satisfies the rule's requirements at the time of the communication; and (4) the conditions set forth in the rule, which require a fund to provide the Summary Prospectus, statutory prospectus, and other information on the Internet in the manner specified in the rule, are satisfied.[202] This provision is similar to section 2(a)(10)(a) of the Securities Act, which provides that a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of Section 10) shall not be deemed a prospectus if it is proved that prior to or at the same time with the communication a written prospectus meeting the requirements for a statutory prospectus at the time of the communication was sent or given to the person to whom the communication was made.[203] Pursuant to this provision, communications that would otherwise be considered ''prospectuses'' subject to the liability provisions of section 12(a)(2) of the Securities Act are not

[196] 15 U.S.C. 77e(b)(2).

[197] A fund could rely upon existing Commission guidance, which typically requires affirmative consent from individual investors, to send or give a Summary Prospectus by electronic means. *See* Securities Act Release No. 7233 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)]; Securities Act Release No. 7856 (Apr. 28, 2000) [65 FR 25843 (May 4, 2000)]. If, prior to the effective date of this rule, an investor had consented in accordance with existing Commission guidance to receive future versions of one or more funds' statutory prospectuses by electronic means, we would not object if a fund or financial intermediary relies on that consent to send or give the Summary Prospectuses of those funds by electronic means to that investor, provided that the consent is not otherwise revoked.

[198] Rule 498(c).

[199] These include paper delivery of a statutory prospectus or electronic delivery of a statutory prospectus in reliance upon existing Commission guidance. See *supra* note 197 for existing Commission guidance on electronic delivery. We note that it would be permissible to satisfy Section 5(b)(2) obligations by relying on rule 498 to send or give a Summary Prospectus to some investors, while providing a statutory prospectus to others. For example, it would be permissible to rely on rule 498 to send or give the Summary Prospectus to existing investors who purchase additional shares while providing the statutory prospectus to new investors. It would also be permissible for a life insurance company to satisfy Section 5(b)(2) obligations with respect to a variable insurance contract by relying on rule 498 to send or give a Summary Prospectus with respect to some underlying funds, while providing a statutory prospectus with respect to other underlying funds, for example, where some underlying funds maintain a Summary Prospectus while others do not.

[200] *See, e.g.*, AARP Letter, *supra* note 34; Fund Democracy *et al.* Letter, *supra* note 34.

[201] *See supra* note 155. To the extent that we conclude that such an obligation on the part of financial intermediaries is appropriate, we would also consider similar obligations in the case of funds that are sold directly to investors.

[202] Rule 498(d). This provision is limited to a mutual fund Summary Prospectus that satisfies the terms of the proposed rule and does not apply in the case of any issuer other than a mutual fund.

[203] 15 U.S.C. 77b(a)(10)(a).

deemed prospectuses and are not subject to section 12(a)(2) if they are preceded or accompanied by the statutory prospectus.[204] Similarly, under the new rule, communications that are preceded or accompanied by a Summary Prospectus are not deemed to be prospectuses and are not subject to section 12(a)(2) if all the conditions of the rule are met. These communications remain subject to the general antifraud provisions of the federal securities laws.[205]

Commenters generally supported the proposal, noting that investors will be more likely to read and understand the Summary Prospectus than the statutory prospectus and that use of the Summary Prospectus will help investors to focus on what is most important in making investment decisions with respect to a particular fund.[206] One commenter noted that its own research has shown that most investors do not find the statutory prospectus to be a particularly useful document and do not rely heavily on it in making a fund selection. The commenter agreed that it makes little sense to continue to require delivery of a document to all investors that most say they do not value.[207] A second commenter noted that the proposal ''reflects the strikingly broad consensus that investors would be best served by simplified, streamlined disclosure of essential fund information'' and is supported by research conducted by the Commission and others.[208] Similarly, investors in our focus groups generally expressed favorable views of the Summary Prospectus, noting its usefulness as a screening tool to identify funds that they might wish to research further.[209] Commenters also approved of the proposal's use of the power of the Internet and advances in technology to deliver information to investors.[210]

Two commenters argued that use of the Summary Prospectus should be mandatory, including one who noted that inconsistent use of the Summary Prospectus could create confusion and would make comparison of funds more difficult for investors.[211] We have determined not to mandate use of the Summary Prospectus at this time. We believe that further public comment on this important step is necessary, and we intend to review the use of the Summary Prospectus by investors in funds that voluntarily adopt the Summary Prospectus and reconsider whether the Summary Prospectus should be mandated in the future.

As noted above, we are modifying the rule's conditions in three respects to address the concerns of commenters. First, we have eliminated the condition that the Summary Prospectus be given greater prominence than any accompanying materials[212] and instead made it a rule requirement.[213] Second, we have modified this requirement to clarify that a Summary Prospectus need not be given ''greater prominence'' than other Summary Prospectuses or statutory prospectuses that accompany the Summary Prospectus. Third, we have revised the condition that would have prohibited the Summary Prospectus from being bound together with any other materials[214] to permit a Summary Prospectus for a fund that is available as an investment option in a variable annuity or variable life insurance contract to be bound together with the statutory prospectus for the contract and Summary Prospectuses and statutory prospectuses for other investment options available under the contract.[215]

We have made the ''greater prominence'' standard a rule requirement instead of a condition to satisfaction of section 5(b)(2) obligations.[216] While we continue to believe that the ''greater prominence'' requirement is important to prevent the Summary Prospectus from being obscured by accompanying sales and other materials and to highlight for investors the concise, balanced presentation of the Summary Prospectus,[217] we are persuaded by commenters that the consequences of failure to meet the condition—a Section 5 violation—is not needed to achieve our goal.[218] Therefore, we are adopting commenters' suggestion that satisfaction of the ''greater prominence'' standard be a rule requirement.[219] As adopted, the ''greater prominence'' requirement is not a condition to reliance on the rule to satisfy a fund's or intermediary's delivery obligations under section 5(b)(2) of the Securities Act or the provision that a communication shall not be deemed a prospectus under section 2(a)(10) of the Securities Act. A person that complies with the conditions to the rule will not violate section 5(b)(2) if the ''greater prominence'' standard is not satisfied. This failure will, however, constitute a violation of the Commission's rules. Generally, we believe that the ''greater prominence'' requirement would be satisfied if the placement of the Summary Prospectus is more prominent than accompanying materials, *e.g.*, the Summary Prospectus is on top of a group of paper documents that are provided together.[220]

We are adopting the condition that prohibits a Summary Prospectus from being bound together with any other materials. Although commenters were split on the proposed binding prohibition, with some supporting the requirement and others opposed or seeking modifications,[221] we continue

[204] 15 U.S.C. 77*l*(a)(2). Section 12(a)(2) of the Securities Act imposes liability for materially false or misleading statements in a prospectus or oral communication, subject to a reasonable care defense.

[205] *See, e.g.*, Section 17(a) of the Securities Act [15 U.S.C. 77q(a)]; Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)]; Section 34(b) of the Investment Company Act [15 U.S.C. 80a–33(b)].

[206] *See, e.g.*, AARP Letter, *supra* note 34; CMFI Letter, *supra* note 44; Fund Democracy *et al.* Letter, *supra* note 34; ICI Letter, *supra* note 34; MFDF Letter, *supra* note 34.

[207] *See* Fund Democracy *et al.* Letter, *supra* note 34.

[208] *See* ICI Letter, *supra* note 34.

[209] Focus Group Report, *supra* note 32, at 5–6 (quoting participants as stating, ''I think it cuts to the important factors of performance, cost, objectives. I like it;'' ''It's a two-minute read. If I want more information, I can ask for it;'' ''I think that this [short-form prospectus] you'd read and if you're interested and then you've got questions and you want to go more in-depth and go to the long one;'' ''I think both [the long and short-form prospectuses] have their place. I think it would be foolish to give up the long-form for (the short[-]form) and I think it would be foolish not to have the short-form and insist on a long-form. They both have their place.'').

[210] *See, e.g.*, AARP Letter, *supra* note 34; CMFI Letter, *supra* note 44; ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44.

[211] *See* Letter of Kevin Possin and Ann Lavine (Feb. 7, 2008); Vanguard Letter, *supra* note 42.

[212] Proposed rule 498(c)(1) and (d)(1).

[213] Rule 498(f)(2).

[214] Proposed rule 498(c)(1) and (d)(1).

[215] Rule 498(c)(2) and (d)(2).

[216] Rule 498(f)(2).

[217] *See, e.g.*, Pace Letter, *supra* note 125 (expressing support for the ''greater prominence'' requirement).

[218] *See, e.g.*, ABA Letter, *supra* note 37; ICI Letter, *supra* note 34; NYC Bar Letter, *supra* note 75.

[219] *See, e.g.*, ABA Letter, *supra* note 37; ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44.

[220] In response to a commenter's concerns, we are making a technical change to the ''greater prominence'' requirement to clarify that any particular Summary Prospectus need not be given ''greater prominence'' than any other Summary Prospectuses or statutory prospectuses that accompany the Summary Prospectus. *See* ICI Letter, *supra* note 34.

[221] *See, e.g.*, Pace Letter, *supra* note 125 (supporting binding prohibition); T. Rowe Letter, *supra* note 49 (supporting a binding prohibition instead of a ''greater prominence'' requirement); ICI Letter, *supra* note 34 (arguing that rule should prohibit Summary Prospectuses from being bound together with sales materials, or alternatively that there be certain specific carve-outs to permit binding of funds' privacy notices and to permit the binding together of Summary Prospectuses for certain similar types of funds); Letter of Charles Schwab & Co., Inc., and Charles Schwab Investment Management, Inc. (Feb. 28, 2008) (''Schwab Letter'') (requesting carve-out to permit binding of funds' privacy policies); Data Communiqué Letter, *supra* note 35 (opposing binding prohibition); Dechert Letter, *supra* note 50 (opposing binding prohibition); Schnase Letter, *supra* note 35 (opposing binding prohibition).

to believe that it is important to prevent the Summary Prospectus from being obscured by accompanying sales and other materials and to highlight for investors the concise, balanced presentation of the Summary Prospectus. We are, however, persuaded that it is appropriate to permit binding the statutory prospectus of a variable insurance contract with the Summary Prospectuses and statutory prospectuses of its underlying funds.[222] This will permit satisfaction of prospectus delivery requirements for both a variable insurance contract and its underlying funds in one consolidated package and does not involve any risk of the prospectuses being obscured by sales or other materials. Specifically, under rule 498, a Summary Prospectus for a fund that is available as an investment option in a variable annuity or variable life insurance contract may be bound together with the statutory prospectus for the contract and Summary Prospectuses and statutory prospectuses for other investment options available in the contract, provided that: (i) All of the funds to which the Summary Prospectuses and statutory prospectuses that are bound together relate are available to the person to whom such documents are sent or given; and (ii) a table of contents identifying each Summary Prospectus and statutory prospectus that is bound together, and the page number on which it is found, is included at the beginning or immediately following a cover page of the bound materials. These conditions are intended to ensure that investors are not inundated with prospectuses that are not relevant to the contract they are considering and to ensure that investors can readily locate the particular prospectuses in which they are interested.

2. Content of Summary Prospectus

Rule 498 sets forth the content requirements that a Summary Prospectus must satisfy.[223] A Summary Prospectus meeting the requirements of the rule will be deemed to be a prospectus that is authorized under section 10(b) of the Securities Act and section 24(g) of the Investment Company Act for the purposes of section 5(b)(1) of the Securities Act.[224] A Summary Prospectus meeting these content requirements could be used to offer securities of the fund pursuant to section 5(b)(1) even if the other conditions of the rule were not satisfied. The failure to satisfy these other conditions will, however, preclude the use of the Summary Prospectus for the other purposes described in rule 498, including for purposes of satisfying, in part, a fund's obligation under section 5(b)(2) to deliver a statutory prospectus. In these circumstances, the section 5(b)(2) obligation to deliver a fund's statutory prospectus will have to be met by means other than the new rule or a section 5(b)(2) violation will result.

a. General

We are adopting, with one clarification, the requirement that the Summary Prospectus include the same information as required in the summary section of the statutory prospectus in the same order required in the statutory prospectus.[225] This key information about investment objectives, costs, and risks forms the body of the Summary Prospectus.

We are adopting a new requirement to clarify that if a fund relies on rule 498 to meet its statutory prospectus delivery obligations, the information contained in the Summary Prospectus must be the same as the information contained in the summary section of the fund's statutory prospectus, except as expressly permitted by rule 498.[226] That is, a fund may not provide different, such as more or less expansive, information in its Summary Prospectus than it provides in its statutory prospectus. If, pursuant to rule 497, a mutual fund files a ''sticker'' to its statutory prospectus that changes any information in the summary section, the Summary Prospectus should either be ''stickered'' or amended to reflect the information in the statutory prospectus ''sticker.'' This new requirement is intended to clarify our intent in adopting the same content requirements for the Summary Prospectus and the summary section of the statutory prospectus.

The Summary Prospectus will not be permitted to omit any of the required information or to include additional information except as described below. A document that omits information required in a Summary Prospectus or includes additional information not permitted by the rule will not be a Summary Prospectus under the rule and may not be used under the rule for any purpose, including meeting the obligation to deliver a fund's statutory prospectus.[227] We are adopting these requirements, as proposed, because we believe that uniformity of content in Summary Prospectuses will provide better comparability, which will help investors to make a more informed investment decision, a conclusion which was supported by a number of commenters.[228] While some commenters argued that the rule should provide funds with flexibility to customize the content of the Summary Prospectus,[229] we are not persuaded because customization would significantly impair investors' ability to compare information across funds. We note that, provided the content and order requirements of the rule are met, funds have almost complete flexibility with respect to design issues, including layout, graphics, and color.[230]

[222] *See, e.g.*, CAI Letter, *supra* note 67; Dechert Letter, *supra* note 50; EQ/AXA Letter, *supra* note 67; Fidelity Letter, *supra* note 86; ICI Letter, *supra* note 34; Vanguard Letter, *supra* note 42.

[223] Rule 498(b). Rule 498(a) defines terms used in the rule.

[224] Rule 498(b). Section 10(b) of the Securities Act [15 U.S.C. 77j(b)] authorizes the Commission to adopt rules permitting the use of a prospectus for the purposes of Section 5(b)(1) [15 U.S.C. 77e(b)(1)] that summarizes information contained in the statutory prospectus. Section 24(g) of the Investment Company Act [15 U.S.C. 80a–24(g)] authorizes the Commission to permit the use of a prospectus under Section 10(b) of the Securities Act to include information the substance of which is not included in the statutory prospectus.

[225] Rule 498(b)(2) (Summary Prospectus to include information required or permitted by Items 2 through 8 of Form N–1A). We are adopting, as proposed, the provision that permits a fund to omit from the Summary Prospectus an explanation of the reasons for any change in the securities market index used for comparison purposes in the performance presentation. Rule 498(b)(2). *Cf.* Instruction 2(c) to Item 4(b)(2) of Form N–1A (requiring this explanation in summary section of statutory prospectus).

[226] Rule 498(f)(4). Rule 498(b)(2) expressly permits a Summary Prospectus to omit certain information relating to a change in the securities market index used for comparison purposes. *See supra* note 225.

[227] A Summary Prospectus that omits certain information required by the rule or includes additional information not permitted by the rule could be deemed to be a prospectus under Section 10(b) of the Securities Act for purposes of Section 5(b)(1) of the Securities Act pursuant to rule 482 under the Securities Act [17 CFR 230.482] if the conditions of that rule are met.

[228] *See, e.g.*, Letter of Brown & Associates LLC and Self Audit, Inc. (Feb. 27, 2008) (''Self Audit Letter''); CMFI Letter, *supra* note 44; Data Communiqué Letter, *supra* note 35; Evergreen Letter, *supra* note 41; Firehouse Letter, *supra* note 35; Great-West Letter, *supra* note 42; ICI Letter, *supra* note 34; Keil Letter, *supra* note 62; Letter of NewRiver, Inc. (Feb. 28, 2008) (''NewRiver Letter''); Oppenheimer Letter, *supra* note 44; Pace Letter, *supra* note 125; Schnase Letter, *supra* note 35.

[229] *See, e.g.*, Clarke Letter, *supra* note 35; Hastie Letter, *supra* note 59; Letter of Stephen A. Keen (Feb. 28, 2008); Ogg Letter, *supra* note 75.

[230] *See, e.g.*, AARP Letter, *supra* note 34 (Commission ''should set broad parameters for compliance with the required substance, format and presentation of the summary prospectus, but also allow funds to use their creativity in designing a form that is truly investor friendly.''); Data Communiqué Letter, *supra* note 35 (favoring similar content, but stating that the Commission should allow for layout and graphical differences).

Summary Prospectuses are subject to the font size and legibility requirements for prospectuses that are set forth in rule 420 under the Securities Act [17 CFR 230.420]. Rule 420 generally requires, among

Continued

We are adopting, as proposed, the requirement that a Summary Prospectus describe only one fund, but may describe multiple classes of a single fund.[231] This requirement is similar to the requirements for the summary section of the statutory prospectus.[232] Like those requirements, it is intended to result in a presentation of key fund information that is concise and easy to read.

One commenter suggested that the Commission permit funds to satisfy their obligation to deliver a statutory prospectus to their existing shareholders by delivering a document directing shareholders' attention to material changes that have occurred during the covered period.[233] The commenter argued that such an approach would focus shareholders' attention on the factors that are most likely to affect their continuing evaluation of the fund and impose lower costs than delivery of the Summary Prospectus. We are not adopting this suggestion at this time. We are concerned that creation of an additional document to be used only for existing shareholders could impose significant costs on funds and their shareholders. Moreover, as noted earlier, we recently proposed to require mutual funds to submit in interactive data format information contained in the risk/return summary section of their statutory prospectuses.[234] We are continuing to consider that proposal and believe that, if adopted, this requirement would help investors, intermediaries, and others to readily identify any changes in this information.

b. Cover Page or Beginning of Summary Prospectus

We are adopting, as proposed, the requirements for the cover page or beginning of the Summary Prospectus, with the addition of a requirement to include the exchange ticker symbols of the fund's securities.[235] The Summary Prospectus will be required to include the following information on the cover page or at the beginning of the Summary Prospectus:

- The fund's name and the share classes to which the Summary Prospectus relates;
- The exchange ticker symbol of the fund's securities or, if the Summary Prospectus relates to one or more classes of the fund's securities, adjacent to each such class, the exchange ticker symbol of such class of the fund's securities;
- A statement identifying the document as a ''Summary Prospectus''; and
- The approximate date of the Summary Prospectus's first use.

In addition, the cover page or beginning of the Summary Prospectus is required to include the following legend:

> Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____].[236]

In addition, the legend may include a statement to the effect that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under section 401(k) of the Internal Revenue Code, a tax-deferred arrangement under section 403(b) or 457 of the Internal Revenue Code, or a variable contract as defined in section 817(d) of the Internal Revenue Code and is not intended for use by other investors.[237]

The legend is required to provide an Internet address, toll free (or collect) telephone number, and e-mail address that investors can use to obtain the statutory prospectus and other information.[238] The legend is also permitted to indicate that the statutory prospectus and other information are available from a financial intermediary (such as a broker-dealer or bank) through which shares of the fund may be purchased or sold.[239] The Internet address at which the statutory prospectus and other information are available is not permitted to be the address of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (''EDGAR'').[240] The address is required to be specific enough to lead investors directly to the statutory prospectus and other required information, rather than to the home page or other section of the Web site on which the materials are posted.[241] The Web site could be a central site with prominent links to each required document.[242]

We are not modifying the proposal in response to commenters who suggested that the legend provide more guidance regarding the types of information available,[243] because we believe that investors will be less likely to read a longer legend describing multiple documents and that the legend, as adopted, is sufficient to alert investors to the existence and location of additional information about the fund. Moreover, as discussed below in Part III.B.4.a., a Summary Prospectus that incorporates information by reference is required to include more specific disclosure identifying the documents from which the information is incorporated. We also are not modifying the proposal in response to a commenter who suggested that the legend make clearer that the Summary Prospectus is only a part of the full statutory prospectus.[244] We believe that the

other things, that printed prospectuses be in roman type at least as large and as legible as 10-point modern type.

[231] Rule 498(b)(4).

[232] *See* discussion *supra* introductory text to Part III.A. and ''Organizational Requirements'' in Part III.A.1.

[233] *See* Fund Democracy *et al.* Letter, *supra* note 34. Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)] generally requires that when a prospectus is used more than nine months after the effective date of the registration statement, the information in the prospectus must be as of a date not more than sixteen months prior to such use. The effect of this provision is to require mutual funds to update their statutory prospectuses annually to reflect current cost, performance, and other financial information. Many funds deliver updated statutory prospectuses annually to their existing shareholders in order to meet their prospectus delivery obligations with respect to additional purchases by those shareholders.

[234] Investment Company Act Release No. 28298, *supra* note 28, 73 FR at 35443.

[235] This requirement is discussed in Part III.A.2.

[236] Rule 498(b)(1).

[237] Rule 498(b)(1)(v)(B).

[238] Rule 498(b)(1)(v)(A).

[239] The Web site and other contact information provided may be the Web site and contact information of a financial intermediary.

[240] *Cf.* rule 14a–16(b)(3) under the Exchange Act [17 CFR 240.14a–16(b)(3)] (similar requirement in rules relating to Internet availability of proxy materials).

[241] For a description of the information required to be available at the Web site and a discussion of the manner in which such information must be available, see the discussion in Part III.B.3. below.

[242] One commenter suggested removing the word ''prominent'' from the phrase ''a central site with prominent links'' because it calls into question whether a fund complex could have one Web page with numerous links or a drop-down menu allowing users to navigate to disclosure documents for each of the funds. *See* ICI Letter, *supra* note 34. We have decided to retain the prominence requirement because we believe that it is important to effective delivery that investors be able to easily find the links to the particular documents in which they are interested. *Cf.* Exchange Act Release No. 55146 (Jan. 22, 2007) [72 FR 4148, 4153–54 n. 79 (Jan. 29, 2007)] (use of central site with prominent links in electronic delivery of proxy materials). We note, however, that there is no requirement that the links be *more* prominent than other information. In addition, the requirement for prominent links to the relevant documents could be satisfied by a central site that lists each fund in alphabetical order with, in table format, links to each fund's Summary Prospectus, statutory prospectus, SAI, and annual and semi-annual shareholder report or similar means, such as a drop-down menu allowing users to easily navigate the documents for each of the funds.

[243] *See, e.g.*, CMFI Letter, *supra* note 44; Foreside Letter, *supra* note 74; MFS Letter, *supra* note 150.

[244] *See, e.g.*, Schnase Letter, *supra* note 35 (state that investors may want to review the fund's ''*full* prospectus'' or ''*complete* prospectus'' to adequately distinguish it from the Summary Prospectus).

combination of the legend and the requirement to identify the Summary Prospectus as a ''Summary Prospectus'' will provide clear notice to investors that more information is contained in the statutory prospectus.

c. Updating Requirements

We are not adopting the proposed requirement that performance information in the Summary Prospectus be updated quarterly and related provisions of the proposed rule.[245] We are persuaded by commenters who expressed concerns about potential investor confusion, focus on short-term performance, and the costs and operational difficulties associated with implementing quarterly updating.[246] As adopted, the rule will require a fund that makes updated performance information available on a Web site or at a toll-free (or collect) telephone number to include a statement explaining this and providing the Web site address and/or telephone number.[247]

Some commenters noted that investors may be confused if different information is contained in the summary section of the statutory prospectus (which the proposal did not require to be updated on a quarterly basis) and the Summary Prospectus.[248] A number of commenters also expressed concern that the proposed quarterly updating requirement signals a troubling shift toward focusing on short-term performance information, rather than encouraging investors to consider long-term performance.[249] Commenters also noted that updated performance information is already widely available on the Internet and from other sources.[250] Many commenters suggested as an alternative that the Commission require annual updating of the Summary Prospectus, with prominent disclosure in the document describing how investors can access updated performance information (*i.e.*, through a Web site address or toll-free telephone number).[251] Investors participating in our focus groups also indicated that they would be willing to obtain updated fund information online.[252]

In addition, many commenters from the fund industry also stated that the costs and operational difficulties associated with implementing the quarterly updating requirement would discourage funds from using the Summary Prospectus.[253] The commenters noted that updating of Summary Prospectuses would likely require an entirely new process that would be more complex than the one used for existing quarterly fund fact sheets. Moreover, these commenters noted that a quarterly updating requirement would essentially require them to move to an ''on demand'' printing model for distribution of Summary Prospectuses, which would entail changes in business practices, new or amended vendor contracts, and, for a few fund families, significant initial outlays that could substantially delay implementation of the Summary Prospectus.[254] Financial intermediaries similarly expressed concern about ''the ability of even large intermediaries to maintain and track a hard copy inventory of prospectuses which change multiple times per year.''[255] Some commenters also noted that updated performance information is already widely available from other sources.[256]

On the other hand, a small number of commenters supported the proposed quarterly updating requirement.[257] One such commenter argued that quarterly updating would enhance the public's perception of the Summary Prospectus and the information provided. The commenter noted that funds presently provide such updated information in their sales materials; that displaying annually updated performance information in the statutory prospectus and quarterly updated information in the Summary Prospectus would not necessarily confuse investors; and that although funds post updated information online throughout the year, investors without access to the Internet would be greatly disadvantaged if the Commission did not require quarterly updating of the paper Summary Prospectus.[258]

We have determined not to require quarterly updating of performance information in the Summary Prospectus because we are persuaded that this requirement could confuse investors and would discourage funds from using

[245] Proposed rule 498(b)(2)(ii) (quarterly updating requirement); proposed rule 498(e) (provisions related to quarterly updating requirement). The proposal also would have required quarterly updating of a fund's top 10 portfolio holdings. Proposed rule 498(b)(2)(iii). As discussed above, we have determined not to require inclusion of a fund's top 10 portfolio holdings in the summary section of the statutory prospectus or in the Summary Prospectus. *See* discussion *supra* Part III.A.3.a.

[246] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; CAI Letter, *supra* note 67; Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Dechert Letter, *supra* note 50; EQ/AXA Letter, *supra* note 67; Evergreen Letter, *supra* note 41; Fidelity Letter, *supra* note 86; Financial Services Institute Letter, *supra* note 41; Letter of Financial Services Roundtable (Feb. 28, 2008) (''Financial Services Roundtable Letter''); Firehouse Letter, *supra* note 35; Letter of Fluent Technologies (Mar. 14, 2008) (''Fluent Letter''); Foreside Letter, *supra* note 74; Great-West Letter, *supra* note 42; ICI Letter, *supra* note 34; IDC Letter, *supra* note 61; MFS Letter, *supra* note 150; NYC Bar Letter, *supra* note 75; Oppenheimer Letter, *supra* note 44; Putnam Letter, *supra* note 48; Letter of RiverSource Funds (Feb. 25, 2008) (''RiverSource Letter''); Russell Letter, *supra* note 48; Schwab Letter, *supra* note 221; SIFMA Letter, *supra* note 97; Letter of Stradley Ronon Stevens & Young, LLP (Feb. 28, 2008) (''Stradley Letter''); T. Rowe Letter, *supra* note 49; USAA Letter, *supra* note 153; Vanguard Letter, *supra* note 42.

[247] Item 4(b)(2)(i) of Form N–1A. This requirement is discussed more fully in Part III.A.3.e.

[248] *See, e.g.*, Capital Research Letter, *supra* note 34; Dechert Letter, *supra* note 50; ICI Letter, *supra* note 34; NYC Bar Letter, *supra* note 75; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48; SIFMA Letter, *supra* note 97; Stradley Letter, *supra* note 246; T. Rowe Letter, *supra* note 49.

[249] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Dechert Letter, *supra* note 50; Fluent Letter, *supra* note 246; ICI Letter, *supra* note 34; Oppenheimer Letter, *supra* note 44; Russell Letter, *supra* note 48.

[250] *See, e.g.*, ICI Letter, *supra* note 34, Vanguard Letter, *supra* note 42.

[251] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Fidelity Letter, *supra* note 86; Financial Services Institute Letter, *supra* note 41; Firehouse Letter, *supra* note 35; Financial Services Roundtable Letter, *supra* note 246; IDC Letter, *supra* note 61; Janus Letter, *supra* note 63; MFS Letter, *supra* note 150; Oppenheimer Letter, *supra* note 44; Putnam Letter, *supra* note 48; Russell Letter, *supra* note 48; Schwab Letter, *supra* note 221; T. Rowe Letter, *supra* note 49.

[252] *See* Focus Group Report, *supra* note 32, at 11; Focus Group Transcripts, *supra* note 32, at 25–26; *id.* at 49 (''I get my information from the Web anyway. So, what the prospectus says is less important in terms of recent performance. Because there's no way that they can tell me what's been going on that recently.''); *id.* at 78 (''You can go to the library and be on the Web and it doesn't cost you anything, except 15 minutes.''); *id.* (''And if it says, 'This is not necessarily the latest, current, go to this Web site and you'll get the full comparison,' that would be acceptable * * *.'').

[253] *See, e.g.*, AIM Letter, *supra* note 47; American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Clarke Letter, *supra* note 35; Dechert Letter, *supra* note 50; EQ/AXA Letter, *supra* note 67; Evergreen Letter, *supra* note 41; Financial Services Roundtable Letter, *supra* note 246; Fluent Letter, *supra* note 246; Great-West Letter, *supra* note 42; ICI Letter, *supra* note 34; IDC Letter, *supra* note 61; MFS Letter, *supra* note 150; Oppenheimer Letter, *supra* note 44; RiverSource Letter, *supra* note 246; Russell Letter, *supra* note 48; Letter of Saturna Capital Corporation (Jan. 14, 2008); Schwab Letter, *supra* note 221; T. Rowe Letter, *supra* note 49. The Investment Company Institute, a national association of United States investment companies, conducted a survey of its member firms and noted that up to 70 percent of funds would face substantial cost and operational burdens in complying with a quarterly updating requirement and that these burdens would likely lead funds to elect not to use the Summary Prospectus. ICI Letter, *supra* note 34.

[254] *See, e.g.*, ICI Letter, *supra* note 34.

[255] *See, e.g.*, SIFMA Letter, *supra* note 97.

[256] *See, e.g.*, ICI Letter, *supra* note 34, Vanguard Letter, *supra* note 42.

[257] *See, e.g.*, CMFI Letter, *supra* note 44; Data Communiqué Letter, *supra* note 35; Keil Letter, *supra* note 62; NAPFA Letter, *supra* note 44.

[258] *See* Data Communiqué Letter, *supra* note 35.

the Summary Prospectus and thereby undermine our goal of encouraging concise, user-friendly disclosure to investors. We have concluded that the benefits to be derived from quarterly updating do not outweigh this significant disincentive to use of the Summary Prospectus because updated performance information is widely available in fund sales materials, on fund Web sites, and from third-party sources. As noted above, investors in our focus groups indicated that they would be willing to obtain updated information online. As a result, we are requiring a fund that makes updated performance information available on a Web site or at a toll-free (or collect) telephone number to include a statement explaining this and providing the Web site address and/or telephone number.[259] This approach will eliminate any potential investor confusion that could arise as a result of a fund's Summary Prospectus containing more updated information than the fund's statutory prospectus.

3. Provision of Statutory Prospectus, SAI, and Shareholder Reports

We are adopting, with certain modifications to address the concerns of commenters, the requirement that, in addition to sending or giving a Summary Prospectus, a person relying on rule 498 to meet its statutory prospectus delivery obligations must provide the statutory prospectus on the Internet, together with other information, in the manner specified by the rule.[260] We are also adopting, as proposed, the requirement to send the statutory prospectus to any investor requesting a copy. We believe that requiring the statutory prospectus to be provided in two ways, by posting on an Internet Web site and by sending the information directly to any investor requesting a copy, maximizes both the accessibility and usability of the information, as indicated by the preference of commenters and investors participating in our focus groups for access to both online and paper resources.[261] Sending the information directly to an investor is not, however, a condition of reliance on the rule.

a. Documents Required To Be Provided on the Internet

Under the rule, the statutory prospectus and other information are required to be provided through the Internet as follows. The fund's current Summary Prospectus, statutory prospectus, SAI, and most recent annual and semi-annual reports to shareholders are required to be accessible, free of charge, at the Web site address specified on the cover page or at the beginning of the Summary Prospectus.[262] These documents are required to be accessible on or before the time that the Summary Prospectus is sent or given and current versions of the documents are required to remain on the Web site through the date that is at least 90 days after (i) in the case of reliance on the rule to satisfy the obligation to have a statutory prospectus precede or accompany the carrying or delivery of a mutual fund security, the date that the mutual fund security is carried or delivered, or (ii) in the case of reliance on the rule to deem a communication with respect to a mutual fund security not to be a prospectus under Section 2(a)(10) of the Securities Act, the date that the communication is sent or given.[263] This requirement is designed to ensure continuous access to the information from the time the Summary Prospectus is sent or given until at least 90 days after the date of delivery of a security or communication in reliance on rule 498.

A number of commenters expressed concern regarding the meaning of the term ''current'' and asked whether funds would be required to maintain stale information online.[264] In response to these commenters' concerns, we note that the ''current'' standard does not require a fund to maintain online an outdated version of a document that was current at the time the Summary Prospectus was sent or given, but that has subsequently been updated. Rather, the ''current'' standard requires a fund to maintain updated versions of the required documents online.

Several commenters argued that a person relying on the rule should not be required to provide the fund's SAI on the Web site.[265] We have not adopted this suggestion. As discussed above, the rule provides for a layered approach to disclosure in which key information is sent or given to the investor and more detailed information is provided online and, upon request, is sent in paper or by e-mail. The approach of rule 498 is two-fold, both to encourage funds to provide a concise, user-friendly Summary Prospectus to investors and to enhance investor access to more detailed information. Requiring the SAI to be provided online furthers the latter goal.[266]

b. Formatting Requirements for Information Provided on the Internet

We are adopting, with modifications to reflect commenters' concerns, the proposed formatting requirements for the information that is required to be provided online. The proposed rule would have required, as a condition to reliance on the rule to satisfy a person's delivery obligations under section 5(b)(2) of the Securities Act and the provision that a communication shall not be deemed a prospectus under section 2(a)(10) of the Securities Act, that the information on the Internet be presented in a format that is convenient for both reading online and printing on paper.[267] In lieu of this condition, we are adopting a condition requiring that the information on the Internet be presented in a format that is human-readable and capable of being printed on paper in human-readable format.[268] We are also adopting a requirement that the information be in a format that is convenient for both reading online and printing on paper, but this requirement is not a condition to reliance on the rule to satisfy a person's delivery obligations under section 5(b)(2) of the Securities Act or the provision that a communication shall not be deemed a prospectus under section 2(a)(10) of the Securities Act. A person that complies

[259] Item 4(b)(2)(i) of Form N–1A. This requirement is discussed more fully in Part III.A.3.e.

[260] Rule 498(c)(4), (d)(4), and (e).

[261] *See* AARP Letter, *supra* note 34 (supporting the proposal and noting that ''timely access to hard copy, print disclosure must remain an option that is easy to exercise for investors choosing to do so''); Miller Letter, *supra* note 110 (''ensure a simple process for obtaining mutual fund information in paper format in order to maximize accessibility''); Focus Group Report, *supra* note 32, at 12 (noting that some participants preferred to read lengthy documents on the computer screen, while others indicated that they prefer paper documents); Focus Group Transcripts, *supra* note 32, at 28 (''not everybody has [a] computer, so there has to be alternatives''); *id.* at 50 and 78 (quoting most investors as preferring to receive fund information online but also quoting some investors who prefer to obtain at least some fund information on paper).

[262] The cost to access the Internet itself (*e.g.*, monthly subscription to an Internet service provider) and related costs, such as the cost of printer ink, are not considered costs for purposes of determining whether information is accessible, free of charge.

[263] Rule 498(e)(1).

[264] *See, e.g.*, AIM Letter, *supra* note 47; ICI Letter, *supra* note 34.

[265] *See, e.g.*, Fidelity Letter, *supra* note 86; USAA Letter, *supra* note 153.

[266] *See, e.g.*, CMFI Letter, *supra* note 44 (noting that the proposal to require that the SAI be made available through a Web site ''will make it much easier for investors to review this document and become more knowledgeable about fund operations and management'').

[267] Proposed rule 498(f)(2)(i). *Cf.* Rule 14a–16(c) under the Exchange Act [17 CFR 240.14a–16(c)] (requiring materials to be presented in a format convenient for both reading online and printing in paper when delivering proxy materials electronically).

[268] Rule 498(e)(2)(i).

with the conditions to the rule will not violate section 5(b)(2) if the ''convenient for both reading online and printing on paper'' standard is not satisfied, but this failure will constitute a violation of the Commission's rules.[269]

The condition that we are adopting, that information on the Internet be presented in a format that is human-readable and capable of being printed on paper in human-readable format, is a more objective standard than the proposed ''convenient'' condition. Commenters expressed concern about applying the proposed standard as a condition to satisfying section 5 obligations.[270] The adopted condition simply makes clear that posted information must be presented in human-readable text, rather than machine-readable software code, when accessed through an Internet browser and that it must be printable in human-readable text. This condition does not impose any further requirements relating to user-friendliness of the presentation.

We are, however, retaining the standard that posted information be ''convenient for both reading online and printing on paper'' as a rule requirement. This implements the suggestion of commenters who criticized the ''convenient'' standard as a condition and suggested that it could, instead, be made a rule requirement.[271] This standard was designed to ensure that the information provided over the Internet is user-friendly, both online and when printed. It imposes on the online information a standard of usability that is comparable to the readability of a paper document. While we continue to believe that this standard is important to the enhanced disclosure framework we are adopting, we are persuaded by commenters that the consequence of failure to meet a condition—a Section 5 violation—is not needed to achieve our goal.

We are not, at this time, specifying that any particular format, such as HTML or PDF, would constitute a convenient format for both reading online and printing on paper.[272] We are concerned that the Commission's endorsement of any particular format could result in the use of that format to the exclusion of other formats that are in existence today or that may be developed in the future and that are more user-friendly. Moreover, whether a particular format is convenient for reading online and printing depends on a number of factors and must be decided on a case-by-case basis. These factors include the manner in which the online version renders charts, tables, and other graphics; the extent to which the fund utilizes search and other capabilities of the Internet to enhance investors' access to information and provides access to any software necessary to view the online version; and the time required to download the online materials.[273]

c. Technological Requirements for Online Information

We are adopting the proposed requirements for linking within the statutory prospectus and SAI and for linking between the Summary Prospectus, on the one hand, and the statutory prospectus and SAI, on the other. These requirements are intended to result in online information that is in a better and more useable format than the same information when provided in paper. The requirements were generally supported by commenters in concept, although, as discussed below, many expressed concern regarding specific requirements under the proposal.[274] We are making several modifications to the requirements to address technical considerations raised by commenters.[275]

Linking Within the Statutory Prospectus and SAI

We are adopting a requirement that persons accessing the statutory prospectus or SAI online be able to move directly back and forth between each section heading in a table of contents of the document and the section of the document referenced in that section heading. In the case of the statutory prospectus, the linked table of contents must be either the table of contents required by rule 481(c)[276] or a table of contents that contains the same section headings as the required table of contents.[277] This requirement allows an investor or other user to move directly between a table of contents of the prospectus or SAI and the related sections of that document, by a single mouse click and without the need to flip through multiple pages of a paper document.

This requirement includes two modifications from the proposed requirement. First, we are clarifying that the linked table of contents may be outside the document, *e.g.*, in a separate frame or panel of the computer screen and need not be the table of contents that is contained within the document itself, as long as the linked table of contents for the statutory prospectus conforms to the table of contents that is required by our rules to be contained within the document itself. This modification is intended to provide flexibility to use linking technologies other than hyperlinking within the document itself. Permitted technologies would include, for example, the use of ''bookmarks'' that replicate the document's table of contents, but are displayed in a separate panel from the document itself.[278] We have accomplished this clarification by modifying the language of the proposed requirement[279] to refer to ''*a* table of contents *of*'' the relevant document rather than ''*the* table of contents *in*'' the relevant document and by requiring that, in the case of the statutory prospectus, the linked table of contents either be the table of contents required by rule 481(c) or contain the same section headings as the table of contents required by that rule. Second, we are revising the rule language to clarify that the links must permit movement directly back and forth between each section heading in a table of contents and the particular section of the document referenced in that section heading.[280]

Linking Between Documents

We are also adopting a requirement for funds to comply with one of two options: That persons accessing the

[269] Rule 498(f)(3) and (5). This is similar to the ''greater prominence'' requirement discussed in Part III.B.1. above.

[270] *See, e.g.*, ABA Letter, *supra* note 37; ICI Letter, *supra* note 34; NYC Bar Letter, *supra* note 75.

[271] *See, e.g.*, ABA Letter, *supra* note 37; ICI Letter, *supra* note 34.

[272] *See, e.g.*, ABA Letter, *supra* note 37 (arguing that the adopting release should state that a PDF format would constitute a ''convenient'' format for purposes of rule 498).

[273] *See* Investment Company Act Release No. 27671 (Jan. 22, 2007) [72 FR 4148, 4154 (Jan. 29, 2007)]; Exchange Act Release No. 56135, *supra* note 29, 72 FR at 42224 n. 35 (guidance concerning ''convenient for both reading online and printing on paper'' standard in context of electronic delivery of proxies).

[274] *See, e.g.*, CMFI Letter, *supra* note 44; Data Communiqué Letter, *supra* note 35; ICI Letter, *supra* note 34; MFDF Letter, *supra* note 34.

[275] We are not adopting the suggestion of one commenter that the Commission delay, or not apply, linking requirements with respect to funds that are offered through variable insurance contracts. *See* CAI Letter, *supra* note 67. While we recognize that there may be operational challenges associated with the offering of multiple funds from several fund families through a variable insurance contract, the linking requirements are an essential condition to permitting a person to satisfy its prospectus delivery obligations by sending or giving a Summary Prospectus.

[276] 17 CFR 230.481(c).

[277] Rule 498(e)(2)(ii).

[278] *See, e.g.*, ICI Letter, *supra* note 34 (arguing that proposal should be revised to permit the use of bookmarks); Oppenheimer Letter, *supra* note 44 (same).

[279] Proposed rule 498(f)(2)(ii).

[280] *See* Oppenheimer Letter, *supra* note 44 (noting that the proposal could be read to require a viewer to be able to move from *each* section heading in the table of contents to each and every section of the document referenced in the table).

Summary Prospectus be able to move directly back and forth between either (i) each section of the Summary Prospectus and any section of the statutory prospectus and SAI that provides additional detail concerning that section of the Summary Prospectus; or (ii) links located at both the beginning and end of the Summary Prospectus, or that remain continuously visible to persons accessing the Summary Prospectus, and tables of contents of both the statutory prospectus and the SAI that meet the linking requirements described in the preceding section.[281] This requirement allows an investor to move back and forth between related sections of the Summary Prospectus, on the one hand, and the statutory prospectus and SAI, on the other, either directly through a single mouse click or indirectly by means of a table of contents of the prospectus or SAI, in which case two mouse clicks would be required.

We are adopting, as proposed, the first option, which permits movement between related sections of the Summary Prospectus, on the one hand, and the statutory prospectus and SAI, on the other, directly through a single mouse click.[282] Although a number of commenters suggested that this option is unlikely to be used as a result of the number of links that would be required to be maintained,[283] we believe that the option should remain available because the ability to single-click between related sections has the potential to result in an extremely user-friendly presentation.

We are, however, modifying the second proposed option, which involves linking between the Summary Prospectus and tables of contents of the statutory prospectus and SAI, in order to reduce the number of links that would be required.[284] As proposed, this option would have required links between each section of the Summary Prospectus and tables of contents in the statutory prospectus and SAI. This would potentially have required two links in each section of the Summary Prospectus (one for the statutory prospectus and one for the SAI). As adopted, this option will require either links located at both the beginning and end of the Summary Prospectus, or links that remain continuously visible to persons accessing the Summary Prospectus, perhaps in a separate panel or frame.[285] The number of links will be reduced, but their placement, either at the beginning and end of the Summary Prospectus or continuously visible, will ensure that they are prominent and readily accessible to investors. This modification responds to commenters' concerns that multiple links within the Summary Prospectus could result in a cluttered presentation, create mistaken expectations that the Summary Prospectus links would lead directly to related information rather than to tables of contents of the statutory prospectus and SAI, and would be expensive to maintain.[286]

Interactive Data

Some commenters urged the Commission to make greater use of technology to permit investors to access the specific information they need and to facilitate automated comparisons of data across multiple funds.[287] The Commission agrees with these commenters that technology holds great promise for enabling mutual fund investors to make better use of existing information to understand and compare funds. To that end, we note that the Commission has already proposed to require a significant portion of the information that is contained in the summary section of the statutory prospectus and the Summary Prospectus to be filed in interactive data format, which is intended to facilitate automated analysis and comparison of this information.[288] Accordingly, while we are taking a number of steps in the current rulemaking to make greater use of technology, we are considering additional steps, along the lines suggested by the commenters, in the context of the pending interactive data rulemaking. In addition, we recently undertook an initiative to fundamentally reexamine how we can make greater use of technology to deliver information to investors more effectively.[289]

d. Ability To Retain Documents

We are adopting the proposed requirement that persons accessing the Web site must be able to permanently retain, through downloading or otherwise, free of charge, an electronic version of the Summary Prospectus, statutory prospectus, SAI, and shareholder reports in a format that, like the online version, (i) is human-readable and capable of being printed on paper in human-readable format; and (ii) permits persons accessing the downloaded statutory prospectus or SAI to move directly back and forth between each section heading in a table of contents of that document and the section of the document referenced in that section heading.[290] The permanently retained document is not required to be in a format that allows an investor to move back and forth between the Summary Prospectus and the statutory prospectus and SAI because of technical difficulties associated with maintaining links between multiple downloaded documents.

Commenters generally expressed support for this proposal.[291] Two commenters suggested that rule 498 expressly provide that once a user saves a document, a fund is not responsible for maintaining the links that it contains to other documents and that failure to maintain a link will not provide a basis for liability.[292] We have determined that such a provision is unnecessary because we are not requiring downloaded documents to retain any links to other documents. In addition, as described

[281] Rule 498(e)(2)(iii). It is our intention that the ability to move between multiple windows that remain open simultaneously constitutes ''back and forth'' movement under this provision.

[282] Rule 498(e)(2)(iii)(A); proposed rule 498(f)(2)(iii)(A).

[283] *See, e.g.*, AIM Letter, *supra* note 47; Capital Research Letter, *supra* note 34; ICI Letter, *supra* note 34; Janus Letter, *supra* note 63; MFS Letter, *supra* note 150; Oppenheimer Letter, *supra* note 44; T. Rowe Letter, *supra* note 49.

[284] We are also making a technical modification to the rule to clarify that a linked table of contents must meet the requirements described in the preceding section, *i.e.*, it must permit direct movement between each section heading in the table of contents and the section of the document referenced in that section heading and, in the case of the statutory prospectus, it must be the table of contents required by rule 481(c) or contain the same section headings as that table of contents. *See* rule 498(e)(2)(iii)(B) (requiring linked table of contents to meet requirements of paragraph (e)(2)(ii) of rule 498).

[285] Rule 498(e)(2)(iii)(B).

[286] *See, e.g.*, Financial Services Roundtable Letter, *supra* note 246; ICI Letter, *supra* note 34; Janus Letter, *supra* note 63; MFS Letter, *supra* note 150; Oppenheimer Letter, *supra* note 44; Self Audit Letter, *supra* note 228.

[287] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34; Letter of Dominic Jones (Feb. 27, 2008) (''Jones Letter'').

[288] *See* Investment Company Act Release No. 28298, *supra* note 28, 73 FR at 35449.

[289] *See SEC Announces '21st Century Disclosure' Initiative to Fundamentally Rethink the Way Companies Report and Investors Acquire Information*, Securities and Exchange Commission Press Release, June 24, 2008, available at *http://www.sec.gov/news/press/2008/2008-119.htm*.

[290] Rule 498(e)(3). This requirement is identical to our proposal, except that the standards of clauses (i) and (ii) have been modified to reflect the parallel modifications that we made with respect to requirements for the online version. *See* discussion *supra* Part III.B.3.b. and c. Persons accessing the materials must also be able to permanently retain, free of charge, an electronic version of the materials in a format, or formats, that are convenient for both reading online and printing on paper. This is a rule requirement and not a condition to satisfy a person's statutory prospectus delivery obligations under Section 5. Rule 498(f)(3)(ii). *See* discussion *supra* Part III.B.3.b.

[291] *See, e.g.*, Data Communiqué Letter, *supra* note 35; ICI Letter, *supra* note 34; Jones Letter, *supra* note 287; Schnase Letter, *supra* note 35; T. Rowe Letter, *supra* note 49.

[292] *See* ICI Letter, *supra* note 34; T. Rowe Letter, *supra* note 49.

above in Part III.B.3.c., we have revised the requirements for online linking between documents to permit the links to be external to the documents, in which case they would not even appear in the online versions of the documents.

e. Safe Harbor for Temporary Noncompliance

As discussed above, compliance with all of the conditions in rule 498 regarding Internet posting (other than the convenient for reading and printing standard) is required in order to meet prospectus delivery obligations under section 5(b)(2) of the Securities Act. Failure to comply with any of these conditions will be a violation of section 5(b)(2) unless the fund's statutory prospectus is delivered by means other than reliance on the rule. The Commission recognizes, however, that there may be times when, due to events beyond a fund's control, such as system outages or other technological issues, natural disasters, acts of terrorism, or pandemic illnesses, a fund is temporarily not in compliance with the Internet posting requirements of the rule. For that reason, we are adopting the proposed safe harbor provision stating that the conditions regarding Internet availability of a fund's Summary Prospectus, statutory prospectus, SAI, and shareholder reports will be deemed to be met, notwithstanding the fact that those materials are not available for a time in the manner required, provided that the fund has reasonable procedures in place to ensure that those materials are available in the required manner. In addition, a fund is required to take prompt action to ensure that those materials become available in the manner required, as soon as practicable following the earlier of the time at which the fund knows or reasonably should have known that the documents are not available in the manner required.[293] The safe harbor, by its terms, is expressly applicable to the format, linking, and permanent retention conditions of the rule, in addition to the conditions requiring that the documents be available online.[294]

f. Requirement To Send Documents

We are adopting the proposed requirement that a fund (or financial intermediary through which shares of the fund may be purchased or sold) send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the fund's statutory prospectus, SAI, and most recent annual and semi-annual shareholder report to any person requesting such a copy within three business days after receiving a request for a paper copy. We are also adopting, with one modification, the proposed requirement that a fund (or financial intermediary through which shares of the fund may be purchased or sold) send, at no cost to the requestor and by e-mail, an electronic copy of the fund's statutory prospectus, SAI, and most recent annual and semi-annual shareholder report to any person requesting such a copy within three business days after receiving a request for an electronic copy.[295] These requirements are intended to ensure that every investor in a fund taking advantage of the new prospectus delivery framework is permitted to choose whether to review a fund's information on the Internet or whether to receive that information directly, either in paper or through an e-mail. As a result of these requirements, each investor will have prompt access to the required information in the form that he or she prefers.

We are modifying the proposal, as suggested by one commenter,[296] to clarify that the requirement to send an electronic copy of a document by e-mail may be satisfied by sending a direct link to the document on the Internet, provided that a current version of the document is directly accessible through the link from the time that the e-mail is sent through the date that is six months after the date that the e-mail is sent and the e-mail explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.[297] We believe that six months is a reasonable period of time to require the documents to be available and will provide sufficient time for an investor who has requested a copy to access and, if desired, download the information. We also note that an investor may at any time request to receive a paper copy of the documents.

As in the proposal, the requirement that a fund send a paper or electronic copy of the statutory prospectus, SAI, and most recent annual and semi-annual shareholder reports to a person requesting such a copy is not a condition to reliance on the rule to satisfy a fund's delivery obligations under section 5(b)(2) of the Securities Act or the provision that a communication shall not be deemed a prospectus under section 2(a)(10) of the Securities Act. A person that complies with all other aspects of rule 498 will not violate section 5(b)(2) of the Securities Act if the fund (or financial intermediary) fails to send the required paper or electronic copy of the statutory prospectus, SAI, and most recent shareholder reports. This failure will, however, constitute a violation of the Commission's rules.[298]

4. Incorporation by Reference

a. Permissible Incorporation by Reference

We are adopting, with modifications, the proposal to permit a fund to incorporate by reference into the Summary Prospectus information contained in its statutory prospectus, SAI, and shareholder reports.[299] The proposal would have permitted a fund to incorporate by reference information from the fund's most recent report to shareholders. As adopted, rule 498 permits a fund to incorporate by reference any information from the fund's reports to shareholders that the fund has incorporated by reference into its statutory prospectus. This modification addresses commenters' concerns that the proposal was overbroad[300] by limiting incorporation from shareholder reports to information that has been incorporated into the fund's statutory prospectus and, as a result, is subject to liability under section 11 of the Securities Act.[301] The modification also addresses other commenters' concerns that funds be permitted to incorporate by reference information from both the most recent annual shareholder report and most recent semi-annual shareholder report[302] and will permit the Summary Prospectus to incorporate from shareholder reports precisely the same information that the statutory prospectus may incorporate today.

[293] Rule 498(e)(4). This safe harbor is not available to a fund that repeatedly fails to comply with the rule's Internet posting requirements or that is not in compliance with the requirements over a prolonged period.

[294] Rule 498(e)(4) (safe harbor applies to conditions set forth in paragraphs (e)(1), (2), and (3) of rule 498).

[295] Rule 498(f)(1).

[296] *See* ICI Letter, *supra* note 34.

[297] Rule 498(f)(1). We intend that ''current'' means the updated version of a document, not an outdated version that was current at the time the e-mail was sent. This is similar to the meaning of ''current'' discussed above in Part III.B.3.a.

[298] Rule 498(f)(5).

[299] Rule 498(b)(3).

[300] *See* Fund Democracy *et al.* Letter, *supra* note 34 (arguing there is no basis to extend incorporation by reference to annual report); Letter of Prof. Joseph A. Franco (Feb. 28, 2008) (incorporation by reference should be limited to the statutory prospectus).

[301] 15 U.S.C. 77k.

[302] *See* ICI Letter, *supra* note 34.

Incorporation by reference is subject to the conditions described below.

A fund may not incorporate by reference into a Summary Prospectus information from any source other than those described above.[303] In addition, a fund may not incorporate by reference into the Summary Prospectus any of the information described above that is required to be included in the Summary Prospectus.[304] Information may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, and not by reference to another document that incorporates the information by reference.[305] Thus, if a fund's statutory prospectus incorporates the fund's SAI by reference, the fund's Summary Prospectus could not incorporate information in the SAI simply by referencing the statutory prospectus but would be required to reference the SAI directly.[306]

Incorporation by reference of information from a fund's statutory prospectus, SAI, and shareholder reports is permitted only if the fund satisfies the conditions described above in Part III.B.3., which prescribe the means by which the incorporated information is provided to investors.[307] In addition, if a fund incorporates information by reference, the Summary Prospectus legend must specify the type of document (*e.g.*, statutory prospectus) from which the information is incorporated and the date of the document. If a fund incorporates by reference a part of a document, the Summary Prospectus legend must clearly identify the part by page, paragraph, caption, or otherwise.[308] These document identification requirements have been modified from the proposal, which would have required that the legend clearly identify documents that are incorporated by reference, including the date of the documents, in order to make the requirements more precise.[309] The legend is also required to explain that any information that is incorporated from the SAI or shareholder reports may be obtained, free of charge, in the same manner as the statutory prospectus.[310]

A fund that fails to comply with any of the above conditions may not incorporate information by reference into its Summary Prospectus. A fund that provides the incorporated information to investors by complying with all of the conditions, including the conditions for providing the incorporated information through the Internet, is not also required to send or give the incorporated information together with the Summary Prospectus.[311]

A significant number of commenters expressed support for the Commission's proposal to permit incorporation by reference of information from other fund documents into the Summary Prospectus.[312] Commenters stated that, by permitting incorporation by reference, the proposal significantly addresses liability issues that resulted in funds' unwillingness to use the fund profile and will encourage wider use of the Summary Prospectus.[313]

A joint comment letter from three consumer and investor groups, however, stated that the Commission did not adequately address serious questions accompanying incorporation by reference in the proposing release.[314] These commenters argued, first, that the Commission did not adequately explain any purpose for permitting incorporation by reference other than the limitation of funds' liability. Second, the commenters argued that the Commission's proposal would relieve issuers of legal responsibility for misleading disclosure under sections 12(a)(2) and 17(a)(2) of the Securities Act and that the proposing release had not discussed whether the benefits of having a Summary Prospectus that satisfies prospectus delivery obligations is worth the cost of relieving funds of this legal responsibility or whether such a tradeoff is appropriate.

With respect to the commenters' first concern, our purpose in permitting incorporation by reference into the Summary Prospectus is to further our goal of creating an improved mutual fund disclosure framework for the benefit of investors. We have concluded, and the comments and recent investor research support our conclusion, that investors will benefit greatly from receiving a shorter document, such as the Summary Prospectus. We have also concluded, based on both the comments and our experience with the fund profile that, to a significant extent, investors will not realize these benefits unless we permit incorporation by reference because many funds are unlikely to use the Summary Prospectus if incorporation by reference is prohibited. With respect to the commenters' second concern, we do not agree that permitting incorporation by reference will relieve funds of legal responsibility for misleading disclosure. Therefore, we believe that it is appropriate to permit incorporation by reference in order to realize for investors the considerable benefits that the Summary Prospectus will afford. We discuss our analysis more fully below.

Incorporation by Reference Is Necessary To Improve Disclosure Framework

We have concluded that investors will benefit greatly from receiving the Summary Prospectus containing key information that they will be more likely to read and understand than the statutory prospectus, with the ability to access more detailed information either

[303] Rule 498(b)(3)(i) and (ii).

[304] Rule 498(b)(3)(ii)(B).

[305] Rule 498(b)(3)(ii)(C).

[306] *Cf.* Item 10(d) of Regulation S–K [17 CFR 229.10(d)] (''Except where a registrant or issuer is expressly required to incorporate a document or documents by reference * * * reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document.''). General Instruction D.2. of Form N–1A makes Item 10(d) of Regulation S–K applicable to incorporation by reference into a fund's statutory prospectus.

[307] Rule 498(b)(3)(ii)(A) and (e). We note that the safe harbor described in Part III.B.3.e. stating that, under certain circumstances, the conditions regarding Internet availability of a fund's Summary Prospectus, statutory prospectus, SAI, and shareholder reports will be deemed to be met, notwithstanding the fact that those materials are not available for a time in the manner required, also applies to permit incorporation by reference in those circumstances. Rule 498(e)(4).

[308] Rule 498(b)(1)(v)(B). This requirement is similar to the requirements of rule 411(d) under the Securities Act [17 CFR 230.411(d)], which requires that information incorporated by reference ''be clearly identified in the reference by page, paragraph, caption or otherwise.''

[309] *See, e.g.*, ICI Letter, *supra* note 34; NYC Bar Letter, *supra* note 75.

[310] Rule 498(b)(1)(v)(B) and (b)(3)(ii)(A).

[311] Rule 498(b)(3)(i). *Cf.* General Instruction D.1.(b) of Form N–1A (permitting a fund to incorporate by reference any or all of the SAI into the statutory prospectus without delivering the SAI with the prospectus).

[312] *See, e.g.*, ABA Letter, *supra* note 37; CFA Institute Letter, *supra* note 37; Letter of Citigroup Global Markets Inc. (Feb. 26, 2008) (''Citigroup Letter''); Dechert Letter, *supra* note 50; ICI Letter, *supra* note 34; MFDF Letter, *supra* note 34; NYC Bar Letter, *supra* note 75; Oppenheimer Letter, *supra* note 44; Schnase Letter, *supra* note 35; SIFMA Letter, *supra* note 97; T. Rowe Letter, *supra* note 49.

[313] *See, e.g.*, ABA Letter, *supra* note 37; Citigroup Letter, *supra* note 312; ICI Letter, *supra* note 34; MFDF Letter, *supra* note 34; SIFMA Letter, *supra* note 97. *See also* AARP Letter, *supra* note 34 (''Various explanations have emerged as to why the fund profile did not take hold, including the rapid development of the Internet as a resource for mutual fund investors and liability concerns related to the profile. The proposal under consideration today addresses both issues, and as such, paves the way for more widespread use of the summary documents.'').

[314] *See* Fund Democracy *et al.* Letter, *supra* note 34. Another commenter opposed incorporation by reference into the Summary Prospectus, but noted that if incorporation by reference is permitted, the incorporated documents should be available on the Internet, linked with other documents, downloadable in printable form with retained links, and distributed upon request, similar to our proposal. *See* Data Communiqué Letter, *supra* note 35.

immediately in a user-friendly format online or, within a matter of days, in paper. Nearly all of the commenters, including those who opposed incorporation by reference, agreed with this conclusion.[315] This conclusion is also supported by our recent telephone survey of investors, which found that many mutual fund investors do not read statutory prospectuses because they are long, complicated, and hard to understand.[316]

The views expressed by investors in our focus groups also support our conclusion that investors will derive significant benefits from the Summary Prospectus, coupled with ready access to more detailed information in whatever format they choose, paper or electronic.[317] By using multiple means to provide information and by using technology to provide information in a layered format that permits users to move from key information to more detailed information, the new rule is intended to facilitate each investor's ability to effectively choose to review the particular information in which he or she is interested. Each investor in a fund taking advantage of the new prospectus delivery regime can choose the particular means of receiving information that he or she prefers because all of the information is required to be sent promptly to any requesting investor in paper or electronically. Thus, the Summary Prospectus disclosure framework will permit each and every investor to choose both the information he or she wants to review and the format in which he or she wants to review it.

We also believe that significantly more funds and intermediaries will utilize the Summary Prospectus if we permit funds to incorporate by reference information from the funds' statutory prospectus, SAI, and shareholder reports. Numerous commenters stated that, by permitting incorporation by reference, the proposal significantly addresses liability issues that resulted in funds' unwillingness to use the fund profile and will encourage wider use of the Summary Prospectus.[318] Our own experience with the fund profile over the past 10 years confirms that very few funds have adopted it.[319] We believe that one of the principal reasons for the profile's low adoption rate is concern about potential liability for omitting facts from the profile that are contained in the statutory prospectus or SAI.[320] While we acknowledge that an additional contributing factor was the requirement that funds using the profile also provide a statutory prospectus with the confirmation,[321] we do not believe that elimination of this requirement alone, without permitting incorporation by reference, would result in widespread use of the Summary Prospectus by funds.

Thus, permitting incorporation by reference into the Summary Prospectus is essential to accomplishing the Commission's important goal of encouraging use of a disclosure document that provides key information that investors are more likely to read and understand than the statutory prospectus. Commenters and investor testing consistently affirm the importance of the goal and of the Summary Prospectus in achieving the goal. Commenters on the current proposal, and our experience with the profile, confirm that we cannot accomplish the goal without permitting incorporation by reference.

Investor Protection

We have also concluded that permitting incorporation by reference will not relieve funds of any legal responsibility for misleading disclosure under sections 12(a)(2) and 17(a)(2) of the Securities Act.[322] As a result, we have concluded that it is appropriate to permit incorporation by reference in order to realize for investors the considerable benefits that the Summary Prospectus will afford.

The Summary Prospectus, together with information incorporated therein by reference, is subject to liability under sections 12(a)(2) and 17(a)(2) of the Securities Act, and nothing in rule 498 removes, or diminishes, that liability. Under Section 12(a)(2) of the Securities Act, sellers have liability to purchasers for offers or sales by means of a prospectus or oral communication that includes an untrue statement of material fact or omits to state a material fact that makes the statements made, based on the circumstances under which they were made, not misleading. Section 17(a)(2) of the Securities Act is a general antifraud provision which makes it unlawful for any person in the offer and sale of a security to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

We are permitting incorporation by reference of the statutory prospectus,

[315] *See* AARP Letter, *supra* note 34 (stating that it is AARP's view that the Commission's initiative provides a real opportunity to deliver practical disclosure that consumers can use to make informed mutual fund purchase decisions); CMFI Letter, *supra* note 44 (stating that the new disclosure regime would help investors focus on what is most important in making investment decisions with respect to any particular fund and that the Summary Prospectus is much more likely to be reviewed by investors); Data Communiqué Letter, *supra* note 35 (acknowledging the improvements that will result from improved access and ease of comparability of relevant information in a concise format); Fund Democracy *et al.* Letter, *supra* note 34 (supporting Summary Prospectus proposal overall and agreeing that ''a short form alternative to a lengthy statutory prospectus can both improve the quality and usefulness of fund disclosure and reduce fund expenses''); ICI Survey, *supra* note 84 (stating that respondents to a survey it conducted overwhelmingly agreed that the Summary Prospectus is about the right length, makes it easier to compare funds, contains enough information (as long as more detailed information is available online or upon request), and is a document that they would be more likely to use than the current long-form prospectus); Letter of William D. McAllister (Nov. 27, 2007) (stating that current disclosure statements are definitely unreadable for the average citizen investor and that the simplification proposed is needed and appreciated); Letter of Kyle N. Orlowski (March 10, 2008) (stating that the proposal would make an ''apples to apples'' comparison between funds much easier).

[316] *See* Telephone Survey Report, *supra* note 32, at 56, 58 (finding that nearly two-thirds of investors rarely (28%), very rarely (15%), or never (21%) read mutual fund statutory prospectuses that they receive, and that of those two-thirds, over half said that the reason they do not read them was because statutory prospectuses are too complicated or hard to understand (37%) or because statutory prospectuses are too long and wordy (19%)).

[317] *See* Focus Group Report, *supra* note 32, at 5–6 (noting that participants made numerous negative comments about the length of the long-form prospectus and that many participants liked the short-form prospectus and thought that it could be used as a screening tool to identify mutual funds in which they might be sufficiently interested to do some additional review); Focus Group Transcripts, *supra* note 32, at 63 (''It's a two-minute read. If I want more information, I can ask for it.''); *id.* at 38 (''I think both [the long-form prospectus and short-form prospectus] have their place. I think it would be foolish to give up the long-form for 'this' and I think it would be foolish not to have the short-form and insist on a long-form. They both have their place.'').

[318] *See* letters cited *supra* note 313.

[319] Profiles were filed for less than 200 funds during calendar year 2007. During 2007, there were almost 9,000 mutual funds in existence. *See* 2008 ICI Fact Book, *supra* note 16, at 15.

[320] *See* letters cited *supra* note 313. *See also* Tom Leswing, *Profile Prospectus Rule Expected Soon,* Ignites (Mar. 28, 2007) (panelists at the ICI Mutual Funds and Investment Management Conference expressed concern about liability for using a short-form prospectus and noted that concern about liability was the main reason that few funds use the profile); NASD Mutual Fund Task Force Report, *supra* note 19, at 5 (''To date, few mutual funds have used the fund profile in the retail market. One concern that has been voiced about the fund profile is that it could expose funds to unforeseen liability. For example, by summarizing disclosure that appeared in the full prospectus, some fear that the fund profile could be deemed to have omitted material information.'').

[321] *See* Fund Democracy *et al.* Letter, *supra* note 34.

[322] We also note that rule 498 does not reduce, or otherwise affect, liability under Section 11 of the Securities Act. This is discussed in Part III.B.5.

SAI, and information from the shareholder reports that is incorporated into the statutory prospectus in order to reflect, as a legal matter, the practical reality that, under the conditions of rule 498, the information incorporated into the Summary Prospectus will be provided at the same time as the Summary Prospectus though by different means.[323] Funds and other sellers will be liable under sections 12(a)(2) and 17(a)(2) for information incorporated by reference into the statutory prospectus. Investors who choose to review the statutory prospectus, SAI, and shareholder reports in paper will have the same ability to do so that they do today. In addition, rule 498 requires that all information contained in the Summary Prospectus, statutory prospectus, SAI, and shareholder reports be immediately available to investors online in a user-friendly format.[324] By using multiple means to provide this information and using technology to provide information in a layered format, the new rule is intended to facilitate investors' ability to easily access and review the particular information in which they are interested. Indeed, each investor in a fund taking advantage of the new prospectus delivery regime can choose the particular means of receiving information because all of the information is required to be promptly sent to any requesting investor in paper or electronically. The Summary Prospectus disclosure regime enhances the accessibility of the information that is available to investors and increases their options for how to receive the information; it does not take away any information or any option for the method by which information is received.

Our determination to permit incorporation by reference of information into the Summary Prospectus is different from the determination we made with respect to the profile and is made in light of technological advances that have occurred during the intervening years. When the Commission adopted the profile more than 10 years ago, it did not permit incorporation by reference of the statutory prospectus into the profile and stated its belief that allowing this incorporation would be inconsistent with the purpose of the profile and not in the public interest.[325] The Commission noted that the profile was designed to provide summary information about a fund in a self-contained format and that permitting incorporation by reference of the statutory prospectus would be inconsistent with the profile being a self-contained document.[326]

By contrast, the Summary Prospectus is not a self-contained document, but rather one element in a layered disclosure regime that is intended to provide investors with better, more useable access to the information in the statutory prospectus, SAI, and shareholder reports than they have today. The expansion in Internet access and the strides in the speed and quality of Internet connections since the profile rule was adopted in 1998 have made this possible.[327] As a result of these considerations and for the other reasons discussed above, we believe that it is consistent with the purpose of the Summary Prospectus and in the public interest to permit incorporation by reference of information from the statutory prospectus, SAI, and shareholder reports into the Summary Prospectus, subject to the conditions to incorporation by reference contained in rule 498.

b. Effect of Incorporation by Reference

We are adopting, as proposed, the provision of rule 498 stating that, for purposes of rule 159 under the Securities Act,[328] information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with rule 498. This provision addresses the question of when information that is incorporated into the Summary Prospectus under rule 498 is conveyed for purposes of sections 12(a)(2) and 17(a)(2) of the Securities Act. Commenters who addressed this provision generally supported the position that all information that is properly incorporated by reference into the Summary Prospectus is conveyed to an investor for purposes of these sections.[329]

As we have previously stated, we interpret section 12(a)(2) and section 17(a)(2) to mean that, for purposes of assessing whether at the time of sale (including a contract of sale) a prospectus or oral communication or statement includes or represents a material misstatement or omits to state a material fact necessary in order to make the prospectus, oral communication, or statement, in light of the circumstances under which it was made, not misleading, information conveyed to the investor only after the time of sale (including a contract of sale) should not be taken into account.[330] In furtherance of this interpretation, we adopted rule 159 under sections 12(a)(2) and 17(a)(2). Consistent with our interpretation, rule 159 provides that, for purposes of sections 12(a)(2) and 17(a)(2) only, and without affecting any other rights under those sections, for purposes of determining at the time of sale (including the time of the contract of sale) whether a prospectus, oral statement, or a statement[331] includes an untrue statement of material fact or omits to state a material fact necessary

[323] Thus, rule 498(b)(3)(iii) expressly provides that incorporated information is, for purposes of rule 159 (and therefore for purposes of Sections 12(a)(2) and 17(a)(2) of the Securities Act), conveyed not later than the time the Summary Prospectus is received. *See* discussion *infra* Part III.B.4.b.

[324] The provisions that we are adopting requiring linking within and between documents and that the documents be in a format that is convenient for both reading online and printing on paper are intended to contribute to a user-friendly online presentation. Rule 498(e)(2)(ii), (e)(2)(iii), and (f)(3).

[325] Investment Company Act Release No. 23065, *supra* note 194, 63 FR at 13971.

[326] *Id.*

[327] *See, e.g.*, AARP Letter, *supra* note 34 (noting that ''the growth of the Internet as an information source has dramatically improved investors' access to mutual fund information''); CFA Institute Letter, *supra* note 37 (''In a time of electronic accessibility, this approach is in keeping with movement taken by the SEC through other proposals to streamline the process and reduce expenses to investment companies, while preserving investor protections.''). In 1998, one study indicated that over one-third of Americans over the age of 16 used the Internet. Associated Press Online, *One-Third of Americans Use Internet* (Aug. 25, 1998). As noted above, our recent telephone survey indicates that 90% of investors have Internet access. Telephone Survey Report, *supra* note 32, at 115. *See also* 2008 ICI Fact Book, *supra* note 16, at 80–81 (noting that more than nine in 10 U.S. households owning mutual funds have Internet access, up from two-thirds in 2000; 69 percent of mutual fund shareholders age 65 or older have Internet access, up from 30 percent in 2000; and about eight in 10 mutual fund shareholders with Internet access go online for financial purposes, such as to check their bank or investment accounts, obtain investment information, or buy or sell investments). Moreover, very few American homes had broadband connections in 1998. *See* Robert J. Samuelson, *Broadband's Faded Promise,* The Washington Post, at A35 (Dec. 12, 2001) (noting that almost no American homes had broadband in 1998). In contrast, as of early 2007, nearly half of all adult Americans had a broadband connection at home. *See supra* note 26. *See also* Jesse Noyes, *Broadband signals death of dial-up,* The Boston Herald, at 028 (Aug. 7, 2005) (noting that dial-up speeds have remained constant at 56K since 1998 and cannot go higher, while broadband speeds have grown from 1 megabyte per second to 100 megabytes a second in the past six years).

[328] 17 CFR 230.159.

[329] *See, e.g.*, ABA Letter, *supra* note 37; Dechert Letter, *supra* note 50; ICI Letter, *supra* note 34; Schnase Letter, *supra* note 35; T. Rowe Letter, *supra* note 49. As discussed more fully in Part III.B.4.a., several commenters disagreed with the Commission's determination to permit incorporation by reference.

[330] *See* Securities Act Release No. 8591 (Jul. 19, 2005) [70 FR 44722, 44766 (Aug. 3, 2005)].

[331] These include a prospectus or oral statement in the case of Section 12(a)(2), or a statement to which Section 17(a)(2) is applicable.

in order to make the statements, in light of the circumstances under which they were made, not misleading,[332] any information conveyed to the purchaser only after the time of sale will not be taken into account.

Rule 498 provides that, for purposes of rule 159 (and therefore for purposes of sections 12(a)(2) and 17(a)(2)), information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus in accordance with the rule.[333] For purposes of sections 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor at or prior to the time of the contract of sale is a facts and circumstances determination.[334] We have designed the requirements of rule 498 specifically so that the facts and circumstances surrounding receipt by a person of the Summary Prospectus will, in fact, result in the effective conveyance to that person of any information that is incorporated by reference into the Summary Prospectus in compliance with the conditions of the rule. For that reason, rule 498 expressly states that, for purposes of rule 159, information incorporated into a Summary Prospectus is conveyed not later than the time that the Summary Prospectus is received.[335] The relevant facts and circumstances required by rule 498 include actual receipt of the Summary Prospectus; incorporation by reference of the information into the Summary Prospectus and clear disclosure of how the incorporated information may be obtained free of charge; and continuous Internet availability of the incorporated information in formats that permit permanent retention, are human-readable and capable of being printed on paper in human-readable format, and meet the document linking requirements of the rule.[336]

We are not adopting the suggestion of two commenters that rule 498 state that information is conveyed to a person not later than the time that the Summary Prospectus is *conveyed* to the person, rather than *received* by the person.[337] We are unable to conclude that, in all circumstances, information incorporated into a Summary Prospectus has been conveyed to an investor before the investor has received the Summary Prospectus.

Rule 498 addresses one particular set of facts and circumstances under rule 159 and does not address any other situations. For purposes of sections 12(a)(2) and 17(a)(2), whether or not information has been conveyed to an investor at or prior to the time of the contract of sale remains a facts and circumstances determination. Rule 498 does not address any facts and circumstances relating to operating companies or any other issuers that are not mutual funds, nor does it address any information other than information incorporated by reference into a mutual fund Summary Prospectus in accordance with the new rule.

The Commission believes that a person that provides investors with a mutual fund Summary Prospectus in good faith compliance with rule 498 will be able to rely on section 19(a) of the Securities Act[338] against a claim that the Summary Prospectus did not include information that is disclosed in the fund's statutory prospectus, whether or not the fund incorporates the statutory prospectus by reference into the Summary Prospectus.[339] Section 19(a) protects a defendant from liability for actions taken in good faith in conformity with any rule of the Commission.[340]

5. Filing Requirements for the Summary Prospectus

We are requiring each Summary Prospectus to be filed with the Commission on EDGAR no later than the date that it is first used, rather than, as proposed, the fifth business day after the date that it is first used.[341] We agree with commenters who suggested that the Summary Prospectus should be filed with the Commission and be available on the Commission's Web site earlier than the fifth business day after it is first used.[342] In addition, we do not believe that the proposed five-day lag between first use of a Summary Prospectus and filing is necessary, given that we are requiring that the Summary Prospectus be updated only once a year, at the same time that a fund files its updated statutory prospectus. A Summary Prospectus that is filed on EDGAR will be publicly available; however, a fund may not rely on this availability to satisfy the requirements to post the document online discussed in Part III.B.3. above.

Section 10(b) of the Securities Act provides that a prospectus permitted under that section shall, unless provided otherwise by Commission rule, be filed as part of the registration statement but shall not be deemed part of the registration statement for the purposes of section 11 of the Securities Act.[343] In accordance with Section 10(b), a Summary Prospectus will be filed as part of the registration statement, but will not be deemed a part of the registration statement for purposes of section 11 of the Securities Act.

A joint comment letter from three consumer and investor groups expressed concerns that the Summary Prospectus would not be subject to section 11 liability, suggesting that this would result in a diminution of funds' liability under that section.[344] We emphasize that the registration statement of a fund that uses the Summary Prospectus will remain subject to liability under section 11, as is the case today. All of the information that may be included in, or incorporated by reference into, a fund's Summary Prospectus is also required to be included in the fund's registration statement. Thus, as described more fully in the following paragraph, all information included in, or incorporated by reference into, the Summary Prospectus will be subject to

[332] Or, in the case of Section 17(a)(2), any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

[333] Rule 498(b)(3)(iii).

[334] *See* Securities Act Release No. 8591, *supra* note 330, 70 FR at 44766. Such information could include information in the issuer's registration statement and prospectuses for the offering in question, the issuer's Exchange Act reports incorporated by reference therein, or information otherwise disseminated by means reasonably designed to convey such information to investors. Such information also could include information directly communicated to investors.

[335] Whether or not any or all of the incorporated information was conveyed to an investor *prior to* the time that the Summary Prospectus was received will be a facts and circumstances determination.

[336] *Cf.* Investment Company Act Release No. 13436 (Aug. 12, 1983) [48 FR 37928, 37930 (Aug. 22, 1983)] (discussing incorporation by reference of the SAI into the statutory prospectus); *see also White* v. *Melton*, 757 F. Supp. 267, 272 (S.D.N.Y. 1991) (addressing effect of incorporation by reference of the SAI into the statutory prospectus).

[337] *See* ICI Letter, *supra* note 34; Schnase Letter, *supra* note 35.

[338] 15 U.S.C. 77s(a).

[339] *Cf.* Investment Company Act Release No. 23065, *supra* note 194, 63 FR at 13972 (similar Commission statement in context of profile).

[340] *See also* Section 38(c) of the Investment Company Act [15 U.S.C. 80a–37(c)] (similar provision under Investment Company Act).

[341] Rule 497(k). As proposed, we are deleting the reference to the profile from rule 497(a) [17 CFR 230.497(a)].

[342] *See* Bo Li Letter, *supra* note 35; NewRiver Letter, *supra* note 228. Two commenters supported the Commission's proposal to require each Summary Prospectus to be filed with the Commission no later than the fifth business day after first use. *See* ICI Letter, *supra* note 34; Schnase Letter, *supra* note 35.

[343] 15 U.S.C. 77j(b) and 77k.

[344] *See* Fund Democracy *et al.* Letter, *supra* note 34. Under Section 11 of the Securities Act [15 U.S.C. 77k], purchasers of an issuer's securities have private rights of action for untrue statements of material facts or omissions of material facts required to be included in the registration statement or necessary to make the statements in the registration statement not misleading.

liability under section 11 of the Securities Act.

As described in Part III.B.2.a., we are adopting a new requirement to clarify that the information contained in a Summary Prospectus that is used to satisfy prospectus delivery obligations must be the same as the information contained in the summary section of the fund's statutory prospectus. This information is, and will remain, subject to section 11 liability because the fund's prospectus, in its entirety, is subject to Section 11 liability. In addition, information may be incorporated by reference into a Summary Prospectus only if it is contained in the fund's statutory prospectus, SAI, or has been incorporated into the statutory prospectus from the shareholder reports. That is, information that may be incorporated by reference into the Summary Prospectus is already a part of the fund's registration statement and, as a result, is subject in its entirety to liability under section 11. Thus, while section 10(b) of the Securities Act prescribes that the Summary Prospectus will not itself be deemed a part of the registration statement for purposes of section 11, all of the information in the Summary Prospectus will be subject to liability under section 11, either because the information is the same as information contained in the statutory prospectus or because the information is incorporated by reference from the registration statement.

We also note that a Summary Prospectus is subject to the stop order and other administrative provisions of section 8 of the Securities Act.[345] This is in addition to the Commission's power under section 10(b) of the Securities Act to prevent or suspend the use of the Summary Prospectus, regardless of whether or not it has been filed.[346]

C. Technical and Conforming Amendments

We are adopting the following conforming amendments to rule 482 under the Securities Act, the investment company advertising rule, to reflect the Summary Prospectus and the elimination of the voluntary profile.

- The scope section of rule 482 is revised to clarify that the rule does not apply to a Summary Prospectus or to a communication that, pursuant to rule 498, is not deemed a ''prospectus'' under section 2(a)(10) of the Securities Act.[347]
- For funds using the Summary Prospectus, the legend required in a rule 482 advertisement regarding the availability of the statutory prospectus will be required to include references to the Summary Prospectus.[348]
- The provision addressing the use of rule 482 advertisements together with a profile that includes an application to purchase shares is deleted as unnecessary.[349]

We are also adopting amendments to various cross-references to Form N–1A in our rules and forms to reflect changes that we are adopting to Form N–1A. These include cross-references in rule 485 under the Securities Act, rules 304 and 401 of Regulation S–T, Form N–4 under the Securities Act and the Investment Company Act, and Form N–14 under the Securities Act. We are also revising rule 159A under the Securities Act to refer to a Summary Prospectus rather than a profile.

D. Compliance Date

As discussed in the proposing release, the Commission is providing for a transition period after the effective date of the amendments to Form N–1A that gives funds sufficient time to update their prospectuses or to prepare new registration statements under the revised Form N–1A requirements. The effective date of the amendments is March 31, 2009.

All initial registration statements on Form N–1A, and all post-effective amendments that are annual updates to effective registration statements on this form, filed on or after January 1, 2010, must comply with the amendments to Form N–1A. All post-effective amendments that add a new series, filed on or after January 1, 2010, must comply with the amendments with respect to the new series. The final compliance date for filing amendments to effective registration statements to comply with the new Form N–1A requirements is January 1, 2011. Based on the comments, we believe that this will provide adequate time for funds to compile and review the information that must be disclosed.[350] A fund may, at its option, prepare documents in accordance with the requirements of Form N–1A, as amended, at any time after the effective date of the amendments. A person may not rely on rule 498 to satisfy its obligations to deliver a mutual fund's statutory prospectus unless the fund is also in compliance with the amendments to Form N–1A.

Post-effective amendments to existing registration statements filed to comply with the amendments to Form N–1A should be filed under Securities Act rule 485(a).[351] However, in appropriate circumstances, we will consider requests by existing funds to file these post-effective amendments pursuant to Securities Act rule 485(b)(1)(vii).[352] Appropriate circumstances may include, for example, situations where a fund complex has previously filed under rule 485(a) post-effective amendments for a number of funds that implement the new requirements, and the staff determines not to review additional such filings by the fund complex in light of the staff's experience with the previously filed amendments.

IV. Paperwork Reduction Act

Certain provisions of the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[353] The titles for the collections of information are: (1) ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Open-End Management Investment Companies'' (OMB Control No. 3235–0307) and (2) ''Summary Prospectus for Open-End Management Investment Companies'' (OMB Control No. 3235–0637). We published notice soliciting comments on the collection of information requirements in the release proposing the amendments[354] and submitted the proposed collections of information to the Office of Management and Budget

[345] 15 U.S.C. 77h; H.R. Rep. 1542, 83d Cong., 2d Sess., 1954 U.S.C.C.A.N. 2973, 2982 (1954) (noting that the Commission's authority to suspend the use of a defective summary prospectus under Section 10(b) ''is intended to supplement the stop-order powers of the Commission under [S]ection 8'').

[346] 15 U.S.C. 77j(b).

[347] Rule 482(a).

[348] Rule 482(b)(1).

[349] Rule 482(c).

[350] A number of commenters expressed the view that a one-year transition period was needed to make the required disclosure changes and implement the business process changes associated with use of the Summary Prospectus. *See e.g.*, ICI Letter, *supra* note 34; Janus Letter, *supra* note 63; Oppenheimer Letter, *supra* note 44.

[351] A post-effective amendment filed under rule 485(a) [17 CFR 230.485(a)] generally becomes effective either 60 days or 75 days after filing, unless the effective date is accelerated by the Commission. A post-effective amendment filed under rule 485(b) may become effective immediately upon filing. A post-effective amendment may be filed under rule 485(b) if it is filed for one or more specified purposes, including to make non-material changes to the registration statement. A post-effective amendment filed for any purpose not specified in rule 485(b) generally must be filed pursuant to rule 485(a).

[352] Under rule 485(b)(1)(vii), the Commission may approve the filing of a post-effective amendment to a registration statement under rule 485(b) for a purpose other than those specifically enumerated in the rule. The Commission's staff has been delegated the authority to approve registrants' requests under rule 485(b)(1)(vii). 17 CFR 200.30–5(b–3)(1).

[353] 44 U.S.C. 3501 *et seq.*

[354] *See* Proposing Release, *supra* note 12, 72 FR at 67809.

(''OMB'') for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Four commenters specifically addressed the collection of information requirements and we have revised the proposed rule amendments in response to those comments.[355] We have also revised the estimated reporting and cost burdens of the rule amendments to address these comments, as discussed below.

Form N–1A under the Securities Act and the Investment Company Act[356] is used by mutual funds to register under the Investment Company Act and to offer their securities under the Securities Act. Rule 498 under the Securities Act will be used by mutual funds that choose to send or give a Summary Prospectus to investors.[357] 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. Because we have modified our proposals as described above, we are revising the burden estimate for Form N–1A and rule 498. We have submitted a revised request for both to OMB.

We are adopting an improved mutual fund disclosure framework that we originally proposed in November 2007.[358] This improved disclosure framework is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the improved disclosure framework is the provision to all investors of streamlined and user-friendly information that is key to an investment decision.

To implement the new disclosure framework, we are adopting amendments to Form N–1A that will require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. We are also adopting a new option for satisfying prospectus delivery obligations with respect to mutual fund securities under the Securities Act. Under the option, key information will be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus will be provided on an Internet Web site. Funds that select this option will also be required to send the statutory prospectus to the investor upon request.

We are also adopting technical and conforming amendments to rules 159A and 482 under the Securities Act that reflect the Summary Prospectus and the elimination of the voluntary profile, along with amendments that update the cross references to Form N–1A contained in rule 485 under the Securities Act, rules 304 and 401 of Regulation S–T, Form N–4 under the Securities Act and the Investment Company Act, and Form N–14 under the Securities Act. These technical and conforming amendments do not constitute a collection of information because we are not altering the legal requirements of these rules and forms.

Finally, amendments to rule 497 provide the requirements for filing Summary Prospectuses with the Commission. These amendments do not constitute a separate collection of information under rule 497 because the burden required by these amendments is part of the collection of information under rule 498.

A. Form N–1A

Form N–1A, including the amendments, contains collection of information requirements. The likely respondents to this information collection are open-end management investment companies registered or registering with the Commission. Compliance with the disclosure requirements of Form N–1A is mandatory. Responses to the disclosure requirements are not confidential.

Much of the information that is required in the summary section of the prospectus under the amendments has previously been required in a fund's prospectus. However, the amendments require new information regarding the exchange ticker symbol and the compensation received by financial intermediaries. In addition, except for some information common to multiple funds, the summary section must be presented separately for each fund covered by a multiple fund prospectus. As a result, the amendments to Form N–1A may require additional burden hours to compile, review, and present the required information in a separate summary section for each fund. We estimate that the amendments will increase the hour burden per portfolio per filing of an initial registration statement or the initial creation of a post-effective amendment to a registration statement by approximately 17 hours.

In the proposing release, we estimated that the proposed amendments would increase the hour burden per portfolio per filing of an initial registration statement or the initial creation of a post-effective amendment to a registration statement by approximately 16 hours.[359] We received two comments on this estimate.[360] One commenter anticipated approximately 19,000 hours for its 75 funds, or over 253 hours per portfolio, to initially comply with the proposed amendments.[361] Another commenter, who conducted a survey of mutual fund complexes, estimated that the amendments would increase the hour burden per portfolio by 17 hours.[362] Recognizing that the commenter surveyed a broad cross-section of the mutual fund industry, and having reviewed the specific questions it asked respondents, we have incorporated this estimate in our analysis.[363]

We estimate, as we did in the proposing release, that subsequent post-effective amendments to a registration statement will require, on average, approximately 4 burden hours per portfolio to update and review the information.[364] We received one comment, which estimated that ongoing compliance with the proposed amendments to Form N–1A would require an average of 9 hours per fund.[365] However, we believe that the commenter based this estimate on responses to an ambiguous survey question.[366] We believe that respondents may have interpreted this question to ask how many hours it would take them to update and review *all* information each year to comply with Form N–1A rather than only how many additional hours it would take

[355] *See* American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Janus Letter, *supra* note 63; ICI Letter, *supra* note 34.

[356] 17 CFR 239.15A; 17 CFR 274.11A.

[357] A request has been submitted to OMB to remove the collection of information for the fund profile, which is being eliminated, under current rule 498.

[358] *See* Proposing Release, *supra* note 12, 72 FR at 67990.

[359] Proposing Release, *supra* note 12, 72 FR at 67808.

[360] *See* Janus Letter, *supra* note 63; ICI Letter, *supra* note 34.

[361] Janus Letter, *supra* note 63. The commenter did not, however, indicate what percentage of the 19,000 hours it would dedicate to compliance with the proposed amendments to Form N–1A and what percentage it would dedicate to compliance with proposed rule 498.

[362] ICI Letter, *supra* note 34. The commenter estimated that the 42 fund complexes it surveyed offer 3,122 funds, accounting for nearly 60 percent of total mutual fund industry assets as of December 2007.

[363] Although the final rule eliminates disclosure of portfolio holdings in the summary section, we believe that the 17 hours estimated by the commenter based on its survey remains reasonable.

[364] *See* Proposing Release, *supra* note 12, 72 FR at 67808.

[365] *See* ICI Letter, *supra* note 34.

[366] *See id.* (asking survey respondents, ''How much time (in hours) would you estimate that it would take to update and review the information each year for Form N–1A on an on-going basis for all of your funds?'' (bold in original)).

them each year to update and review information to comply with the amended items in Form N–1A.[367] For this reason, we are not adjusting our original burden hour estimate.

Because the PRA estimates represent the average burden over a three-year period, we estimate the average hour burden for one portfolio to comply with the amendments to be approximately 8 hours.[368] We estimate that 8,752 portfolios file initial registration statements and post-effective amendments on Form N–1A.[369] Thus, the incremental hour burden resulting from the amendments relating to the summary section disclosure would be 70,016 hours.[370] The total annual hour burden for all funds for preparation and filing of registration statements and post-effective amendments to Form N–1A would be approximately 1,645,200 hours.[371]

B. Rule 498

Rule 498 contains collection of information requirements. The likely respondents to this information collection are open-end management investment companies registered or registering with the Commission. Under rule 498, use of the Summary Prospectus is voluntary, but the rule's requirements regarding provision of the statutory prospectus are mandatory for funds that elect to send or give a Summary Prospectus in reliance upon rule 498. The information provided under rule 498 will not be kept confidential.

We estimate that for those funds that choose to use the Summary Prospectus, initial compliance with the requirements for the Summary Prospectus will require approximately 23 burden hours per portfolio. We originally assumed in the proposing release that rule 498 would not impose any substantial new information collection requirements with respect to the initial preparation of a Summary Prospectus beyond those discussed above in connection with the collection of information for Form N–1A.[372] One commenter suggested that initial compliance with requirements for the Summary Prospectus and the other provisions of rule 498 would require approximately 23 burden hours per portfolio.[373] The commenter pointed out that initial compliance with the requirements for the Summary Prospectus would include, among other things, a document design process to create the Summary Prospectus; technology requirements for posting documents on funds' Web sites and providing hyperlinks within and between certain documents; and communication with distribution channels regarding the use of the Summary Prospectus.[374] Recognizing that we may have underestimated the costs associated with initial compliance with rule 498 and that the commenter based its estimate on a survey of a broad cross-section of the mutual fund industry, we have added an estimate of 23 burden hours necessary for initial compliance with rule 498.

In addition to initial compliance, we estimate, as we did in the proposing release, that rule 498 will impose a ½ hour burden per portfolio annually associated with the compilation of the additional information required on a cover page or at the beginning of the Summary Prospectus.[375] Rule 498 also imposes annual hour burdens associated with the posting of a fund's Summary Prospectus, statutory prospectus, SAI, and most recent report to shareholders on an Internet Web site.[376] We estimate that the average hour burden for one portfolio to comply with the Internet Web site posting requirements will be approximately one hour annually.[377]

Because the PRA estimates represent the average burden over a three-year period, we estimate the average hour burden for one portfolio to comply with the amendments to be approximately 9 hours.[378] The Summary Prospectus is voluntary, so the percentage of funds that will choose to provide it is uncertain. Given the potential benefits of the amendments to funds, we assume that 80% of all funds will choose to send or give the Summary Prospectus.[379] Assuming 80% of all funds file a Summary Prospectus, the total annual hour burden for filing and updating Summary Prospectuses and posting the required disclosure documents to an Internet Web site pursuant to rule 498 would be approximately 63,014 hours.[380]

C. ETF-Related Amendments

We are amending Form N–1A to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges.

The amendments permit an ETF to exclude certain information from its

[367] The respondents estimated that initial compliance with the Form N–1A amendments, including the creation of separate summaries for funds in a multiple fund prospectus, would require an average of 17 hours per fund, whereas ongoing compliance would average 9 hours per fund. *See* ICI Letter, *supra* note 34. Once such summary sections have been created, we do not believe that an update of such information on an annual basis should require more than half the time it takes to initially compile, review, and present that information in the summary section.

[368] (17 hours in the first year + 4 hours in the second year + 4 hours in the third year) ÷ 3 years = approximately 8 hours.

[369] *See* 2008 ICI Fact Book, *supra* note 16, at 15. In the Proposing Release, based on information in the 2007 version of the ICI Fact Book, we assumed that there were 8,726 portfolios. *See* Proposing Release, *supra* note 12, 72 FR at 67990 n. 14.

[370] 8 hours × 8,752 portfolios.

[371] 70,016 hours + 1,575,184 hours. Currently, the approved annual hour burden for preparing and filing registration statements on Form N–1A is 1,575,184 hours.

[372] *See* Proposing Release, *supra* note 12, 72 FR at 67809.

[373] *See* ICI Letter, *supra* note 34.

[374] *See id.*

[375] *See* Proposing Release, *supra* note 12, 72 FR at 67809.

[376] Rule 498, as proposed, also would have imposed an annual hour burden associated with updating the Summary Prospectus every quarter. In the Proposing Release, we estimated that quarterly updating would impose approximately 3 burden hours per quarter per portfolio, or 9 hours annually for each of the three subsequent quarters. *See* Proposing Release, *supra* note 12, 72 FR at 67809. However, we are not including quarterly updating requirements in the final rule.

[377] *See* Proposing Release, *supra* note 12, 72 FR at 67809. We have reduced this figure from the 4 hour estimate we made in the Proposing Release because we have not included quarterly updating requirements in the final rule. We originally estimated that Internet Web site posting would require approximately 1 hour per quarter, but without quarterly updating, we estimate that it will require 1 hour annually.

We received four comments on our original estimates of the burden of ongoing compliance. *See* American Century Letter, *supra* note 48; Capital Research Letter, *supra* note 34; Janus Letter, *supra* note 63; ICI Letter, *supra* note 34. One commenter estimated that filing Summary Prospectuses for its funds would require approximately 1150 hours per quarter, or 11 hours per fund. *See* American Century Letter, *supra* note 48. The second commenter estimated that the proposed quarterly updating requirement would require its 75 funds to spend approximately 5,300 burden hours. *See* Janus Letter, *supra* note 63. The third commenter estimated that it would spend an additional 4,400 hours per year to comply with the proposed quarterly updating requirements. *See* Capital Research Letter, *supra* note 34. Based on a survey of mutual funds, the fourth commenter stated that ongoing compliance with rule 498, as proposed, would require approximately 10 hours per fund per update. *See* ICI Letter, *supra* note 34. All three commenters, however, based their estimates on the proposal's requirement of quarterly updating of top 10 portfolio holdings and performance information. Because we are not requiring quarterly updating of performance information and we are not requiring any disclosure of top 10 portfolio holdings, we are not making further adjustments to our estimates.

[378] (23 hours in the first year + 1.5 hours in the second year + 1.5 hours in the third year) ÷ 3 years = approximately 9 hours.

[379] *See* Proposing Release, *supra* note 12, 72 FR at 67809. In the Proposing Release, we assumed that 75% of all funds would choose to send or give a Summary Prospectus. However, one commenter estimated that 80% of funds would elect to use the Summary Prospectus if the Commission eliminated quarterly updating requirements from the final rule. *See* ICI Letter, *supra* note 34. Having eliminated quarterly updating from the final rule and recognizing that the commenter had surveyed a major cross-section of the mutual fund industry, we have adopted the commenter's estimate that 80% of funds will likely choose to send or give a Summary Prospectus.

[380] 9 hours × 8,752 portfolios × .80.

prospectus that is not pertinent to investors purchasing individual ETF shares on secondary markets. Specifically, an ETF that has creation units of 25,000 shares or more may exclude from its prospectus: (i) Information on how to purchase and redeem shares of the ETF;[381] and (ii) fee table fees and expenses for purchases and redemptions of creation units.[382] Based on conversations with industry representatives, Commission staff estimated in the ETF proposing release that these amendments would decrease the information collection burdens of an ETF that has creation units of 25,000 shares or more by an average of 1.4 hours per fund per filing of an initial registration statement or post-effective amendment to a registration statement. We requested comment on this estimate in the ETF proposing release. No commenters addressed this estimate and we continue to believe that it is appropriate.

The amendments also require disclosures designed to include important information for purchasers of individual ETF shares, as described below. An ETF will have to modify the narrative explanation preceding the example in the fee table in its prospectus and periodic reports to state that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors in ETF shares may be required to pay brokerage commissions that are not reflected in the fee table.[383] We believe that the added information collection burdens associated with this statement, if any, would be negligible.

The proposed amendments would have required each ETF to include a separate line item for returns based on the market price of ETF shares in the average annual total returns table in Item 2 of the Form,[384] and to calculate total return at market prices in addition to returns at NAV for their financial highlights tables.[385] At the suggestion of commenters, we have not adopted these requirements.

The proposed amendments would have required ETFs to include premium/discount information in both the prospectus and annual report of each ETF. Based on commenters' suggestions, the final amendments permit ETFs to omit the historical premium/discount disclosure in those documents if the ETF includes premium/discount information on its Internet Web site and discloses in the prospectus and annual report an Internet address where investors can locate the information.[386] Commission staff estimated in the ETF proposing release that each ETF currently spends an average of 0.5 hours per filing of an initial registration statement or a post-effective amendment to a registration statement to include this disclosure.[387] The staff further estimated that each ETF also would spend 0.5 hours per annual report to include this disclosure. We requested comment on these estimates in the ETF proposing release. No commenters addressed these estimates and we continue to believe that they are appropriate for ETFs that choose to include the information in the prospectus and annual report.

Based on Commission filings, Commission staff estimates that on an annual basis, ETFs file initial registration statements covering 98 ETF portfolios, and post-effective amendments covering 1,441 ETF portfolios on Form N–1A. Based on staff estimates, we estimate that the amendments will not increase the hour burden per ETF per filing on an initial registration or post-effective amendment to a registration statement. We estimate that the amendments will add approximately 0.5 hours, which staff estimates will be offset by a reduction of 1.4 hours (elimination of description of creation units and associated fees). Although the total annual hour burden for ETFs to prepare and file initial registration statements and post-effective amendments may decrease slightly, we are not decreasing our overall estimates to reflect the incremental decrease in order to be conservative in our estimates of the collection of information burdens.

V. Cost/Benefit Analysis

The Commission is sensitive to the costs and benefits imposed by its rules. We are adopting amendments to Form N–1A that will require every prospectus to include a summary section at the front of the prospectus, consisting of key information about the fund, including investment objectives and strategies, risks, costs, and performance. The key information is required to be presented in plain English in a standardized order. Our intent is that this information will be presented succinctly, in three or four pages, at the front of the prospectus.

We are also adopting a new option for satisfying prospectus delivery obligations with respect to mutual fund securities under the Securities Act. Under the option, key information will be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus will be provided on an Internet Web site. Upon an investor's request, funds will also be required to send the statutory prospectus to the investor. Our intent in providing this option is that funds take full advantage of the Internet's search and retrieval capabilities in order to enhance the provision of information to mutual fund investors.

The disclosure framework that we are adopting has the potential to revolutionize the provision of information to the millions of investors who rely on mutual funds for their most basic financial needs. It is intended to help investors who are overwhelmed by the choices among thousands of available funds described in lengthy and legalistic documents to readily access key information that is important to an informed investment decision. At the same time, by harnessing the power of technology to deliver information in better, more useable formats, the disclosure framework can help those investors, their intermediaries, third-party analysts, the financial press, and others to locate and compare facts and data from the wealth of more detailed disclosures that are available.

In the proposing release, we requested public comment and specific data regarding the costs and benefits of the amendments. As discussed below, we received five comments directly addressing our quantitative cost/benefit analysis.[388] We also received numerous comments pertinent to qualitative aspects of our analysis.[389]

[381] Item 6(c)(2) of Form N–1A.

[382] Instruction 1(e)(ii) to Item 3 of Form N–1A.

[383] Instruction 1(e)(i) to Item 3 of Form N–1A; Instruction 1(e)(i) to Item 27(d) of Form N–1A. The amendments also require each ETF to identify the principal U.S. market on which its shares are traded and include a statement to the effect that ETF shares are bought and sold on national securities exchanges. We believe that the added information collection burdens associated with these very brief and specific statements, if any, would be negligible.

[384] Proposed Instruction 5(a) to Item 2(c)(2) of Form N–1A.

[385] Proposed Instruction 3(f) to Item 8(a) of Form N–1A.

[386] Item 11(g)(2) of Form N–1A; Item 27(b)(7)(iv) of Form N–1A. Although the time period required in the disclosure is different in the prospectus and annual report, ETFs will be able to omit both disclosures by providing on their Internet Web site only the premium/discount information required by Item 11(g)(2) (the most recently completed fiscal year and quarters since that year). *Id.*

[387] This estimate is based on discussions with representatives of ETFs, which include premium/discount information as required by their exemptive orders.

[388] *See* Data Communiqué Letter, *supra* note 35; ICI Letter, *supra* note 34; MFS Letter, *supra* note 150; NewRiver Letter, *supra* note 228; Memorandum from the Division of Investment Management regarding August 25, 2008 meeting with representatives of RR Donnelley & Sons Co. and Prospectus Central, LLC (Aug. 26, 2008) (''RR Donnelley Memorandum'').

[389] *See, e.g.*, AARP Letter, *supra* note 34; CFA Institute Letter, *supra* note 37; CMFI Letter, *supra*

Continued

A. Benefits

1. Form N–1A

Possible benefits of the amendments include enhanced disclosure of information needed to make informed investment decisions about mutual funds, more rapid dissemination of information over the Internet, and reduced printing and mailing costs.

Millions of individual Americans invest in shares of mutual funds, relying on mutual funds for their retirements, their children's educations, and their other basic financial needs.[390] These investors face a difficult task in choosing among the more than 8,000 available mutual funds.[391] Fund prospectuses, which have been criticized by investor advocates, representatives of the fund industry, and others as long and complicated, often prove difficult for investors to use efficiently in comparing their many choices. Current Commission rules require mutual fund prospectuses to contain key information about investment objectives, risks, and expenses that, while important to investors, can be difficult for investors to extract. Prospectuses are often long, both because they contain a wealth of detailed information and because prospectuses for multiple funds are often combined in a single document. Too frequently, the language of prospectuses is complex and legalistic, and the presentation formats make little use of graphic design techniques that would contribute to readability.

The amendments require investment information that is key to an investment decision to be provided in a streamlined document with other more detailed information provided elsewhere. The provision of this information to investors in concise, user-friendly formats will allow investors to compare information across funds and may assist them in making better informed portfolio allocation decisions in line with their investment goals.

The amendments also will provide the additional benefits of increased Internet availability of fund information, by providing layered disclosure that allows investors to move back and forth between the information within the Summary Prospectus and more detailed information within other disclosure documents. These benefits include, among other things, facilitating comparisons among funds and replacing one-size-fits-all disclosure with disclosure that each investor can tailor to his or her own needs. In recent years, access to the Internet has greatly expanded,[392] and significant strides have been made in the speed and quality of Internet connections.[393] Advances in technology offer a promising means to address the length and complexity of mutual fund prospectuses by streamlining the key information that is provided to investors, ensuring that access to the full wealth of information about a fund is immediately and easily accessible, and providing the means to present all information about a fund online in a format that facilitates comparisons of key information, such as expenses, across different funds and different share classes of the same fund. Technology has the potential to replace the current one-size-fits-all mutual fund prospectus with an approach that allows investors, their financial intermediaries, third-party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

Significant technological advances have increased both the market's demand for more timely disclosure and the ability of funds to capture, process, and disseminate information. The amendments will enable funds to take greater advantage of the Internet to more rapidly communicate and deliver information to investors. Accordingly, investor demand for information could be satisfied through relatively inexpensive mass dissemination of the information through electronic means. We anticipate that demand for the information in the statutory prospectus and SAI will increase as access to that information becomes easier through the use of layered disclosure that allows investors, their financial intermediaries, third-party analysts, and others to tailor the wealth of available information to their particular needs and circumstances.

Nearly all of the comments we received, including comments from consumer groups and industry representatives, agreed with our conclusion that investors will benefit greatly from receiving the Summary Prospectus containing key information that investors will be more likely to read and understand, with the ability to access more detailed information either immediately in a user-friendly format online or, within a matter of days, in paper.[394] This conclusion is also supported by our recent telephone survey of investors, which found that many mutual fund investors do not read statutory prospectuses because they are long, complicated, and hard to understand.[395] In addition, the views expressed by investors in our focus groups also support our conclusion that investors will derive significant benefits from the Summary Prospectus, coupled with ready access to more detailed information in whatever format they choose.[396]

In addition to benefiting investors, the Summary Prospectus also will provide quantifiable cost savings to funds. We believe that funds will benefit from being able to send or give a Summary Prospectus rather than having to print and send statutory prospectuses to all investors and prospective investors. We expect that funds will experience cost savings with respect to both annual mailings to their current shareholders and mailings made in connection with a purchase of fund shares. We estimate that funds distribute approximately 300,000,000 statutory prospectuses annually to their current shareholders[397] and another 64,500,000 in connection with fund purchases.[398]

note 44; Fund Democracy *et al.* Letter, *supra* note 34; ICI Letter, *supra* note 34; MFDF Letter, *supra* note 34; NAPFA Letter, *supra* note 44.

[390] *See supra* note 16.

[391] *See* 2008 ICI Fact Book, *supra* note 16, at 15.

[392] *See supra* note 25.

[393] *See supra* note 26.

[394] *See, e.g.*, Fund Democracy *et al.* Letter, *supra* note 34; ICI Letter, *supra* note 34; *see also supra* notes 315–317 and accompanying text (discussing the qualitative benefits of the amendments).

[395] Telephone Survey Report, *supra* note 32, at 56, 58.

[396] *See* Focus Group Report, *supra* note 32, at 5–6. *See also* Focus Group Transcripts, *supra* note 32, at 63 (''It's a two-minute read. If I want more information, I can ask for it.''); *Id.* at 38 (''I think both [the long-form prospectus and short-form prospectus] have their place. I think it would be foolish to give up the long-form for 'this' and I think it would be foolish not to have the short-form and insist on a long-form. They both have their place.'').

[397] *See* 2008 ICI Fact Book, *supra* note 16, at 110 (estimating 298,966,000 shareholder accounts at the end of 2007). In the Proposing Release, we used an estimate of 290,000,000 statutory prospectuses, which was based on the 2007 version of the ICI Fact Book estimate of the number of shareholder accounts at the end of 2006. *See* Proposing Release, *supra* note 12, 72 FR at 67810.

Often, a fund will mail a statutory prospectus to each of its shareholders annually in addition to mailing a statutory prospectus in connection with a purchase of fund shares. We recognize that: some shareholders may currently receive their fund documents electronically; some households where more than one fund investor resides will only receive one copy of the statutory prospectus per household; some accounts may hold more than one fund; and not all funds send out statutory prospectuses annually. Therefore, the actual number of prospectuses mailed annually may be higher or lower than our estimate.

[398] Our estimate of the number of statutory prospectuses sent out to fulfill a fund's prospectus delivery obligation upon purchase is based on information provided by Broadridge Financial Solutions, Inc. (''Broadridge'') prior to issuing the Proposing Release. *See* Memorandum from the Division of Investment Management regarding October 25, 2007 meeting with Broadridge

We received two comments related to the estimated number of statutory prospectuses that are distributed.[399]

We estimate that the cost savings for annual mailings will be approximately $126,000,000[400] and that the cost savings for purchase mailings will be approximately $80,496,000.[401] These cost savings would be reduced by the costs of sending the statutory prospectus to those investors who request it. We estimate that approximately 2% of the investors who own shares in the 80% of funds that likely will choose to send or give the Summary Prospectus will request that a statutory prospectus be mailed to them.[402] We estimate that the cost of mailing statutory prospectuses to existing investors would be $12,288,000.[403] We further estimate that approximately 3% investors purchasing shares in the 80% of funds that likely will choose to send or give the Summary Prospectus will request that a statutory prospectus be sent to them.[404] We estimate that the cost of sending statutory prospectuses requested by investors making purchases of fund shares would be approximately $3,962,880.[405] Therefore, we estimate the annual cost savings will be approximately $190,245,120,[406] or approximately $21,737 per portfolio.[407]

We received four comments bearing on the cost savings of the new delivery option.[408] Of those, only two commenters provided actual estimates of the total savings that would be generated by the new delivery option.[409] Insofar as these two commenters' total savings estimates differed from our $190,245,120 figure, they did so largely because the commenters assumed different per unit printing and postage costs. However, assuming (1) that 80% of funds will choose to send or give the Summary Prospectus, (2) that funds distribute approximately 300,000,000

representatives (Nov. 28, 2007) (''Broadridge Memorandum'').

[399] One commenter stated that our estimates of the numbers of statutory prospectuses distributed to existing shareholders and investors purchasing shares in the Proposing Release are reasonable because they fall within the range between the commenter's lowest possible estimates (230,000,000 for annual fulfillment and 58,000,000 for purchase fulfillment) and the commenter's highest possible estimates (373,000,000 for annual fulfillment and 95,000,000 for purchase fulfillment). *See* ICI Letter, *supra* note 34. A second commenter estimated that the number of statutory prospectuses distributed to existing shareholders is 231,981,600 and the number distributed to investors purchasing fund shares is 72,494,250, based on its experience preparing distributions of statutory prospectuses and shareholder reports for mutual funds. *See* Data Communiqué Letter, *supra* note 35.

[400] Our annual estimates are derived from information we received from Broadridge. *See* Broadridge Memorandum, *supra* note 398. Broadridge estimated that the average cost of a statutory prospectus printed in a full production run is $0.27 and that the average cost to mail a statutory prospectus by bulk mail is $0.255. *Id.* The cost savings with respect to annual mailings were calculated by multiplying the costs of printing and mailing a statutory prospectus by the 300,000,000 statutory prospectuses mailed annually reduced to reflect our estimate that 80% of funds will elect to send Summary Prospectuses (($0.27 for the printing of a statutory prospectus + $0.255 for the mailing of a statutory prospectus) × 300,000,000 statutory prospectuses × 80% of funds).

[401] For purposes of our estimate, we used Broadridge's printing cost estimate of $0.35 that is blended to reflect full production printing runs and digital print on demand documents. *Id.* This blended rate reflects the fact that a fund may run out of statutory prospectuses produced in a full production run and may have to print additional statutory prospectuses on demand. Broadridge also estimated that the average cost to mail a statutory prospectus by first class mail is $1.21. *Id.* The cost savings with respect to purchase mailings were calculated by multiplying the costs of printing and mailing a statutory prospectus by 64,500,000 statutory prospectuses mailed in connection with a fund purchase reduced to reflect our estimate that 80% of funds will elect to send Summary Prospectuses (($0.35 for the printing of a statutory prospectus + $1.21 for the mailing of a statutory prospectus) × 64,500,000 statutory prospectuses × 80% of funds).

[402] We originally did not project that existing investors would request hard copies of the statutory prospectus. However, one commenter stated that at most 2% of existing investors would likely request hard copies, based on information from Broadridge indicating investor requests for written materials under the Commission's notice and access e-proxy model have averaged around 2%. *See* ICI Letter, *supra* note 34. We believe that it is reasonable to estimate a similar percentage of existing investors will request hard copies of the statutory prospectus.

[403] For purposes of this estimate, we used the digital print on demand rate of $1.35 and the average first class mail rate of $1.21. *See* Broadridge Memorandum, *supra* note 398 (estimating postage costs of $1.21); ICI Letter, *supra* note 34 (estimating a digital print on demand rate of $1.35). In the Proposing Release, we estimated a blended print rate of $0.35 for prospectuses sent to requesting investors. *See* Proposing Release, *supra* note 12, 72 FR at 67810 n. 162. However, one commenter stated that this estimate is too low because it largely reflects economies of scale from high volume offset printing that are not realistic given the likely low number of investor requests for hard copies of the statutory prospectus. *See* ICI Letter, *supra* note 34. Therefore, we have adopted the commenter's digital print rate estimate of $1.35.

The costs were calculated by multiplying the costs of printing and mailing a statutory prospectus by the 300,000,000 prospectuses sent out annually to existing shareholders reduced to reflect our estimate that 80% of funds will elect to adopt the new disclosure option and 2% of investors will request a statutory prospectus be mailed to them (($1.35 for the printing of a statutory prospectus + $1.21 for the mailing of a statutory prospectus) × 300,000,000 statutory prospectuses × 80% of funds × 2% of investors).

[404] In the Proposing Release, we originally estimated that 10% of such investors would likely request hard copies of the statutory prospectus. However, one commenter stated that 2% of *both* existing investors and investors purchasing fund shares would request hard copies of the statutory prospectus. *See* ICI Letter, *supra* note 34. While we agree with the commenter that we may have initially underestimated the percentage of existing investors and overestimated the percentage of purchasing investors that would request hard copies, we do not believe that the same percentage of both groups would request hard copies. Investors making initial fund purchases would potentially have a greater interest in receiving hard copies of statutory prospectuses than investors that have owned fund shares for some time. For this reason, we have lowered our original estimate that 10% of investors purchasing fund shares would request hard copies, but have lowered it less than the commenter suggested.

[405] For purposes of this estimate, we used the digital print on demand rate of $1.35 and the average first class mail rate of $1.21. *See supra* note 403. The costs were calculated by multiplying the costs of printing and mailing a statutory prospectus by the 64,500,000 prospectuses sent out in response to fund purchases reduced to reflect our estimate that 80% of funds will elect to send Summary Prospectuses and 3% of investors will request a statutory prospectus be mailed to them (($1.35 for the printing of a statutory prospectus + $1.21 for the mailing of a statutory prospectus) × 64,500,000 statutory prospectuses × 80% of funds × 3% of investors).

[406] ($126,000,000 cost savings for annual mailings + $80,496,000 cost savings for purchase mailings) − ($12,288,000 cost of sending requested statutory prospectuses to existing investors + $3,962,880 cost of sending requested statutory prospectuses to investors purchasing funds).

A study of industry participants estimated cost savings of approximately $300,000,000 per year. *See* Forrester Consulting Study commissioned on behalf of NewRiver, Inc., *The Short-Form Prospectus*, at 6 (Oct. 2007), available at *http://www1.newriver.com/upload_files/ForresterConsulting_NewRiver_ShortForm_Prospectus_10_25_2007.pdf.*

[407] $190,245,120 ÷ 8,752 portfolios.

Although we believe that not all funds will choose to use the Summary Prospectus, we believe it is appropriate to estimate the amendments' effect across the entire mutual fund industry. Therefore, we have estimated the average cost savings per portfolio industry-wide rather than estimate the cost savings per portfolio only for those portfolios using the Summary Prospectus.

[408] *See* Data Communiqué Letter, *supra* note 35; ICI letter, *supra* note 34; MFS Letter, *supra* note 150; RR Donnelley Memorandum, *supra* note 388.

[409] *See* Data Communiqué Letter, *supra* note 35 (estimating $220,254,203 in annual cost savings) ICI Letter, *supra* note 34 (estimating $236,000,000 in annual cost savings).

The two commenters also provided the printing and postage cost estimates they used to arrive at their total cost savings estimates. *See* Data Communiqué Letter, *supra* note 35 (estimating per unit printing and postage costs for annual fulfillment of $0.25 and $0.392 respectively, per unit printing and postage costs for purchase fulfillment of $0.25 and $0.654 respectively, and a blended per unit printing and postage cost for delivery of hard copies of the statutory prospectus to requesting investors of $0.50); ICI Letter, *supra* note 34 (estimating per unit printing and postage costs for annual fulfillment of $0.26 and $0.255 respectively, per unit printing and postage costs for purchase fulfillment of $0.26 and $1.39 respectively, and per unit printing and postage costs for delivery of hard copies of the statutory prospectus to requesting investors of $1.35 and $1.39 respectively).

Of the two commenters that did not provide total cost savings estimates, one commenter estimated that it currently pays an average of $0.15 per piece for offset printing of a statutory prospectus. MFS Letter, *supra* note 150. The other commenter estimated that a fund with a print volume of 30,000 64-page statutory prospectuses could save 6.3% by using a four-page Summary Prospectus and that a fund with a print volume of 100,000 64-page statutory prospectuses could save 22.2%, assuming that 10% of investors still request hard copies of the statutory prospectus. RR Donnelley Memorandum, *supra* note 388.

statutory prospectuses to existing investors annually and distribute approximately 64,500,000 statutory prospectuses to purchasing investors annually, and (3) that 2% of existing investors in funds using the new delivery option and 3% of investors purchasing shares in such funds request hard copies of the statutory prospectus, the commenters' differing per unit printing and postage cost estimates would not produce total cost savings estimates that differ significantly from our estimate.[410]

We expect that funds will face the highest level of uncertainty about the extent of investors' continued use of printed statutory prospectuses in the first year after adoption of the amendments. We expect that, as funds gain familiarity with the extent of continued use of printed prospectuses and as shareholders increasingly turn to the Internet for fund information, the number of requested paper copies will decline, as will funds' tendency to print more copies than ultimately are requested.

2. ETF-Related Disclosures

As noted above, in March of this year, the Commission proposed several amendments to Form N–1A to accommodate the use of the form by ETFs, and we are adopting those amendments today, with some changes to respond to issues raised by commenters. As noted in the ETF proposing release, many of the exemptive orders that permit an ETF to operate exempt broker-dealers from the obligation to deliver prospectuses in secondary market transactions. The exemptive orders permit a broker-dealer instead to deliver a product description containing basic information about the ETF and its shares. We understand that many, if not most, broker-dealers transmit a prospectus to purchasers and do not rely on the exemption in our orders. In light of this practice, we are adopting amendments to Form N–1A designed to meet the needs of investors (including retail investors) who purchase ETF shares in the secondary market rather than financial institutions that purchase creation units directly from the ETF.

We expect that one benefit of the amendments will be to provide ETF investors purchasing shares in the secondary market with information on the investment that they currently may not receive in a product description, such as the fund's fee table and the name and length of service of the portfolio manager. Another benefit of the amendments will be to provide ETF investors purchasing shares in the secondary market with prospectus disclosure that is specifically tailored to ETFs. We expect this would provide ETF investors with information that will allow them to understand more easily an investment in an ETF. This information also may be helpful to investors in making portfolio allocation decisions.

Our amendments are designed to simplify prospectus and periodic report disclosure in two ways. First, the amendments allow ETFs to exclude from the prospectus information on how to purchase and redeem creation units, including information on fees and expenses associated with creation unit sales or purchases. Current ETF prospectuses and periodic reports include detailed information on how to purchase and redeem creation units. The fee table and example include information on transaction fees payable only by creation unit purchasers. Our amendments permit ETFs with creation units of at least 25,000 shares to exclude this information because it is not relevant (and may be potentially confusing) to investors purchasing in secondary market transactions.[411] This provision should simplify ETF prospectuses without compromising the disclosure provided to investors who purchase ETF shares in secondary market transactions.

Second, our exemptive orders require ETFs to include in their prospectuses and annual reports premium/discount information to alert investors of the extent and frequency with which market prices deviated from the fund's NAV. ETFs may omit this disclosure if they provide the information on their Internet Web sites and provide an Internet address where investors may locate the information. ETFs have generally included this information in a supplemental section of the prospectus and annual report.[412] The amendments incorporate this disclosure in the shareholder information section (Item 11 of Form N–1A) of the prospectus and the management's discussion of fund performance in the annual reports (Item 27(b)(7) of Form N–1A). We anticipate that this may benefit ETF investors by simplifying the prospectuses and annual reports of ETFs while codifying important disclosures mandated by our ETF exemptive orders. ETFs also may benefit because they may choose to disclose this information in the most cost efficient way—either in the prospectus and the annual report, or on their Web sites.

B. Costs

1. Form N–1A

While the amendments will result in significant cost savings for funds, we believe that there will be costs associated with them. These include the costs for funds to compile and review the new information required by our amendments and to post the required disclosure documents on an Internet Web site. These costs may include both internal costs (for attorneys and other non-legal staff, such as computer programmers, to prepare and review the required disclosure) and external costs (for printing and mailing of the Summary Prospectus). We estimate that the external costs for printing and mailing of the Summary Prospectus will be approximately $106,200,000[413] or approximately $12,134 per portfolio.[414]

[410] One commenter also did not account for the fact that less than 100% of funds would adopt the new delivery option in its calculation of quantified benefits. *See* ICI Letter, *supra* note 34.

[411] *See supra* Part III.A.4.

[412] *See, e.g.*, iShares MSCI Series, Prospectus 62–65 (Jan. 1, 2007); iShares MSCI Series, 2006 Shareholders Annual Report 130–136 (Aug. 31, 2006).

[413] This estimate assumes printing and postage costs for annual fulfillment of $0.08 and $0.255 per unit respectively and printing and postage costs for purchase fulfillment of $0.08 and $0.42 per unit respectively. We increased our estimate of postage costs for purchase fulfillment from $0.41 in the Proposing Release to $0.42 to reflect the current rate for first class mail. Our estimate is derived as follows: [(($0.08 to offset print a Summary Prospectus + $0.255 for bulk mail) × 300,000,000 prospectuses estimated to be sent out annually) + (($0.08 to offset print a Summary Prospectus + $0.42 for first class mail) × 64,500,000 prospectuses estimated to be sent out in response to a fund purchase)] × 80% of funds.

In the Proposing Release, we estimated printing costs of $0.11 per unit for on-demand printing in black and white. *See* Proposing Release, *supra* note 12, 72 FR at 67811 n. 168. However, we have changed our estimate of per unit printing costs based on comments we received and based on our decision not to include a quarterly updating requirement in the final rule. Instead of using the original $0.11 per unit figure for on-demand printing in black and white, we now estimate printing costs of $0.08 per unit, a figure representing offset printing of a blend of color and black and white. *See* ICI Letter, *supra* note 34.

[414] $106,200,000 ÷ 8,752 portfolios.

Our new cost/benefit analysis retains our original postage costs of $0.255 per unit for annual fulfillment and $0.41 per unit for purchase fulfillment. Two commenters assumed the same postage costs in their cost/benefit analyses. *See* ICI Letter, *supra* note 34; NewRiver Letter, *supra* note 228. Another commenter's estimates of postage costs were close to ours ($0.233 per unit for annual fulfillment and $0.484 per unit for purchase fulfillment). *See* Data Communiqué Letter, *supra* note 35. By contrast, a fourth commenter estimated postage costs of $0.241 per Summary Prospectus, without differentiating between annual and purchase fulfillment costs. *See* RR Donnelley Memorandum, *supra* note 388. However, we did not adjust our postage cost estimates based on this comment because the other three commenters largely agreed with our original postage cost estimates.

We received four comments regarding our estimates of per unit print costs for the Summary Prospectus.[415] Of the four commenters, only one accounted for the likelihood that some funds would print Summary Prospectuses in color.[416] In discussing its estimates, the commenter reported that 47% of funds it surveyed expected to use color for the Summary Prospectus. Therefore the commenter's per unit print cost estimates represent a blend of 47% color and 53% black and white. Assuming that the Commission would require quarterly updating of the Summary Prospectus, the commenter estimated a per unit printing cost of $0.17 for annual fulfillment and $0.26 for purchase fulfillment.[417] However, the commenter also estimated that without quarterly updating, most funds would print Summary Prospectuses by offset methods, and therefore estimated a per unit print cost of $0.08 per unit for both annual and purchase fulfillment.[418]

We accept the commenter's assertion that roughly half of funds will print their Summary Prospectuses in color and half will print in black and white because their estimate was based on a survey of a broad cross-section of the mutual fund industry. Additionally, with the elimination of quarterly updating requirements in the final rule, we believe that most funds will likely print Summary Prospectuses for annual *and* purchase fulfillment at the same time, giving most funds sufficient print volume to make offset printing methods economical.[419] Therefore, we have revised our estimates of per unit print costs for annual and purchase fulfillment to $0.08 per unit.

For purposes of the PRA, we have estimated that the new disclosure requirements, assuming 80% of funds choose to send or give a Summary Prospectus, would add: (1) 70,016 hours to the annual burden of preparing Form N–1A; and (2) 63,014 hours to the annual burden of preparing and using a Summary Prospectus, including complying with Internet posting requirements, under rule 498. We estimate that this additional burden would equal total internal costs of $37,248,400 annually[420] or approximately $4,256 per portfolio.[421]

The amendments also may result in costs associated with investors printing fund documents posted online. We estimate that approximately ½% of existing investors and 3% of investors purchasing shares will print statutory prospectuses at an estimated cost of $2.03 per statutory prospectus.[422] Based on these assumptions, the amendments are estimated to produce annual investor printing costs of $5,578,440.[423]

We received one comment letter arguing that the use of the Summary Prospectus under rule 498 may impose costs on investors by relieving funds of liability for misleading disclosure.[424] For the reasons discussed in Parts III.B.4.a. and III.B.5., we do not believe that the amendments, as adopted, will entail such costs.

2. ETF-Related Disclosures

The primary goal of our amendments relating to ETF disclosures is to provide investors in ETF shares with more valuable information regarding an investment in an ETF. We do not expect that the amendments will result in significant additional costs to ETFs.[425] As noted above, the N–1A amendments generally codify disclosure requirements in existing ETF exemptive orders.

In addition to codifying disclosure requirements of existing exemptive orders, we are adopting a few new disclosure requirements in Form N–1A. The disclosure amendments require each ETF to identify the principal U.S. market on which its shares are traded[426] and include statements to the effect that (i) ETF shares are bought and sold on

Although we believe that not all funds will choose to use the Summary Prospectus, we believe it is appropriate to estimate the amendments' effect across the entire mutual fund industry. Therefore, we have estimated the average external costs per portfolio industry-wide rather than estimate the costs per portfolio only for those portfolios using the Summary Prospectus.

[415] Data Communiqué Letter, *supra* note 35 (estimating $0.07 per unit for offset printing in black and white); ICI Letter, *supra* note 34 (estimating $0.17 per unit for annual fulfillment and $0.26 per unit for purchase fulfillment, with both figures representing a blend of offset printing and print on demand as well as a blend of color and black and white printing); MFS Letter, *supra* note 150 (estimating $0.10 per unit for print on demand, but not indicating whether that figure includes any color printing); NewRiver Letter, *supra* note 228 (estimating $0.10 per unit for print on demand, but not indicating whether that figure includes any color printing).

[416] *See* ICI Letter, *supra* note 34.

[417] Given our assumptions that 80% of funds will adopt the Summary Prospectus, that funds distribute 300 million prospectuses for purposes of annual fulfillment, and that they distribute 64.5 million prospectuses for purchase fulfillment each year, the commenter's per unit postage and mailing cost estimates would lead to total postage and mailing costs of $136,572,000 annually [(($0.17 for a blend of offset/print on demand and color/black and white printing + $0.255 for bulk mail) × 300,000,000 prospectuses estimated to be sent out annually) + (($0.26 for print on demand of a blend of color/black and white printing + $0.41 for first class mail) × 64,500,000 prospectuses estimated to be sent out in response to a fund purchase)] × 80% of funds.

[418] *See* Memorandum from the Division of Investment Management regarding September 29, 2008 telephone conversation with representatives of the Investment Company Institute (October 6, 2008).

[419] We recognize that some funds may not have sufficient numbers of investors and purchasers to warrant printing Summary Prospectuses by offset method. ICI, however, estimated that absent a quarterly updating requirement, nearly 90% of funds would print Summary Prospectuses by offset methods. *See id.*

[420] This cost increase is estimated by multiplying the total annual hour burden (133,030 hours) by the rounded estimated hourly wage rate of $280. The estimated wage figure is based on published rates for compliance attorneys and senior programmers, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding effective hourly rates of $270 and $289, respectively. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2007. The estimated wage rate is further based on the estimate that attorneys and programmers would divide time equally, resulting in a rounded weighted wage rate of $280 (($270 × .50) + ($289 × .50)).

In the Proposing Release, we estimated an hourly wage rate of $252.50, which was based on the Report on Management & Professional Earnings in the Securities Industry 2006. *See* Proposing Release, *supra* note 12, 72 FR at 67811 n. 170.

[421] $37,248,400 ÷ 8,752 portfolios.

In the Proposing Release, we estimated the costs per fund choosing to use the Summary Prospectus. *See* Proposing Release, *supra* note 12, 72 FR 67811 n. 166. We have revised this calculation to produce an average cost per portfolio industry-wide.

[422] Our estimate of potential printing costs is based on data provided by Lexecon Inc. in response to Investment Company Act Release No. 27182 (Dec. 8, 2005) [70 FR 74598 (Dec. 15, 2005)]. *See* Lexecon Inc. Letter (Feb. 13, 2006). To calculate printing costs, we estimate that 100% of prospectuses are printed in black and white at a cost of $0.035 per page for ink and that the average prospectus length is approximately 45 pages at a cost of $0.010 per page for the paper (($0.035 for ink + $0.010 for paper) × 45 pages).

In the Proposing Release, we estimated that approximately 5% of investors making fund purchases would print statutory prospectuses. *See* Proposing Release, *supra* note 12, 72 FR at 67811. However, we received a comment estimating that 2% of both existing investors and investors purchasing fund shares would print the statutory prospectus. See ICI Letter, *supra* note 34. While we agree with the commenter that we may have initially underestimated the percentage of existing investors and overestimated the percentage of investors purchasing fund shares that would print the statutory prospectus, we do not believe that the same percentage of both groups of investors would print statutory prospectuses. Rather, we believe that investors making initial fund purchases would have greater interest in printing statutory prospectuses than investors who already own fund shares. Thus, we have lowered our original estimate of investors purchasing shares who print the statutory prospectus to 3% and estimate that approximately ½% of existing investors will print statutory prospectuses.

[423] (300,000,000 × ½% of printing investors) + (64,500,000 × 3% of printing investors) × 80% of funds × $2.03.

[424] Fund Democracy *et al.* Letter, *supra* note 34.

[425] Existing ETFs would face a one-time ''learning cost'' to determine the difference between the current Form N–1A requirements as modified by their exemptive orders and the amendments we are adopting today. We do not anticipate that this cost will be significant given the similarity of the amendments to the conditions in existing exemptive orders.

[426] Item 1(a)(2) of Form N–1A.; rule 498(b)(1)(ii).

national securities exchanges;[427] (ii) because the price of shares is based on market price, shares may trade at a premium or discount to NAV;[428] and (iii) ETF investors may be required to pay brokerage commissions.[429] Including these additional statements should present minimal, if any, printing costs. Any additional costs incurred by an ETF in complying with these additional disclosures should be offset by the cost-savings of the amendments, which would allow most, if not all, ETFs to exclude creation unit purchase and redemption information in their prospectuses.[430]

VI. Consideration of Promotion of Efficiency, Competition, and Capital Formation

Section 2(c) of the Investment Company Act[431] and section 2(b) of the Securities Act[432] require the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We requested, but did not receive, any comments directly addressing whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation, or comments on any anti-competitive effects of the proposed amendments.[433]

The amendments we are adopting are intended to provide enhanced disclosure regarding mutual funds. These changes may improve efficiency. The enhanced disclosure requirements may enable shareholders to make more informed investment decisions by focusing attention on key information, which could promote efficiency. We anticipate that the amendments will increase efficiency at mutual funds by providing an alternative to the printing and mailing of paper copies of statutory prospectuses.

We anticipate that improving investors' ability to make informed investment decisions may also lead to increased competitiveness of the U.S. capital markets. The ability of investors to directly locate the information they seek regarding a fund or funds through the use of the Internet may result in more investment in the U.S. capital markets. In addition, we believe that the amendments may enhance competition and efficiency because they will reduce fund printing and mailing costs. Funds could, for example, use these savings to conduct additional investment research or to pass cost savings on to investors. We also believe that the amendments will enhance competition among funds because they will facilitate investor comparisons of mutual fund information, including important cost and fee disclosures.

We anticipate that this increased market efficiency also may promote capital formation by improving the flow of information between funds and their investors. Specifically, we believe that the amendments will: (1) Facilitate greater availability of information to investors and the market with regard to all funds; (2) build upon the increased importance of electronic dissemination of information, including the use of the Internet; and (3) promote the capital formation process.

VII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[434] It relates to the Commission's amendments to Form N–1A under the Securities Act and the Investment Company Act and to new rule 498 under the Securities Act.

A. Need for the Rule

We are adopting an improved mutual fund disclosure framework that is intended to provide investors with information that is easier to use and more readily accessible, while retaining the comprehensive quality of the information that is available today. The foundation of the improved disclosure framework is the provision to all investors of streamlined and user-friendly information that is key to an investment decision.

In addition, the amendments to Form N–1A that specifically apply to ETFs are intended to accommodate the form for use by ETFs and are designed to provide more useful information to investors who purchase and sell ETF shares on national securities exchanges.

B. Significant Issues Raised by Public Comment

In the proposing release, we requested comment on the number of small entity issuers that may be affected, the existence or nature of the potential impact and how to quantify the impact of the amendments. Commenters generally supported the proposal.[435] One commenter, however, stated that the proposal would simply add another costly burden to small fund families.[436] While we believe there will be some costs associated with the amendments, we have tried to minimize those costs. Nearly all of the information that is required in the summary section of the prospectus under the amendments has previously been required in a fund's prospectus. We eliminated the proposed quarterly updating requirement in response to commenters' concerns. In addition, we have made use of the Summary Prospectus voluntary, meaning that a fund can choose whether or not to adopt it considering its costs and benefits to the fund and its investors.

In the initial regulatory flexibility analysis for the ETF proposing release, we requested comment on any aspect of the IRFA, including the number of small entities likely to rely on the proposed amendments to Form N–1A, the likely impact of the proposed amendments on small entities, and the nature of any impact on small entities. We also requested empirical data supporting the extent of any impact on small entities. We received no comments on that analysis.

C. Small Entities Subject to the Rule

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[437] Approximately 127 mutual funds registered on Form N–1A meet this definition.[438] Of the approximately 593 registered open-end investment companies that are ETFs, only one is a small entity.[439]

[427] Item 6(c)(i)(A) of Form N–1A.

[428] Item 6(c)(i)(B) of Form N–1A.

[429] Instruction 1(e)(i) to Item 3 of Form N–1A. We also are adopting a conforming amendment to the expense example in ETF annual and semi-annual reports. Instruction 1(e)(i) to Item 27(d) of Form N–1A.

[430] *See* Instruction 1(e)(ii) to Item 3 of Form N–1A; Items 6(c)(ii); 11(g)(1) of Form N–1A. For purposes of our Paperwork Reduction Act analysis, we have estimated that these amendments will not change the current Form N–1A compliance costs. *See supra* Part IV.C.

[431] 15 U.S.C. 80a–2(c).

[432] 15 U.S.C. 77b(b).

[433] *See* Proposing Release, *supra* note 12, 72 FR at 67812.

[434] 5 U.S.C. 603 *et seq.*

[435] *See supra* note 206 and accompanying text.

[436] *See* McCormick Letter, *supra* note 74. The commenter made specific suggestions for improving mutual fund disclosure, such as consolidating the statutory prospectus and SAI and eliminating the semi-annual reports and quarterly filings on Form N–Q, that were beyond the scope of this particular rulemaking.

[437] 17 CFR 270.0–10.

[438] This estimate is based on analysis by the Division of Investment Management staff of publicly available data.

[439] For purposes of this analysis, any series or portfolio of an ETF is considered a separate ETF.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments we are adopting require all funds, including funds that are small entities, to provide key information in a summary section of their statutory prospectuses. In addition, the amendments provide a new option that will permit a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act. Under the option, key information will be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus will be provided on an Internet Web site. Upon an investor's request, funds are required to send the statutory prospectus to the investor. No funds are required to send or give a Summary Prospectus. However, for purposes of the PRA, we estimate that 80% of all funds will choose to send or give a Summary Prospectus pursuant to rule 498 both to enhance investor access to information about a fund and to take advantage of the cost savings that a fund may realize. If a fund elects the new delivery regime for prospectuses, it is required to prepare, file, and send or give a Summary Prospectus to investors. The required disclosure in the Summary Prospectus is information that generally is readily available to funds. A fund is required to post the statutory prospectus along with other required documents to an Internet Web site and provide either a paper or an e-mail copy of its statutory prospectus to requesting shareholders.

For purposes of the Paperwork Reduction Act, we have estimated that the new disclosure requirements would increase the hour burden of filings on Form N–1A by 70,016 hours annually and for rule 498 by 63,014 hours annually. We estimate that this additional burden would increase total internal costs per portfolio, including those that are small entities, by approximately $4,256 per portfolio annually.[440] We also estimate that the external costs for printing and mailing of the Summary Prospectus will be approximately $12,075 per portfolio.[441] However, we estimate that the benefit of decreased printing and other costs will decrease total external costs per portfolio, including those that are small entities, by approximately $21,737 per portfolio annually.[442]

The amendments to Form N–1A that specifically apply to ETFs will impose reporting requirements on open-end funds that operate as ETFs. The amendments require an ETF to disclose in its prospectus and annual reports the number of trading days on which the market price of an ETF's shares was greater than its NAV and the number of days it was less than its NAV (premium/discount information) unless the ETF discloses this information on its Web site and provides an Internet address where an investor can locate the information.[443] The amendments also require the ETF to disclose in its prospectus (in addition to its exchange ticker trading symbol), the principal U.S. market(s) on which its shares are traded.[444]

The amendments to Form N–1A also eliminate some disclosure requirements for ETFs with creation units of 25,000 or more shares and replace them with fewer disclosures. Under the amendments, those ETFs do not have to: (i) Disclose information on how to buy and redeem shares of ETF;[445] (ii) include in its fee table in its prospectus or annual and semi-annual reports fees and expenses for purchases or sales of creation units;[446] or (iii) disclose procedures for the purchase and redemption of fund shares.[447]

The amendments to Form N–1A are designed to accommodate the form for use by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than institutional investors purchasing creation units directly from the ETF. We anticipate that the amendments will have a negligible impact (if any) on the disclosure burdens on ETFs while providing necessary information to ETF investors. We do not believe that the amendments to Form N–1A will disproportionately impact small funds.

E. Agency Action To Minimize the Effect on Small Entities

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the amendments, the Commission considered the following alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the amendments for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the amendments, or any part thereof, for small entities.

The Commission believes at the present time that special compliance or reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. We believe that the amendments to Form N–1A will provide investors with enhanced disclosure regarding funds. This enhanced disclosure will allow investors to better assess their investment decisions. The ETF amendments to Form N–1A are designed to accommodate the form for use by ETFs and to meet the needs of investors (including retail investors) who purchase ETF shares in secondary market transactions rather than financial institutions purchasing creation units directly from the ETF. Different disclosure requirements for funds that are small entities may create the risk that investors in these funds would be less able to evaluate funds and less able to compare different funds, thereby lessening the ability of investors to make informed choices among funds. We believe it is important for the disclosure that is required by the amendments to Form N–1A to be provided to investors in all funds, not just funds that are not considered small entities.

Rule 498 provides a new option that permits a person to satisfy its mutual fund prospectus delivery obligations under the Securities Act. Under the

Therefore, there are 593 portfolios or series of registered open-end investment companies operating as ETFs. For purposes of determining whether a fund is a small entity under the Regulatory Flexibility Act, however, the assets of funds (including each portfolio and series of a fund) in the same group of related investment companies are aggregated.

[440] These figures are based on an estimated hourly wage rate of $280. *See supra* note 420. We note that this estimate includes a one-time burden of 17 hours to create the summary section of the statutory prospectus and a one-time burden of 23 hours to create the Summary Prospectus.

[441] *See supra* note 414 and accompanying text.

[442] *See supra* note 407 and accompanying text.

[443] Item 11(g)(2) of Form N–1A (requiring premium/discount information in the prospectus to span the most recently completed calendar year and quarters since that year); Item 27(b)(7)(iv) of Form N–1A (requiring premium/discount information disclosed in annual reports to span five fiscal years). The ETF is required to present premiums or discounts as a percentage of NAV and to explain that shareholders may pay more than NAV when purchasing shares and receive less than NAV when selling, because shares are bought and sold at market prices. Instructions 2, 3 to Item 11(g)(2) of Form N–1A; Instructions 2, 3 to Item 27(b)(7)(iv).

[444] Item 1(a)(2) of Form N–1A; rule 498(b)(1)(ii).

[445] Item 6(c)(ii) of Form N–1A. Instead ETF prospectuses could simply state that individual fund shares can only be bought and sold on the secondary market through a broker-dealer. Item 6(c)(i)(A) of Form N–1A.

[446] Instruction 1(e)(ii) to Item 3 of Form N–1A; Instruction 1(e)(ii) to Item 27(d) of Form N–1A. An ETF will instead modify the narrative explanation preceding the example in the fee table to state that investors may be required to pay brokerage commissions that are not reflected in the fee table. Instruction 1(e)(i) to Item 3 of Form N–1A; Instruction 1(e)(i) to Item 27(d) of Form N–1A.

[447] Item 11(g)(1) of Form N–1A.

option, key information is to be sent or given to investors in the form of a Summary Prospectus, and the statutory prospectus is to be provided on an Internet Web site. Upon an investor's request, funds are required to send the statutory prospectus to the investor. Because the rule is optional, an exemption from the rule for small entities would deprive small entities of the potential benefits of the rule.

We have endeavored through the amendments to minimize the regulatory burden on all funds, including small entities, while meeting our regulatory objectives. Small entities should benefit from the Commission's reasoned approach to the amendments to the same degree as other funds. We also have endeavored to clarify, consolidate, and simplify disclosure for all funds, including those that are small entities. Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context. Based on our past experience, we believe that the disclosure required by the amendments will be more useful to investors if there are enumerated informational requirements.

VIII. Statutory Authority

The Commission is adopting amendments to Form N–1A and Form N–4 pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)] and sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–24(a), 80a–24(g), 80a–29, and 80a–37]. The Commission is adopting amendments to Form N–14 pursuant to authority set forth in sections 5, 6, 7, 10, and 19(a) of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, and 77s(a)]. The Commission is adopting amendments to rules 159A, 482, 485, 497, and 498 under the Securities Act and to rules 304 and 401 of Regulation S–T pursuant to authority set forth in sections 5, 6, 7, 10, 19, and 28 of the Securities Act [15 U.S.C. 77e, 77f, 77g, 77j, 77s, and 77z–3] and sections 8, 24(a), 24(g), 30, and 38 of the Investment Company Act [15 U.S.C. 80a–8, 80a–24(a), 80a–24(g), 80a–29, and 80a–37].

List of Subjects

17 CFR Parts 230 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 232 and 239

Reporting and recordkeeping requirements, Securities.

Text of Final Rule and Form Amendments

■ For the reasons set out in the preamble, the Commission amends Title 17, Chapter II, of the Code of Federal Regulations as follows.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 2. Section 230.159A is amended by removing the word ''profile'' in paragraph (a)(2) and adding in its place ''summary prospectus''.

■ 3. Section 230.482 is amended by:

■ a. Revising paragraph (a) before the note; and

■ b. Revising paragraphs (b)(1) and (c).

The revisions read as follows:

§ 230.482 Advertising by an investment company as satisfying requirements of section 10.

(a) *Scope of rule.* This section applies to an advertisement or other sales material (*advertisement*) with respect to securities of an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (*1940 Act*), or a business development company, that is selling or proposing to sell its securities pursuant to a registration statement that has been filed under the Act. This section does not apply to an advertisement that is excepted from the definition of prospectus by section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) or § 230.498(d) or to a summary prospectus under § 230.498. An advertisement that complies with this section, which may include information the substance of which is not included in the prospectus specified in section 10(a) of the Act (15 U.S.C 77j(a)), will be deemed to be a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

* * * * *

(b) * * *

(1) *Availability of additional information.* An advertisement must include a statement that advises an investor to consider the investment objectives, risks, and charges and expenses of the investment company carefully before investing; explains that the prospectus and, if available, the summary prospectus contain this and other information about the investment company; identifies a source from which an investor may obtain a prospectus and, if available, a summary prospectus; and states that the prospectus and, if available, the summary prospectus should be read carefully before investing.

* * * * *

(c) *Use of applications.* An advertisement that complies with this section may not contain or be accompanied by any application by which a prospective investor may invest in the investment company, except that a prospectus meeting the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)) by which a unit investment trust offers variable annuity or variable life insurance contracts may contain a contract application although the prospectus includes, or is accompanied by, information about an investment company in which the unit investment trust invests that, pursuant to this section, is deemed a prospectus under section 10(b) of the Act (15 U.S.C. 77j(b)).

* * * * *

■ 4. Section 230.485 is amended by removing the reference ''Items 5 or 6(a)(2) of Form N–1A'' in paragraph (b)(1)(iv) and adding in its place ''Item 5(b) or 10(a)(2) of Form N–1A''.

■ 5. Section 230.497 is amended by revising paragraphs (a) and (k) to read as follows:

§ 230.497 Filing of investment company prospectuses—number of copies.

(a) Five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement that varies from the form or forms of prospectus included in the registration statement filed pursuant to § 230.402(a) shall be filed as part of the registration statement not later than the date that form of prospectus is first sent or given to any person, except that an investment company advertisement under § 230.482 shall be filed under this paragraph (a) (but not as part of the registration statement) unless filed under paragraph (i) of this section.

* * * * *

(k) *Summary Prospectus filing requirements.* This paragraph (k), and not the other provisions of § 230.497, shall govern the filing of summary prospectuses under § 230.498. Each definitive form of a summary prospectus

under § 230.498 shall be filed with the Commission no later than the date that it is first used.

■ 6. Revise § 230.498 to read as follows:

§ 230.498 Summary Prospectuses for open-end management investment companies.

(a) *Definitions.* For purposes of this section:

(1) *Class* means a class of shares issued by a Fund that has more than one class that represent interests in the same portfolio of securities under § 270.18f–3 of this chapter or under an order exempting the Fund from sections 18(f), 18(g), and 18(i) of the Investment Company Act (15 U.S.C. 80a–18(f), 80a–18(g), and 80a–18(i)).

(2) *Exchange-Traded Fund* means a Fund or a Class, the shares of which are traded on a national securities exchange, and that has formed and operates pursuant to an exemptive order granted by the Commission or in reliance on an exemptive rule adopted by the Commission.

(3) *Fund* means an open-end management investment company, or any Series of such a company, that has, or is included in, an effective registration statement on Form N–1A (§§ 239.15A and 274.11A of this chapter) and that has a current prospectus that satisfies the requirements of section 10(a) of the Act (15 U.S.C. 77j(a)).

(4) *Series* means shares offered by a Fund that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with § 270.18f–2(a) of this chapter.

(5) *Statement of Additional Information* means the statement of additional information required by Part B of Form N–1A.

(6) *Statutory Prospectus* means a prospectus that satisfies the requirements of section 10(a) of the Act.

(7) *Summary Prospectus* means the summary prospectus described in paragraph (b) of this section.

(b) *General requirements for Summary Prospectus.* This paragraph describes the requirements for a Fund's Summary Prospectus. A Summary Prospectus that complies with this paragraph (b) will be deemed to be a prospectus that is authorized under section 10(b) of the Act (15 U.S.C. 77j(b)) and section 24(g) of the Investment Company Act (15 U.S.C. 80a–24(g)) for the purposes of section 5(b)(1) of the Act (15 U.S.C. 77e(b)(1)).

(1) *Cover page or beginning of Summary Prospectus.* Include on the cover page of the Summary Prospectus or at the beginning of the Summary Prospectus:

(i) The Fund's name and the Class or Classes, if any, to which the Summary Prospectus relates.

(ii) The exchange ticker symbol of the Fund's shares or, if the Summary Prospectus relates to one or more Classes of the Fund's shares, adjacent to each such Class, the exchange ticker symbol of such Class of the Fund's shares. If the Fund is an Exchange-Traded Fund, also identify the principal U.S. market or markets on which the Fund shares are traded.

(iii) A statement identifying the document as a ''Summary Prospectus.''

(iv) The approximate date of the Summary Prospectus's first use.

(v) The following legend:

Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____].

(A) The legend must provide an Internet address, other than the address of the Commission's electronic filing system; toll free (or collect) telephone number; and e-mail address that investors can use to obtain the Statutory Prospectus and other information. The Internet Web site address must be specific enough to lead investors directly to the Statutory Prospectus and other materials that are required to be accessible under paragraph (e)(1) of this section, rather than to the home page or other section of the Web site on which the materials are posted. The Web site could be a central site with prominent links to each document. The legend may indicate, if applicable, that the Statutory Prospectus and other information are available from a financial intermediary (such as a broker-dealer or bank) through which shares of the Fund may be purchased or sold.

(B) If a Fund incorporates any information by reference into the Summary Prospectus, the legend must identify the type of document (*e.g.*, Statutory Prospectus) from which the information is incorporated and the date of the document. If a Fund incorporates by reference a part of a document, the legend must clearly identify the part by page, paragraph, caption, or otherwise. If information is incorporated from a source other than the Statutory Prospectus, the legend must explain that the incorporated information may be obtained, free of charge, in the same manner as the Statutory Prospectus. A Fund may modify the legend to include a statement to the effect that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under section 401(k) of the Internal Revenue Code (26 U.S.C. 401(k)), a tax-deferred arrangement under section 403(b) or 457 of the Internal Revenue Code (26 U.S.C. 403(b) or 457), or a variable contract as defined in section 817(d) of the Internal Revenue Code (26 U.S.C. 817(d)), as applicable, and is not intended for use by other investors.

(2) *Contents of the Summary Prospectus.* Except as otherwise provided in this paragraph (b), provide the information required or permitted by Items 2 through 8 of Form N–1A, and only that information, in the order required by the form. A Summary Prospectus may omit the explanation and information required by Instruction 2(c) to Item 4(b)(2) of Form N–1A.

(3) *Incorporation by reference.*

(i) Except as provided by paragraph (b)(3)(ii) of this section, information may not be incorporated by reference into a Summary Prospectus. Information that is incorporated by reference into a Summary Prospectus in accordance with paragraph (b)(3)(ii) of this section need not be sent or given with the Summary Prospectus.

(ii) A Fund may incorporate by reference into a Summary Prospectus any or all of the information contained in the Fund's Statutory Prospectus and Statement of Additional Information, and any information from the Fund's reports to shareholders under § 270.30e–1 that the Fund has incorporated by reference into the Fund's Statutory Prospectus, provided that:

(A) The conditions of paragraphs (b)(1)(v)(B) and (e) of this section are met;

(B) A Fund may not incorporate by reference into a Summary Prospectus information that paragraphs (b)(1) and (2) of this section require to be included in the Summary Prospectus; and

(C) Information that is permitted to be incorporated by reference into the Summary Prospectus may be incorporated by reference into the Summary Prospectus only by reference to the specific document that contains the information, not by reference to another document that incorporates such information by reference.

(iii) For purposes of § 230.159, information is conveyed to a person not later than the time that a Summary Prospectus is received by the person if the information is incorporated by reference into the Summary Prospectus

in accordance with paragraph (b)(3)(ii) of this section.

(4) *Multiple Funds and Classes.* A Summary Prospectus may describe only one Fund, but may describe more than one Class of a Fund.

(c) *Transfer of the security.* Any obligation under section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)) to have a Statutory Prospectus precede or accompany the carrying or delivery of a Fund security in an offering registered on Form N–1A is satisfied if:

(1) A Summary Prospectus is sent or given no later than the time of the carrying or delivery of the Fund security;

(2) The Summary Prospectus is not bound together with any materials, except that a Summary Prospectus for a Fund that is available as an investment option in a variable annuity or variable life insurance contract may be bound together with the Statutory Prospectus for the contract and Summary Prospectuses and Statutory Prospectuses for other investment options available in the contract, provided that:

(i) All of the Funds to which the Summary Prospectuses and Statutory Prospectuses that are bound together relate are available to the person to whom such documents are sent or given; and

(ii) A table of contents identifying each Summary Prospectus and Statutory Prospectus that is bound together, and the page number on which it is found, is included at the beginning or immediately following a cover page of the bound materials;

(3) The Summary Prospectus that is sent or given satisfies the requirements of paragraph (b) of this section at the time of the carrying or delivery of the Fund security; and

(4) The conditions set forth in paragraph (e) of this section are satisfied.

(d) *Sending communications.* A communication relating to an offering registered on Form N–1A sent or given after the effective date of a Fund's registration statement (other than a prospectus permitted or required under section 10 of the Act) shall not be deemed a prospectus under section 2(a)(10) of the Act (15 U.S.C. 77b(a)(10)) if:

(1) It is proved that prior to or at the same time with such communication a Summary Prospectus was sent or given to the person to whom the communication was made;

(2) The Summary Prospectus is not bound together with any materials, except as permitted by paragraph (c)(2) of this section;

(3) The Summary Prospectus that was sent or given satisfies the requirements of paragraph (b) of this section at the time of such communication; and

(4) The conditions set forth in paragraph (e) of this section are satisfied.

(e) *Availability of Fund's Statutory Prospectus and certain other Fund documents.*

(1) The Fund's current Summary Prospectus, Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders under § 270.30e–1 are publicly accessible, free of charge, at the Web site address specified on the cover page or at the beginning of the Summary Prospectus on or before the time that the Summary Prospectus is sent or given and current versions of those documents remain on the Web site through the date that is at least 90 days after:

(i) In the case of reliance on paragraph (c) of this section, the date that the Fund security is carried or delivered; or

(ii) In the case of reliance on paragraph (d) of this section, the date that the communication is sent or given.

(2) The materials that are accessible in accordance with paragraph (e)(1) of this section must be presented on the Web site in a format, or formats, that:

(i) Are human-readable and capable of being printed on paper in human-readable format;

(ii) Permit persons accessing the Statutory Prospectus or Statement of Additional Information to move directly back and forth between each section heading in a table of contents of such document and the section of the document referenced in that section heading; provided that, in the case of the Statutory Prospectus, the table of contents is either required by § 230.481(c) or contains the same section headings as the table of contents required by § 230.481(c); and

(iii) Permit persons accessing the Summary Prospectus to move directly back and forth between:

(A) Each section of the Summary Prospectus and any section of the Statutory Prospectus and Statement of Additional Information that provides additional detail concerning that section of the Summary Prospectus; or

(B) Links located at both the beginning and end of the Summary Prospectus, or that remain continuously visible to persons accessing the Summary Prospectus, and tables of contents of both the Statutory Prospectus and the Statement of Additional Information that meet the requirements of paragraph (e)(2)(ii) of this section.

(3) Persons accessing the materials specified in paragraph (e)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that meet each of the requirements of paragraphs (e)(2)(i) and (ii) of this section.

(4) The conditions set forth in paragraphs (e)(1), (e)(2), and (e)(3) of this section shall be deemed to be met, notwithstanding the fact that the materials specified in paragraph (e)(1) of this section are not available for a time in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section, provided that:

(i) The Fund has reasonable procedures in place to ensure that the specified materials are available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section; and

(ii) The Fund takes prompt action to ensure that the specified documents become available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section, as soon as practicable following the earlier of the time at which it knows or reasonably should have known that the documents are not available in the manner required by paragraphs (e)(1), (e)(2), and (e)(3) of this section.

(f) *Other requirements.*

(1) *Delivery upon request.* If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by U.S. first class mail or other reasonably prompt means, a paper copy of the Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for a paper copy. If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund (or a financial intermediary through which shares of the Fund may be purchased or sold) must send, at no cost to the requestor and by e-mail, an electronic copy of the Fund's Statutory Prospectus, Statement of Additional Information, and most recent annual and semi-annual reports to shareholders to any person requesting such a copy within three business days after receiving a request for an electronic copy. The requirement to send an electronic copy of a document by e-mail may be satisfied by sending a direct link to the document on the Internet; provided that a current version of the document is directly accessible through the link from the time that the e-mail is sent through

the date that is six months after the date that the e-mail is sent and the e-mail explains both how long the link will remain useable and that, if the recipient desires to retain a copy of the document, he or she should access and save the document.

(2) *Greater prominence.* If paragraph (c) or (d) of this section is relied on with respect to a Fund, the Fund's Summary Prospectus shall be given greater prominence than any materials, with the exception of other Summary Prospectuses or Statutory Prospectuses, that accompany the Fund's Summary Prospectus.

(3) *Convenient for reading and printing.* If paragraph (c) or (d) of this section is relied on with respect to a Fund:

(i) The materials that are accessible in accordance with paragraph (e)(1) of this section must be presented on the Web site in a format, or formats, that are convenient for both reading online and printing on paper; and

(ii) Persons accessing the materials that are accessible in accordance with paragraph (e)(1) of this section must be able to permanently retain, free of charge, an electronic version of such materials in a format, or formats, that are convenient for both reading online and printing on paper.

(4) *Information in Summary Prospectus must be the same as information in Statutory Prospectus.* If paragraph (c) or (d) of this section is relied on with respect to a Fund, the information provided in response to Items 2 through 8 of Form N–1A in the Fund's Summary Prospectus must be the same as the information provided in response to Items 2 through 8 of Form N–1A in the Fund's Statutory Prospectus except as expressly permitted by paragraph (b)(2) of this section.

(5) *Compliance with paragraph (f) not a condition to reliance on paragraphs (c) and (d).* Compliance with this paragraph (f) is not a condition to the ability to rely on paragraph (c) or (d) of this section with respect to a Fund, and failure to comply with paragraph (f) does not negate the ability to rely on paragraph (c) or (d).

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

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

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 8. Section 232.304 is amended by removing the references ''Item 22 of Form N–1A'' in paragraphs (d) and (e) and adding in their place ''Item 27 of Form N–1A''.

■ 9. Section 232.401 is amended by:

■ a. Removing the reference ''Item 8(a) of Form N–1A'' in paragraph (b)(1)(iii) and adding in its place ''Item 13(a) of Form N–1A''; and

■ b. Removing the reference ''Items 2 and 3 of Form N–1A'' in paragraph (b)(1)(iv) and adding in its place ''Items 2, 3, and 4 of Form N–1A''.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 10. The general authority citation for part 239 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u–5, 78w(a), 78ll, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

■ 11. Form N–14 (referenced in § 239.23) is amended by:

■ a. Revising paragraph (a) in Item 5;

■ b. Revising the reference ''Items 10 through 22 of Form N–1A'' in Item 12(a) to read ''Items 14 through 27 of Form N–1A''; and

■ c. Revising the reference ''Items 10 through 13 and 15 through 22 of Form N–1A'' in Item 13(a) to read ''Items 14 through 17 and 19 through 27 of Form N–1A''.

The revision to paragraph (a) of Item 5 reads as follows:

Note: The text of Form N–14 does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–14

* * * * *

Item 5. Information About the Registrant

* * * * *

(a) If the registrant is an open-end management investment company, furnish the information required by Items 2 through 8, 9(a), 9(b), and 10 through 13 of Form N–1A under the 1940 Act;

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 12. The authority citation for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

■ 13. Form N–1A (referenced in §§ 239.15A and 274.11A) is amended by:

■ a. Revising the Cover Page by replacing the address reference ''450 5th Street, NW., Washington, D.C. 20549–6009'' with ''100 F Street, NE, Washington, DC 20549–1090'';

■ b. Revising the Table of Contents;

■ c. Revising the General Instructions as follows:

■ i. Adding the definitions ''Exchange-Traded Fund'' and ''Market Price'' in alphabetical order to paragraph A;

■ ii. Revising the phrase ''(except Items 1, 2, 3, and 8), B, and C (except Items 23(e) and (i)–(k))'' in paragraph B.2.(b) to read ''(except Items 1, 2, 3, 4, and 13), B, and C (except Items 28(e) and (i)–(k))'';

■ iii. Revising paragraphs B.4.(c), C.3.(a), C.3.(b), and C.3.(c);

■ iv. Revising the reference ''Items 6(b)–(d) and 7(a)(2)–(5)'' in paragraph C.3.(d)(i) to read ''Items 6, 11(b)–(d), and 12(a)(2)–(5)''; and

■ v. Revising the reference ''Items 2(c)(2)(iii)(B) and (C) and 2(c)(2)(iv)'' in paragraph C.3.(d)(iii) to read ''Items 4(b)(2)(iii)(B) and (C) and 4(b)(2)(iv)'';

■ d. Revising Item 1 as follows:

■ i. Revising paragraph (a)(1);

■ ii. Adding new paragraph (a)(2) and redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4);

■ iii. Removing Instruction 6 to Item 1(b)(1);

■ iv. In Item 1(b)(3), revising the telephone number ''1–202–942–8090'' to read ''1–202–551–8090''; and

■ v. In Item 1(b)(3), revising the zip code ''20549–0102'' to read ''20549–1520'';

■ e. Redesignating Items 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 as Items 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, respectively;

■ f. Adding new Item 2;

■ g. Revising Item 3 as follows:

■ i. Adding a sentence after the sentence following the heading ''Fees and expenses of the Fund'';

■ ii. Revising the heading ''Annual Fund Operating Expenses (expenses that are deducted from Fund assets)'';

■ iii. Adding a new paragraph after the ''Example'' with the heading ''Portfolio Turnover'';

■ iv. Revising Instruction 1(b);

■ v. Adding new Instruction 1(e);

■ vi. In Instruction 2(a)(i), revising the reference ''Item 7(a)'' to read ''Item 12(a)'';

■ vii. Revising Instruction 3(e);
■ viii. In Instruction 3(f)(iii), revising the references ''Item 8(a)'' to read ''Item 13(a)'';
■ ix. In Instruction 3(f)(vii), revising the reference ''Item 8'' to read ''Item 13'';
■ x. Revising Instruction 4(a);
■ xi. Redesignating Instruction 5 as Instruction 6 and adding new Instruction 5; and
■ xii. In newly redesignated Instruction 6, removing paragraph (b) and redesignating paragraph (c) as paragraph (b);
■ h. Revising newly redesignated Item 4 as follows:
■ i. Removing paragraph (a) and redesignating paragraphs (b) and (c) as paragraphs (a) and (b);
■ ii. In newly redesignated Item 4(a), revising the reference ''Item 4(b)'' to read ''Item 9(b)'';
■ iii. In newly redesignated Item 4(b)(1)(i), revising the reference ''Item 4(c)'' to read ''Item 9(c)'';
■ iv. In the Instruction to newly redesignated Item 4(b)(1)(iii), revising the reference ''Items 2(c)(1)(ii) and (iii)'' to read ''Items 4(b)(1)(ii) and (iii)'';
■ v. Revising newly redesignated Item 4(b)(2)(i);
■ vi. In newly redesignated Item 4(b)(2)(iii), revising the reference ''Item 22(b)(7)'' to read ''Item 27(b)(7)'';
■ vii. In newly redesignated Item 4(b)(2)(iv), revising the reference ''paragraph 2(c)(2)(iii)'' to read ''paragraph 4(b)(2)(iii)'';
■ viii. In Instruction 1(a) to newly redesignated Item 4(b)(2), revising the reference ''Item 8(a)'' to read ''Item 13(a)'';
■ ix. In Instruction 1(b) to newly redesignated Item 4(b)(2), revising the reference ''paragraph (c)(2)(i)'' to read ''paragraph (b)(2)(i)'';
■ x. In Instruction 2(a) to newly redesignated Item 4(b)(2), revising the references ''Item 21(a)'', ''Item 21(b)(1)'', and ''Items 21(b)(2) and (3)'' to read ''Item 26(a)'', ''Item 26(b)(1)'', and ''Items 26(b)(2) and (3)'', respectively;
■ xi. In Instruction 2(b) to newly redesignated Item 4(b)(2), revising the reference ''Item 22(b)(7)'' to read ''Item 27(b)(7)'';
■ xii. In Instruction 2(d) to newly redesignated Item 4(b)(2), revising the references ''Item 21(b)(2)'' and ''Item 21'' to read ''Item 26(b)(2)'' and ''Item 26'', respectively;
■ xiii. In newly redesignated Item 4(b)(2), revising Instructions 2(e), 3(a), 3(b), and 3(c);
■ xiv. In Instruction 3(c)(ii)(D) to newly redesignated Item 4(b)(2), revising the reference ''paragraphs 2(c)(2)(iii)(B) and (C)'' to read ''paragraphs 4(b)(2)(iii)(B) and (C)'';
■ xv. In Instruction 3(c)(iii) to newly redesignated Item 4(b)(2), revising the reference ''paragraphs 2(c)(2)(iii)(A), (B), and (C)'' to read ''paragraphs 4(b)(2)(iii)(A), (B), and (C)''; and
■ xvi. In Instruction 4 to newly redesignated Item 4(b)(2), revising the reference ''Item 22(b)(7)'' to read ''Item 27(b)(7)'';
■ i. Adding new Items 5, 6, 7, and 8;
■ j. In Instruction 5 to newly redesignated Item 9(b)(1), revising the reference ''Item 11(c)(1)'' to read ''Item 16(c)(1)'';
■ k. Revising newly redesignated Item 10 as follows:
■ i. Revising paragraph (a)(1)(i);
■ ii. Revising paragraph (a)(2); and
■ iii. Removing the Instructions to newly redesignated Item 10(a)(2);
■ l. Revising newly redesignated Item 11 as follows:
■ i. Revising paragraph (a)(1);
■ ii Revising paragraph (b); and
■ iii. Revising paragraph (g);
■ m. Revising newly redesignated Item 12 as follows:
■ i. In Instruction 1 to newly redesignated Item 12(a)(2), revising the reference ''Item 7'' to read ''Item 12'';
■ ii. In Instruction 2 to newly redesignated Item 12(a)(2), revising the references ''Item 7'' and ''Items 12(d) and 17(b)'' to read ''Item 12'' and ''Items 17(d) and 22(b)'', respectively;
■ iii. In newly redesignated Item 12(a)(5), revising the reference ''Item 17(a)'' to read ''Item 22(a)''; and
■ iv. In the Instruction to newly redesignated Item 12(a)(5), revising the references ''Item 7'' to read ''Item 12'';
■ n. Revising newly redesignated Item 14 as follows:
■ i. Revising paragraph (a)(1); and
■ ii. Adding new paragraph (a)(2) and redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4);
■ o. Revising newly redesignated Item 16 as follows:
■ i. In newly redesignated Item 16(d), revising the reference ''Item 4(b)'' to read ''Item 9(b)'';
■ ii. In newly redesignated Item 16(e), revising the reference ''Item 8'' to read ''Item 13''; and
■ iii. In Instruction 1 to newly redesignated Item 16(f)(2), revising the reference ''Item 11(f)(2)'' to read ''Item 16(f)(2)'';
■ p. In newly redesignated Item 17, revising the references ''Item 12'' to read ''Item 17'';
■ q. In newly redesignated Items 20(a), 20(b), and 20(c), revising the references ''Item 5(a)(2)'' to read ''Item 5(b)'';
■ r. Revising newly redesignated Item 23 as follows:
■ i. Removing the Instruction to newly redesignated Item 23(a);
■ ii. In Instruction 4 to newly redesignated Item 23(c), revising the reference ''Item 22'' to read ''Item 27''; and
■ iii. In Instruction 1 to newly redesignated Item 23(e), revising the reference ''Item 17(e)'' to read ''Item 23(e)'';
■ s. In Instruction 1 to newly redesignated Item 25(c), revising the references ''Item 7(b)(2)'', ''Item 14(d)'', and ''Item 30'' to read ''Item 12(b)(2)'', ''Item 19(d)'', and ''Item 34'', respectively;
■ t. Revising newly redesignated Item 27 as follows:
■ i. In newly redesignated Item 27(a), revising the reference ''Item 17(c)'' to read ''Item 23(c)'';
■ ii. In newly redesignated Item 27(b)(2), revising the reference ''Item 8(a)'' to read ''Item 13(a)'';
■ iii. In newly redesignated Item 27(b)(5), revising the reference ''Item 12(a)(1)'' to read ''Item 17(a)(1)'';
■ iv. In newly redesignated Item 27(b)(7)(ii)(B), revising the reference ''Item 21(b)(1)'' to read ''Item 26(b)(1)'';
■ v. In newly redesignated Item 27(b)(7), adding new paragraph (iv);
■ vi. In Instruction 10 to newly redesignated Item 27(b)(7), revising the reference ''Instruction 5 to Item 3'' to read ''Instruction 6 to Item 3'';
■ vii. In the Instruction to newly redesignated Item 27(c)(1), revising the references ''Item 22(b)(1)'' and ''Item 22(c)(1)'' to read ''Item 27(b)(1)'' and ''Item 27(c)(1)'', respectively;
■ viii. In newly redesignated Item 27(c)(2), revising the reference ''Item 8(a)'' to read ''Item 13(a)'';
■ ix. In Instruction 1(c) to newly redesignated Item 27(d)(1), revising the reference ''Item 8(a)'' to read ''Item 13(a)'';
■ x. In newly redesignated Item 27(d)(1), adding Instruction 1(e);
■ xi. In Instruction 2(a)(ii) to newly redesignated Item 27(d)(1), revising the reference ''Item 22(d)(1)'' to read ''Item 27(d)(1)''; and
■ xii. In the Instruction to newly redesignated Item 27(d)(4), revising the reference ''Item 12(f)'' to read ''Item 17(f)'';
■ u. In newly redesignated Item 28(k), revising the reference ''Item 22'' to read ''Item 27'';
■ v. Revising newly redesignated Item 32 as follows:
■ i. In newly redesignated Item 32(b), revising the reference ''Item 20'' to read ''Item 25'';
■ ii. In Instruction 2 to newly redesignated Item 32(c), revising the reference ''Item 20(c)'' to read ''Item 25(c)''; and

■ w. In Instruction 1 to newly redesignated Item 34, revising the reference ''Item 14'' to read ''Item 19''.

The additions and revisions are to read as follows:

Note: The text of Form N–1A does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–1A

* * * * *

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General Instructions

A. Definitions

* * * * *

''*Exchange-Traded Fund*'' means a Fund or Class, the shares of which are traded on a national securities exchange, and that has formed and operates pursuant to an exemptive order granted by the Commission or in reliance on an exemptive rule adopted by the Commission.

* * * * *

''*Market Price*'' refers to the last reported sale price at which Exchange-Traded Fund shares trade on the principal U.S. market on which the Fund's shares are traded during a regular trading session or, if it more accurately reflects the current market value of the Fund's shares at the time the Fund uses to calculate its net asset value, a price within the range of the highest bid and lowest offer on the principal U.S. market on which the Fund's shares are traded during a regular trading session.

* * * * *

B. Filing and Use of Form N–1A

* * * * *

4. * * *

(c) The plain English requirements of rule 421 under the Securities Act [17 CFR 230.421] apply to prospectus disclosure in Part A of Form N–1A. The information required by Items 2 through 8 must be provided in plain English under rule 421(d) under the Securities Act.

* * * * *

C. Preparation of the Registration Statement

* * * * *

3. * * *

(a) *Organization of Information.* Organize the information in the prospectus and SAI to make it easy for investors to understand. Notwithstanding rule 421(a) under the Securities Act regarding the order of information required in a prospectus, disclose the information required by Items 2 through 8 in numerical order at the front of the prospectus. Do not precede these Items with any other Item except the Cover Page (Item 1) or a table of contents meeting the requirements of rule 481(c) under the Securities Act. Information that is included in response to Items 2 through 8 need not be repeated elsewhere in the prospectus. Disclose the information required by Item 12 (Distribution Arrangements) in one place in the prospectus.

(b) *Other Information.* A Fund may include, except in response to Items 2 through 8, information in the prospectus or the SAI that is not otherwise required. For example, a Fund may include charts, graphs, or tables so long as the information is not incomplete, inaccurate, or misleading and does not, because of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included. Items 2 through 8 may not include disclosure other than that required or permitted by those Items.

(c) *Use of Form N–1A by More Than One Registrant, Series, or Class.* Form N–1A may be used by one or more Registrants, Series, or Classes.

(i) When disclosure is provided for more than one Fund or Class, the disclosure should be presented in a format designed to communicate the information effectively. Except as required by paragraph (c)(ii) for Items 2 through 8, Funds may order or group the response to any Item in any manner that organizes the information into readable and comprehensible segments and is consistent with the intent of the prospectus to provide clear and concise information about the Funds or Classes. Funds are encouraged to use, as appropriate, tables, side-by-side comparisons, captions, bullet points, or other organizational techniques when presenting disclosure for multiple Funds or Classes.

(ii) Paragraph (a) requires Funds to disclose the information required by Items 2 through 8 in numerical order at the front of the prospectus and not to precede Items 2 through 8 with other information. Except as permitted by paragraph (c)(iii), a prospectus that contains information about more than one Fund must present all of the information required by Items 2 through 8 for each Fund sequentially and may not integrate the information for more than one Fund together. That is, a prospectus must present all of the information for a particular Fund that is required by Items 2 through 8 together, followed by all of the information for each additional Fund, and may not, for example, present all of the Item 2 (Risk/Return Summary: Investment Objectives/Goals) information for several Funds followed by all of the Item 3 (Risk/Return Summary: Fee Table) information for several Funds. If a prospectus contains information about multiple Funds, clearly identify the name of the relevant Fund at the beginning of the information for the Fund that is required by Items 2 through 8. A Multiple Class Fund may present the information required by Items 2 through 8 separately for each Class or may integrate the information for

multiple Classes, although the order of the information must be as prescribed in Items 2 through 8. For example, the prospectus may present all of the Item 2 (Risk/Return Summary: Investment Objectives/Goals) information for several Classes followed by all of the Item 3 (Risk/Return Summary: Fee Table) information for the Classes, or may present Items 2 and 3 for each of several Classes sequentially. Other presentations of multiple Class information also would be acceptable if they are consistent with the Form's intent to disclose the information required by Items 2 through 8 in a standard order at the beginning of the prospectus. For a Multiple Class Fund, clearly identify the relevant Classes at the beginning of the Items 2 through 8 information for those Classes.

(iii) A prospectus that contains information about more than one Fund may integrate the information required by any of Items 6 through 8 for all of the Funds together, provided that the information contained in any Item that is integrated is identical for all Funds covered in the prospectus. If the information required by any of Items 6 through 8 is integrated pursuant to this paragraph, the integrated information should be presented immediately following the separate presentations of Item 2 through 8 information for individual Funds. In addition, include a statement containing the following information in each Fund's separate presentation of Item 2 through 8 information, in the location where the integrated information is omitted: ''For important information about [purchase and sale of fund shares,] [tax information,] and [financial intermediary compensation], please turn to [identify section heading and page number of prospectus].''

* * * * *

Part A: Information Required in a Prospectus

Item 1. Front and Back Cover Pages

(a) *Front Cover Page*. Include the following information, in plain English under rule 421(d) under the Securities Act, on the outside front cover page of the prospectus:

(1) The Fund's name and the Class or Classes, if any, to which the prospectus relates.

(2) The exchange ticker symbol of the Fund's shares or, if the prospectus relates to one or more Classes of the Fund's shares, adjacent to each such Class, the exchange ticker symbol of such Class of the Fund's shares. If the Fund is an Exchange-Traded Fund, also identify the principal U.S. market or markets on which the Fund shares are traded.

* * * * *

Item 2. Risk/Return Summary: Investment Objectives/Goals

Disclose the Fund's investment objectives or goals. A Fund also may identify its type or category (*e.g.*, that it is a Money Market Fund or a balanced fund).

Item 3. Risk/Return Summary: Fee Table

* * * * *

Fees and Expenses of the Fund

* * * You may qualify for sales charge discounts if you and your family invest, or agree to invest in the future, at least $[____] in [name of fund family] funds. More information about these and other discounts is available from your financial professional and in [identify section heading and page number] of the Fund's prospectus and [identify section heading and page number] of the Fund's statement of additional information.

* * * * *

Annual Fund Operating Expenses (expenses that you pay each year as a percentage of the value of your investment)

* * * * *

Example

* * * * *

Portfolio Turnover

The Fund pays transaction costs, such as commissions, when it buys and sells securities (or ''turns over'' its portfolio). A higher portfolio turnover rate may indicate higher transaction costs and may result in higher taxes when Fund shares are held in a taxable account. These costs, which are not reflected in annual fund operating expenses or in the example, affect the Fund's performance. During the most recent fiscal year, the Fund's portfolio turnover rate was __% of the average value of its portfolio.

Instructions.

1. *General*.

(a) * * *

(b) Include the narrative explanations in the order indicated. A Fund may modify the narrative explanations if the explanation contains comparable information to that shown. The narrative explanation regarding sales charge discounts is only required by a Fund that offers such discounts and should specify the minimum level of investment required to qualify for a discount as disclosed in the table required by Item 12(a)(1).

* * * * *

(e) If the Fund is an Exchange-Traded Fund,

(i) Modify the narrative explanation to state that investors may pay brokerage commissions on their purchases and sales of Exchange-Traded Fund shares, which are not reflected in the example; and

(ii) If the Fund issues or redeems shares in creation units of not less than 25,000 shares each, exclude any fees charged for the purchase and redemption of the Fund's creation units.

* * * * *

3. *Annual Fund Operating Expenses*.

(a) * * *

(e) If there are expense reimbursement or fee waiver arrangements that will reduce any Fund operating expenses for no less than one year from the effective date of the Fund's registration statement, a Fund may add two captions to the table: One caption showing the amount of the expense reimbursement or fee waiver, and a second caption showing the Fund's net expenses after subtracting the fee reimbursement or expense waiver from the total fund operating expenses. The Fund should place these additional captions directly below the ''Total Annual Fund Operating Expenses'' caption of the table and should use appropriate descriptive captions, such as ''Fee Waiver [and/or Expense Reimbursement]'' and ''Total Annual Fund Operating Expenses After Fee Waiver [and/or Expense Reimbursement],'' respectively. If the Fund provides this disclosure, also disclose the period for which the expense reimbursement or fee waiver arrangement is expected to continue, including the expected termination date, and briefly describe who can terminate the arrangement and under what circumstances.

* * * * *

4. *Example*.

(a) Assume that the percentage amounts listed under ''Total Annual Fund Operating Expenses'' remain the same in each year of the 1-, 3-, 5-, and 10-year periods, except that an adjustment may be made to reflect any expense reimbursement or fee waiver arrangements that will reduce any Fund operating expenses for no less than one year from the effective date of the Fund's registration statement. An adjustment to reflect any expense reimbursement or fee waiver arrangement may be reflected only in the period(s) for which the expense reimbursement or fee waiver arrangement is expected to continue.

* * * * *

5. *Portfolio Turnover*. Disclose the portfolio turnover rate provided in response to Item 13(a) for the most

recent fiscal year (or for such shorter period as the Fund has been in operation). Disclose the period for which the information is provided if less than a full fiscal year. A Fund that is a Money Market Fund may omit the portfolio turnover information required by this Item.

* * * * *

Item 4. Risk/Return Summary: Investments, Risks, and Performance

* * * * *

(b) *Principal risks of investing in the Fund*.

* * * * *

(2) *Risk/Return Bar Chart and Table*.

(i) Include the bar chart and table required by paragraphs (b)(2)(ii) and (iii) of this section. Provide a brief explanation of how the information illustrates the variability of the Fund's returns (*e.g.*, by stating that the information provides some indication of the risks of investing in the Fund by showing changes in the Fund's performance from year to year and by showing how the Fund's average annual returns for 1, 5, and 10 years compare with those of a broad measure of market performance). Provide a statement to the effect that the Fund's past performance (before and after taxes) is not necessarily an indication of how the Fund will perform in the future. If applicable, include a statement explaining that updated performance information is available and providing a Web site address and/or toll-free (or collect) telephone number where the updated information may be obtained.

* * * * *

Instructions.

* * * * *

2. *Table*.

* * * * *

(e) Returns required by paragraphs 4(b)(2)(iii)(A), (B), and (C) for a Fund or Series must be adjacent to one another and appear in that order. The returns for a broad-based securities market index, as required by paragraph 4(b)(2)(iii), must precede or follow all of the returns for a Fund or Series rather than be interspersed with the returns of the Fund or Series.

3. *Multiple Class Funds*.

(a) When a Multiple Class Fund presents information for more than one Class together in response to Item 4(b)(2), provide annual total returns in the bar chart for only one of those Classes. The Fund can select which Class to include (*e.g.*, the oldest Class, the Class with the greatest net assets) if the Fund:

(i) Selects the Class with 10 or more years of annual returns if other Classes have fewer than 10 years of annual returns;

(ii) Selects the Class with the longest period of annual returns when the Classes all have fewer than 10 years of returns; and

(iii) If the Fund provides annual total returns in the bar chart for a Class that is different from the Class selected for the most immediately preceding period, explain in a footnote to the bar chart the reasons for the selection of a different Class.

(b) When a Multiple Class Fund offers a new Class in a prospectus and separately presents information for the new Class in response to Item 4(b)(2), include the bar chart with annual total returns for any other existing Class for the first year that the Class is offered. Explain in a footnote that the returns are for a Class that is not presented that would have substantially similar annual returns because the shares are invested in the same portfolio of securities and the annual returns would differ only to the extent that the Classes do not have the same expenses. Include return information for the other Class reflected in the bar chart in the performance table.

(c) When a Multiple Class Fund presents information for more than one Class together in response to Item 4(b)(2):

(i) Provide the returns required by paragraph 4(b)(2)(iii)(A) of this Item for each of the Classes;

(ii) Provide the returns required by paragraphs 4(b)(2)(iii)(B) and (C) of this Item for only one of those Classes. The Fund may select the Class for which it provides the returns required by paragraphs 4(b)(2)(iii)(B) and (C) of this Item, provided that the Fund:

* * * * *

Item 5. Management

(a) *Investment Adviser(s)*. Provide the name of each investment adviser of the Fund, including sub-advisers.

Instructions.

1. A Fund need not identify a sub-adviser whose sole responsibility for the Fund is limited to day-to-day management of the Fund's holdings of cash and cash equivalent instruments, unless the Fund is a Money Market Fund or other Fund with a principal investment strategy of regularly holding cash and cash equivalent instruments.

2. A Fund having three or more sub-advisers, each of which manages a portion of the Fund's portfolio, need not identify each such sub-adviser, except that the Fund must identify any sub-adviser that is (or is reasonably expected to be) responsible for the management of a significant portion of the Fund's net assets. For purposes of this paragraph, a significant portion of a Fund's net assets generally will be deemed to be 30% or more of the Fund's net assets.

(b) *Portfolio Manager(s)*. State the name, title, and length of service of the person or persons employed by or associated with the Fund or an investment adviser of the Fund who are primarily responsible for the day-to-day management of the Fund's portfolio (''Portfolio Manager'').

Instructions.

1. This requirement does not apply to a Money Market Fund.

2. If a committee, team, or other group of persons associated with the Fund or an investment adviser of the Fund is jointly and primarily responsible for the day-to-day management of the Fund's portfolio, information in response to this Item is required for each member of such committee, team, or other group. If more than five persons are jointly and primarily responsible for the day-to-day management of the Fund's portfolio, the Fund need only provide information for the five persons with the most significant responsibility for the day-to-day management of the Fund's portfolio.

Item 6. Purchase and Sale of Fund Shares

(a) *Purchase of Fund Shares*. Disclose the Fund's minimum initial or subsequent investment requirements.

(b) *Sale of Fund Shares*. Also disclose that the Fund's shares are redeemable and briefly identify the procedures for redeeming shares (*e.g.*, on any business day by written request, telephone, or wire transfer).

(c) *Exchange-Traded Funds*. If the Fund is an Exchange-Traded Fund,

(i) Specify the number of shares that the Fund will issue (or redeem) in exchange for the deposit or delivery of basket assets (*i.e.*, the securities or other assets the Fund specifies each day in name and number as the securities or assets in exchange for which it will issue or in return for which it will redeem Fund shares) and explain that:

(A) Individual Fund shares may only be purchased and sold on a national securities exchange through a broker-dealer; and

(B) The price of Fund shares is based on market price, and because Exchange-Traded Fund shares trade at market prices rather than net asset value, shares may trade at a price greater than net asset value (premium) or less than net asset value (discount); and

(ii) If the Fund issues shares in creation units of not less than 25,000 shares each, the Fund may omit the information required by Items 6(a) and 6(b).

Item 7. Tax Information

State, as applicable, that the Fund intends to make distributions that may be taxed as ordinary income or capital gains or that the Fund intends to distribute tax-exempt income. For a Fund that holds itself out as investing in securities generating tax-exempt income, provide, as applicable, a general statement to the effect that a portion of the Fund's distributions may be subject to federal income tax.

Item 8. Financial Intermediary Compensation

Include the following statement. A Fund may modify the statement if the modified statement contains comparable information. A Fund may omit the statement if neither the Fund nor any of its related companies pay financial intermediaries for the sale of Fund shares or related services.

Payments to Broker-Dealers and Other Financial Intermediaries.

If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may create a conflict of interest by influencing the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's Web site for more information.

* * * * *

Item 10. Management, Organization, and Capital Structure

(a) *Management.*

(1) *Investment Adviser.*

(i) Provide the name and address of each investment adviser of the Fund, including sub-advisers. Describe the investment adviser's experience as an investment adviser and the advisory services that it provides to the Fund.

* * * * *

(2) *Portfolio Manager.* For each Portfolio Manager identified in response to Item 5(b), state the Portfolio Manager's business experience during the past 5 years. Include a statement, adjacent to the foregoing disclosure, that the SAI provides additional information about the Portfolio Manager's(s') compensation, other accounts managed by the Portfolio Manager(s), and the Portfolio Manager's(s') ownership of securities in the Fund. If a Portfolio Manager is a member of a committee, team, or other group of persons associated with the Fund or an investment adviser of the Fund that is jointly and primarily responsible for the day-to-day management of the Fund's portfolio, provide a brief description of the person's role on the committee, team, or other group (*e.g.*, lead member), including a description of any limitations on the person's role and the relationship between the person's role and the roles of other persons who have responsibility for the day-to-day management of the Fund's portfolio.

* * * * *

Item 11. Shareholder Information

(a) * * *

(1) An explanation that the price of Fund shares is based on the Fund's net asset value and the method used to value Fund shares (market price, fair value, or amortized cost); except that if the Fund is an Exchange-Traded Fund, an explanation that the price of Fund shares is based on market price.

* * * * *

(b) *Purchase of Fund Shares.* Describe the procedures for purchasing the Fund's shares.

* * * * *

(g) *Exchange-Traded Funds.* If the Fund is an Exchange-Traded Fund:

(1) The Fund may omit from the prospectus the information required by Items 11(a)(2), (b), and (c) if the Fund issues or redeems Fund shares in creation units of not less than 25,000 shares each; and

(2) Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value (*i.e.*, premium or discount) for the most recently completed calendar year, and the most recently completed calendar quarters since that year (or the life of the Fund, if shorter). The Fund may omit this table if the Fund provides an Internet address at the Fund's Web site, which is publicly accessible, free of charge, that investors can use to obtain the premium/discount information required in this Item.

Instructions.

1. Provide the information in tabular form.

2. Express the information as a percentage of the net asset value of the Fund, using separate columns for the number of days the Market Price was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value. Round all percentages to the nearest hundredth of one percent.

3. Adjacent to the table, provide a brief explanation that: Shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell those shares, because shares are bought and sold at current market prices.

4. Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

Item 14. Cover Page and Table of Contents

(a) *Front Cover Page.* Include the following information on the outside front cover page of the SAI:

(1) The Fund's name and the Class or Classes, if any, to which the SAI relates. If the Fund is a Series, also provide the Registrant's name.

(2) The exchange ticker symbol of the Fund's securities or, if the SAI relates to one or more Classes of the Fund's securities, adjacent to each such Class, the exchange ticker symbol of such Class of the Fund's securities. If the Fund is an Exchange-Traded Fund, also identify the principal U.S. market or markets on which the Fund shares are traded.

* * * * *

Item 27. Financial Statements

* * * * *

(b) *Annual Report.* * * *

* * * * *

(7) *Management's Discussion of Fund Performance.* * * *

* * * * *

(iv) Provide a table showing the number of days the Market Price of the Fund shares was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value (*i.e.*, premium or discount) for the most recently completed five fiscal years (or the life of the Fund, if shorter). The Fund may omit this table from the annual report if the Fund provides an Internet address at the Fund's Web site, which is publicly accessible, free of charge, that investors can use to obtain the premium/discount information required in Item 11(g)(2).

Instructions.

1. Provide the information in tabular form.

2. Express the information as a percentage of the net asset value of the Exchange-Traded Fund, using separate columns for the number of days the Market Price was greater than the Fund's net asset value and the number of days it was less than the Fund's net asset value. Round all percentages to the nearest hundredth of one percent.

3. Adjacent to the table, provide a brief explanation that: Shareholders may pay more than net asset value when they buy Fund shares and receive less than net asset value when they sell

those shares, because shares are bought and sold at current market prices.

4. Include a statement that the data presented represents past performance and cannot be used to predict future results.

* * * * *

(d) *Annual and Semi-Annual Reports.* * * *

(1) *Expense Example.* * * *

* * * * *

Instructions.

1. *General.*

* * * * *

(e) If the Fund is an Exchange-Traded Fund:

(i) Modify the narrative explanation to state that investors may pay brokerage commissions on their purchases and sales of Exchange-Traded Fund shares, which are not reflected in the example; and

(ii) If the Fund issues or redeems shares in creation units of not less than 25,000 shares each, exclude any fees charged for the purchase and redemption of the Fund's creation units.

* * * * *

14. Form N–4 (referenced in §§ 239.17b and 274.11c) is amended by revising the reference ''Item 22(b)(ii) of Form N–1A'' to read ''Item 27(b)(ii) of Form N–1A'' and by revising the reference ''Item 22(b)(ii) equation'' to read ''Item 27(b)(ii) equation'' in Instruction 3 to Item 20(b)(ii).

Note: The text of Form N–4 does not, and these amendments will not, appear in the Code of Federal Regulations.

Dated: January 13, 2009.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–1035 Filed 1–23–09; 8:45 am]

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Federal Register

Monday,
January 26, 2009

Part IV

General Services Administration

48 CFR Part 538

General Services Acquisition Regulation; GSAR Case 2006–G507; Rewrite of GSAR Part 538, Federal Supply Schedule Contracting; Proposed Rule

GENERAL SERVICES ADMINISTRATION

48 CFR Part 538

[GSAR Case 2006–G507; Docket 2009–0013; Sequence 1]

RIN 3090–AI77

General Services Acquisition Regulation; GSAR Case 2006–G507; Rewrite of GSAR Part 538, Federal Supply Schedule Contracting

AGENCY: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Proposed rule.

SUMMARY: The GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to revise sections of the GSAR that provide requirements for Federal Supply Schedule Contracting actions.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before March 27, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G507 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2006–G507'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with GSAR Case 2006–G507. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''GSAR Case 2006–G507'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G507 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Warren Blankenship at (202) 501–1900, or by e-mail at *warren.blankenship@gsa.gov*. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G507.

SUPPLEMENTARY INFORMATION:

A. Background

The General Services Administration is amending the General Services Administration Acquisition Regulation (GSAR) to update the text addressing GSAR Part 538, Federal Supply Schedule Contracting: Subpart 538.1, Definitions; Subpart 538.4, Administrative Matters; Subpart 538.7, Acquisition Planning; Subpart 538.9, Contractor Qualifications; Subpart 538.12, Acquisition of Commercial Items—FSS; Subpart 538.15, Negotiation and Award of Contracts; Subpart 538.17, Administration of Evergreen Contracts; Subpart 538.19, FSS and Small Business Programs; Subpart 538.25, Requirements for Foreign Entities; Subpart 538.42, Contract Administration and Subpart 538.43, Contract Modifications. This rule is a result of the GSA Acquisition Manual (GSAM) rewrite initiative undertaken by GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR) and to implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA contracting personnel can use when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

The GSA is in the process of rewriting each part of the GSAR and GSAM, and as each GSAR part is rewritten, will publish it in the **Federal Register**.

This proposed rule covers the GSAR portion of Part 538. The information in Subpart 538.2 is being retained; however, the various sections have been redistributed to more appropriate subparts within the text. Subpart 538.9, Contractor Qualifications, is being added to define the roles and responsibilities of ''Contractor Partnering Arrangements (CPAs)'' for contractors. Subpart 538.12, Acquisition of Commercial Items, has been added to outline solicitation provisions and clauses. This subpart was formerly 538.273—Contract clauses, but was moved to 538.1203 so as to align with the FAR. Aside from individual prescriptions, GSA has also included an overarching prescription that directs the contracting officer to insert appropriate provisions and clauses, when applicable. Additionally, 96 provisions/clauses are now proposed for inclusion. Some of the provisions/clauses are new, some are being retained, and others are being relocated from other GSAM parts.

Subpart 538.15, Negotiation and Award of Contracts, has been added to provide clarity to FSS contracting officers regarding contract evaluation and award. The current section 538.270, Evaluation of multiple award schedule (MAS) offers, has been relocated to Subpart 538.15. It contains minor revisions within the text to clarify the contracting officer's role as well as a revised title and section, 538.1504, Evaluation of commercial pricing practices. Also, 538.272, MAS price reductions, has been revised for clarity. More specifically, the term ''eligible ordering activity'' has been changed to ''Government'' to bring clarity to the relationship between the Government and the contractor, and to ensure that the contractor understands the importance of maintaining this correlation of price relationship for the duration of the contract. The revision can be found at section 538.1508.

Subpart 538.25, Requirements for Foreign Entities, is added to advise contractors to submit commercial price lists in English and to allow for payments in local currency. Subpart 538.42, Contract Administration, is being added to advise the contractor to abide by the terms and conditions of the Industrial Funding Fee (IFF) and Sales Reporting Requirements when entering into ''Contractor Partnering Arrangements (CPAs),'' and to explain the process and procedures that should be followed when cancelling a contract at the contractor's request. Subpart 538.43, Contract Modifications, is added to provide guidance to the contractor when initiating a modification request to the Government.

There were 36 public comments received in response to the Advanced Notice of Proposed Rulemaking.

The first commenter recommended suggestions in regard to GSAR 552.238–75, Price Reductions (May 2004) clause, the Commercial Sales Practices Format (CSPF) in GSAR 515.408, and figure 515.4, Instructions that accompany the CSPF. First, the commenter indicated that the failure to identify the customer (or category of customers) that formed the basis of award in the Price Reductions clause needs to be corrected.

Response: Though the rewrite team reviewed this comment as substantive, it was unable to be addressed at this time. The team will confer with the Multiple Award Schedule Advisory Panel for possible recommendations. Second, the commenter indicated that more consistent parameters were needed for the ''Commercial Sales Practices'' disclosure section. GSAM Part 505 includes a GSAM Form 3617, Record of Authorization of Access to

Proprietary or Source Selection Information, which the GSA contracting community will use to ensure that proprietary data is not released.

The second commenter suggested that GSA be proactive in using GSAM Part 538 to address unresolved issues regarding GSA Schedule contracting. The GSA contractors have requested guidance and consistent policy on matters such as time and material task orders, and the extent to which G&A can be added to travel. Though some of these issues are addressed generally in the FAR, specific questions regarding application to Schedules contracting have remained unanswered, leading to inconsistent applications across the Schedules program.

Response: The team's analysis of this comment is that it is outside the scope of this part. Currently, the Schedule's acquisition community uses FAR 52.232–7, Payments Under Time and Material, and FAR 31.205–46, Travel Costs, to address time and material task orders. However, specific guidance for contracting officers for time and material task orders is under internal review.

The third commenter suggested that the GSAR should include coverage on Governmentwide Acquisition Contracts (GWACs) contracting and the use of GSA Assisted Service. Presently, the GSAR covers neither of these topics. Such areas of discussion, according to the commenter, should include criteria for establishing GWAC and/or assisted acquisition services, pricing objectives, and standard clauses. The commenter stated that adding GWAC coverage would enable the government to implement the best practices of individual offices across the entire program, afford GSA contractors an opportunity to streamline their internal corporate systems and processes, and result in better service and more cost efficient systems that may ultimately reflect in the Government's prices.

Response: The Team's analysis of this comment is that it is outside the scope of this part. The team has referred this comment to the GSAM Part 516, Types of Contracts, team.

The fourth commenter suggested that GSA resolve how the requirement to annually update the Central Contractor Registration (CCR) affects the position that small business size status is as of the time the offer is submitted. This problem stems from the number of corporate acquisitions and restructurings that continue to take place in the commercial marketplace. The commenter recommended that GSA rationalize the rules of FAR 42.12, GSAR 542.12 and the commercial item clause at FAR 52.212–4(p).

Response: The team's analysis concludes that this comment is outside the scope of this part. This is a comment that would have Government-wide application.

The fifth commenter suggested that the GSAR prescribe language to insert into GSA Schedule Price Lists on the topic of Size Status and the CCR. The language would inform agencies that, notwithstanding data in CCR, for purposes of ordering against the Schedule, a contractor is designated as small in size for the entire 5-year period of the Schedule contract. Schedule contractors are required to recertify size status at the time of renewal. Additionally, the commenter suggests that GSAR resolve how the requirement to annually update CCR affects the position that small business size status is currently determined at the time the offer is submitted.

Response: The team's analysis concluded that guidance at FAR 52.219–28, Post-Award Small Business Program Rerepresentation, appropriately addresses and provides guidance to the acquisition and contractor communities to ensure proper implementation of size considerations at various times during the contract. From time of submittal to award, offerors are required to maintain information in CCR as current and accurate.

The sixth commenter suggested that GSA consider adding a section describing the purpose and objectives of Schedule contracting. Such a section would provide context and focus that could help improve consistency in the myriad of decisions that contracting officers have to make daily. For example, some contracting officers are attempting to compare prices offered by one company to prices of another for similar, but not identical, services and products. This process was found to be highly objectionable.

Response: The team's analysis concludes that the rewrite of GSAM Part 538 will adequately provide contracting officers consistent guidance and policy.

The seventh commenter suggested that GSA clarify the MAS pricing policy by deleting the term ''most favored customer (MFC)'' from this section of the GSAR.

Response: The team does not concur with this comment because the convention of the term ''most favored customer'' still remains a viable practice across the FSS program.

The eighth commenter suggested that the GSAR more specifically state the circumstances that warrant the Government getting a lower discount than commercial customers.

Response: The team does not concur with this comment because section 538.1504, Evaluation of commercial pricing practices (formerly 538.270), clearly outlines the criteria for the Government to seek a lower discount than commercial customers.

The ninth commenter suggested that GSAR be revised to reflect that many MAS contracts are no longer awarded as a discount from catalog. This shift has occurred because more services have been introduced into the program.

Response: The team concurs with this comment and has created a Commercial Sales Practices Format (CSP–2), GSAR 538.1203(c)(42) for ''Professional Services'' to reflect contracts awarded for services.

The tenth commenter suggested that the GSAR should limit (or give better guidance) as to the number of commercial customers that can be the basis of award.

Response: The team does not concur with this comment. Current guidance as outlined in section 538.1504 allows the contracting officer the flexibility to analyze numerous factors to establish the customer for the basis of award.

The 11th commenter suggested that GSA eliminate the Price Reductions Clause (552.238–75).

Response: The team does not concur with this comment. In keeping with the philosophy of the FSS Program, this clause should remain. The team will await the results of the Multiple Award Schedule Advisory Panel's analysis and recommendations and will consider this when assessing the clause's validity within the program.

The 12th commenter suggested that the GSAR should provide specific guidelines on the Schedule renewal process.

Response: The team concurs with this comment and has added verbiage at GSAR 538.4202, Administration of Evergreen Contracts.

The 13th commenter suggested that exceptions to the Price Reduction Clause be considered for situations where the Government is not negotiating discounts from a commercial price list; also, the commenter suggested that the Government give consideration to using price analysis and price acceptance from a vendor's average selling price.

Response: The team partially concurs with this comment and has created a CSP–2 Format, GSAR 538.1203(c)(42) for ''Professional Services'' to reflect contracts awarded for services without a commercial price list. Also, the team will confer with the Multiple Award

Schedule Advisory Panel for possible recommendations in this area.

The 14th commenter recommended providing guidance on establishing relationships with dealers/distributors/resellers under the FSS Program in terms of tracking customer selections.

Response: The team does not concur with this comment. The Price Reductions Clause encompasses a mechanism for tracking customers in dealer/distributor/reseller situations. This can be accomplished under ''category of customers.'' Further, the team will confer with the Multiple Award Schedule Advisory Panel for possible recommendations in this area.

The 15th commenter suggested the addition of guidance on sales volume for vendor consideration under the FSS Program—Contract Award Sales Criteria Clause.

Response: The team partially concurs with this comment. First, the team revised the Commercial Sales Practices Format (CSP–1) to bring clarity to the ''Instructions'' section, explaining that the contracting officer has the discretion to change offeror estimated sales to conform with the level of sales expectancy. The business decision will be based upon the contracting officer's analysis of the offeror's submission and a realistic evaluation of expected sales.

The 16th commenter suggested adding guidance on how to handle teaming arrangements.

Response: The team concurs with this comment and has added guidance on Teaming Arrangements, which will be entitled ''Contractor Partnering Arrangements (CPAs),'' and the team added guidance on the application of the CPAs to the Federal Supply Schedule Program.

The 17th commenter suggested that FAR 52.212–4(s), Order of Precedence, be revised to resolve any inconsistencies discovered in the solicitation or resulting contract.

Response: The team reviewed the comment and does not concur. This comment is deemed outside the scope of this part and should be resolved at the FAR level.

The 18th commenter suggested adding the following verbiage to update GSAR 552.238–75, Price Reductions: ''The identified customer or category of customers may, but is not required to be, the Offeror's most-favored customer.'' The intent here is to clarify the misconception as to whether the tracking customer is required to be the MFC for a particular product or group of products or service.

Response: The team does not concur with this comment, and feels that the addition of this verbiage would convolute the intent of the current Price Reductions Clause. Moreover, it would diminish the contracting officer's authority to establish a viable price/discount relationship with the offeror.

The 19th commenter recommended that GSAR 552.238–75(a) be revised to be consistent with GSAR 538.272 to make clear that a change in the price/discount relationship between the eligible ordering activity and the tracking customer(s) does not trigger a price reduction under the clause unless that change also ''results in a less advantageous relationship'' for the Government.

Response: The team does not concur with this comment and feels that the intent is clearly defined in the current Price Reduction Clause. Additionally, GSAR 538.272 has been proposed for deletion.

The 20th commenter suggested deleting the verbiage ''with the same effective date and * * *'' from the Price Reductions Clause. The commenter suggested that this language be deleted because it is not feasible or realistic to require the contractor to make a revised price available to the Government with the ''same effective date'' as for the tracking customer.

Response: The team reviewed the comment and does not concur. GSAR 552.238–75 delineates as to the time period during which an FSS price reduction is required to be effective. It states that ''the contractor shall offer the price reduction to the Government with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).'' Thus, no change is warranted.

The 21st commenter suggested that the GSAR be clarified to require that the parties express the relationship in the basis of award as a specific percentage or ratio, or any other objective measurement.

Response: The team concurs with this comment and has added new verbiage to GSAR 538.1506–2, Price Negotiation Memorandum, which clarifies the relationship of the parties in terms of a percentage or ratio.

The 22nd commenter stated that GSA sometimes requests commercial sales practices information from manufacturers of GSA resellers regardless of whether the reseller has significant sales to the general public, in an attempt to ascertain whether the reseller's proposed prices are fair and reasonable. Further, the commenter stated that, if the reseller has significant sales, the need for its manufacturer's sales information is negated. In this case, the commenter suggested that such requests for pricing information should be limited to pricing or other than cost and pricing information as provided by the reseller, who already has an existing competitive commercial sales practice. In the event that the reseller does not have significant commercial sales or otherwise lacks relevant pricing information, GSA may request other information from the reseller, such as the reseller's cost basis from the manufacturer, pricing information available under other GSA Schedules, or sales by other resellers of the manufacturer's products. Requiring pricing information from manufacturers is unnecessary and a source of considerable confusion within GSA and industry.

Response: The team concurs with the commenter's scenarios in regard to resellers as offerors under the Federal Supply Schedule Program. If a reseller has significant sales to the general public for products and/or services being proposed by manufacturers which are represented by the resellers they represent, then they should follow the instructions provided in the CSP–1 with an established catalog price list. For resellers that do not have significant sales to the general public, the manufacturer's data shall be submitted in connection with the offer as documentation to support the contracting officer's determination of price reasonableness.

The 23rd commenter suggests that GSA consider changing the way it administers the updates to the Federal Supply Schedules. Furthermore, the commenter suggests that the process is administratively burdensome for Schedule contractors and GSA contracting officers alike, and can create considerable confusion concerning which set of terms applies to a particular task or delivery order.

Response: The team empathizes with the commenter; however, the FSS Program is constantly evolving. As new products and services are introduced as well as changes to any terms and conditions, the Government reserves the right to provide state-of-the-art technology to the end user. Therefore, spontaneous ''refreshment'' of solicitation and/or contract terms and conditions are inevitable and part of the acquisition process.

The 24th commenter focused on section C.32 of the contract and GSAR 552.246–73 (WARRANTY—MULTIPLE AWARD SCHEDULE (Mar 2000) (Alternate I—May 2003)) as outlined in the Schedule 70 Solicitation. The commenter suggested that FAR 52.246–4 and FAR 52.246–6 are redundant with paragraph (a) of FAR 52.212–4.

Response: The team concurs with the commenter that the aforementioned clauses conflict, and that they should not be used in Schedule acquisitions. Adequate coverage can be found in FAR 52.212–4 (Alternate I).

Second, the commenter suggested that GSAR 552.246–73, which invites contractors to offer their commercial warranties to address post-acceptance remedies, conflicts with the final sentence of paragraph (a) of 52.212–4.

Response: The team concurs with this comment and believes that Schedule acquisitions should follow the procedures as outlined in FAR Part 12, Commercial Acquisitions, and GSAM Part 512, Acquisition of Commercial Items.

Third, the commenter suggested that FAR 52.232–23 incorporated by reference and GSAR 552.232–23 should be removed because they conflict with FAR 52.212–4(b).

Response: The team concurs with this comment because commercial acquisitions should use commercial terms and conditions as outlined in FAR Part 12, Commercial Acquisitions, and GSAM Part 512—Acquisition of Commercial Items.

Fourth, this commenter focused on the ''Changes Clause'' at FAR 52.212–4(c). Paragraph (c) of this clause does not make clear whether changes to the contract may be agreed to by an ordering activity and the contractor for purposes of a particular order.

Response: The team does not concur with this comment. Subparagraph (c) indicates that all changes to the contract must be made only by written agreement between the parties. Commercial practices should be considered for incorporation into the solicitation/contract in accordance with FAR 12.213. If so indicated by market research that the aforementioned is appropriate for the acquisition of the particular item, an ordering activity may add additional terms and conditions to the order as long as the terms and conditions do not conflict with the base contract, as long as it is not precluded by law or executive order. Therefore, this requirement flows down to the task order level.

The 25th commenter is concerned about excusable delays, more specifically, GSA's change to paragraph (f) of FAR 52.212–4 by substituting the words ''ordering activity'' for ''Government'' in the standard FAR version. Although this change is appropriate in other areas of the clause, it is not appropriate to describe force majeure events. Typically, a force majeure clause recognizes that a superseding event could arise from any part of the Government rather than solely from the ordering activity. Further, the commenter stated that the clause might be read to create automatic liability for default of the entire contract for a nonperformance event with a single order.

Response: After careful review of this comment, the team was unable to clearly ascertain the rationale. It appears that GSA changed the text as mentioned above; however, without supporting documentation, the team could not provide a substantive response. ''The standard FAR text of paragraph (f) of 52.212–4 contains the word ''Government.'' Based on the comment, it appears that GSA deviated from this verbiage and substituted ''ordering activity.'' The team's interpretation of this comment is that the change was made to accommodate cooperative and recovery purchasing. The rationale is that a force majeure event can only be determined at the order level and would only apply to that order. It does not apply to the entire Schedule contract.

The 26th commenter was concerned about contract invoicing. The commenter suggested that the unlabelled paragraph after (g)(1), but before (g)(2), of GSA's deviation to FAR 52.212–4 addresses electronic funds transfer. FAR 52.232–33 (PAYMENT BY ELECTRONIC FUNDS TRANSFER—CENTRAL CONTRACTOR REGISTRATION (Oct 2003)) should be integrated within this portion of the clause to simplify the contract. The commenter recommended deleting FAR 52.232–33 and changing the relevant section of FAR 52.212–4 to more assertively and clearly incorporate FAR 52.232–33, unless an ordering activity indicates otherwise. Additionally, paragraph (d) of GSAR 552.232–74 (INVOICE PAYMENTS (Sep 1999)) changes the requirement in FAR 52.212–4(g)(1) from having to provide three copies of the invoice to having to provide only one original invoice.

Response: The team concurs with the comment and agrees that FAR 52.232–33 should not be included in MAS solicitations because FAR 52.212–4 contains the appropriate invoicing information. The issue of the number of copies of invoices required is outside the scope of this part.

The 27th commenter was concerned about risk of loss. The commenter recommends that GSA consider whether the various delivery and packaging requirements can be simplified to clearly require delivery and packaging that comports with the contractor's standard commercial practices.

Response: The team concurs that the delivery requirements should be simplified. As such, the team determined that GSAR 552.211–75 and GSAR 552.211–77 are not applicable under the MAS. However, the team believes that the MAS should include GSAR 552.211–78, which was deleted from GSAM Part 511 and added to this part.

The 28th commenter stated that FAR clauses 52.229–1 (State and Local Taxes (Apr 1984) (Deviation—May 2003)), 52.229–3 (Federal, State, and Local Taxes (Apr 2003) (Deviation—May 2003)), 52.229–5 (Taxes—Contracts Performed in U.S. Possessions or Puerto Rico (Apr 1984)), and 52.229–71 (Federal Excise Tax—DC Government (Sep 1999)) appear to be in conflict.

Response: The team, believes, however that a careful reading of the language makes clear GSA's apparent intent to exclude all applicable Federal, State, and local taxes and duties, except after imposed or relieved Federal taxes. Additionally, FAR 52.229–71, which is incorporated into the contract in section C.2 of the contract, is not reflected in current regulations. The team concurs that FAR 52.212–4(k) should not be modified. However, FAR 52.212–5 still remains a viable clause in the FSS program. Additionally, FAR 52.229–71 was cited incorrectly and should be noted as GSAR 552.229–71 (Federal Excise Tax—DC Government). This clause will remain as an incorporated by reference clause under GSAR 552.212–71.

The 29th commenter suggested that GSA establish a central location for all contract clauses that it includes in FSS and GWAC contracts. The commenter's concern is that there is no single publication, Web site, or other resource where all of the different types of contract clauses can be reviewed. Publishing all of them in a central location, according to the commenter, will make the contract formation process more transparent and administratively less burdensome.

Response: The team concurs with this comment. The GSA's rewrite of the GSAM will accomplish this feat by relocating all of the FSS's clauses and provisions from its current clause manual to GSAM Part 538. This is inclusive of other FSS clauses and provisions that are currently found in other GSAM parts. Consequently, this will bring consistency to the program, providing a one-stop approach to FSS policy and guidance.

The 30th commenter suggested revisions to the GSAR to make it more consistent with the FAR and to eliminate inconsistencies and redundancies between the FAR and GSAR. Specifically, the commenter

focused on FAR clauses 52.246–4 (Inspection of Services—Fixed Price (Aug 1996) (Deviation—May 2003)) and 52.246–6 (Inspection-Time and Material and Labor-Hour (May 2001) (Deviation—May 2003)) as well as GSAR clause 552.246–73 (Warranty—Multiple Award Schedule (Mar 2000) (Alternate I—May 2003)). The commenter noted that the aforementioned clauses conflict and are redundant with paragraph (a) of FAR 52.212–4. Moreover, GSAR 552.246–73, which invites contractors to offer their commercial warranties to address post-acceptance remedies, according to the commenter, conflicts with the final sentence of paragraph (a) of FAR 52.212–4. The commenter suggested that the clauses be reconciled or deleted to the extent that they are redundant. As such, paragraph (a) could be limited in application to products under particular Special Identification Numbers (SINs)—as opposed to services—to easily alleviate the patent conflict between the FAR clauses as to the inspection and acceptance of services. Also, the final sentence of paragraph (a) should be changed to reference the post acceptance rights contemplated under the contractor's commercial warranty pursuant to GSAR 552.246–73. A suggested change might read as follows: ''The ordering activity must exercise any post acceptance rights pursuant to contractor's commercial warranty incorporated into this contract under C.32. If no such commercial warranty is incorporated, then the ordering activity must exercise its post acceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.'' Alternatively, the commenter believes that the final sentence of paragraph (a) should be deleted altogether as the post acceptance rights to which it refers are unclear.

Response: The team partially concurs with this comment. An attempt to revise paragraph (a) of FAR 52.212–4 would require a FAR Case and consensus from the Department of Defense (DoD) and Civilian agencies. This is outside the scope of this part. However, GSAR 552.246–73 is sufficient in supplementing the FAR because it provides policy regarding placement of the burden of defective items on the contractor for a specific timeframe (90 days) as opposed to FAR 52.212–4(a) which states ''within a reasonable time.'' This is inclusive of transportation to and from site as well as onsite repair.

The 31st commenter raised a concern about GSAR 552.232–23 (Assignment of Claims (Sep 1999)) conflicting with and supplementing paragraph (b) of FAR 52.232–23. The GSAR at 552.232–23 incorporates FAR 52.232–23, but whereas FAR 52.232–23 permits assignment of any amount under the contract to a bank, trust company or financial institution, GSAR 552.232–23 changes the first paragraph of FAR 52.232–23 to permit assignment of amounts due under any order of $1000 or more. Although the GSAR clause refers to the indefinite delivery/indefinite quantity nature of the GSA Schedule Contract as a rationale, it is unclear if the $1000 limitation remains relevant today; the vast majority of orders are well above $1000. The change in nomenclature between the contract and order is appropriate and provides the parties more flexibility than a reference to the entire GSA Schedule Contract might. The recommendation here is that section C.21 of the contract should be deleted and paragraph (b) of FAR 52.232–23 should be changed to conform to the order concept. The GSAR clause 552.232–23, including the $1000 limitation, should be eliminated. Thus, FAR paragraph 52.232–23(b) might read: ''The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract, *or any order hereunder,* to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727).'' Nevertheless, when a third party makes payment (*e.g.*, use of a credit card), the contractor may not assign its rights to receive payment under this contract.

Response: The team does not concur with this comment. The $1000 limitation would not apply to most orders, but still remains relevant when purchasing office supplies under the program. Further, the recommendation that section C.21 of the contract should be deleted and that paragraph (b) of FAR 52.232–23 be changed to conform to the order concept is outside the scope of this part. This would require a collaborative decision between DoD and GSA at the FAR level.

The 32nd commenter noted that, on the topic of Termination for the Ordering Activity's Convenience, the clause is ambiguous due to the use of the word ''hereof.'' The commenter is concerned that it could be read to suggest that the ordering activity has the ability to terminate the underlying GSA Schedule contract, rather than merely the order. Thus, the commenter's recommendation is that the first sentence should be clarified, consistent with GSA's intent, to refer to an ''order'' rather than the GSA Schedule Contract, by changing the terms ''hereof'' to ''thereof'' and ''hereunder'' to ''thereunder.''

Response: The team partially concurs with this comment. Though the change in verbiage would adequately distinguish ''contract'' from ''order,'' this change is outside the scope of this part. It would require a collaborative decision between DoD and GSA at the FAR level.

The 33rd commenter focused on FAR 52.212–4(m) addressing the topic of Termination for cause, particularly GSAR clause section C.34 contract Default (I–FSS–249–B) (May 2000). The commenter is concerned that the use of the word ''hereof'' in this clause is somewhat ambiguous with regard to the ordering activity's ability to terminate the underlying GSA Schedule Contract, rather than merely the order. The commenter's suggestion is that the first sentence should be clarified so as to be consistent with GSA's intent by referring to an ''order'' rather than the GSA Schedule Contract and by changing the word ''hereof'' to ''thereof.''

Response: The team partially concurs with this comment. Though the change in verbiage would adequately distinguish ''contract'' from ''order,'' this change is outside the scope of this part. It would require a collaborative decision between DoD and GSA at the FAR level.

The 34th commenter focused on FAR 52.212–4(p) addressing Limitation of Liability. Of particular note was GSA's deviation to paragraph (p) which does not permit an exclusion of consequential damages for implied warranty claims. As the commenter notes, the FAR version of this clause does not include the language ''or implied warranty'' in the first sentence of the clause, thereby excluding consequential damages from implied warranty claims.

Further, the commenter believes that there does not seem to be any reason for GSA's different approach, particularly because most companies exclude all implied warranties in their commercial warranty provisions—exclusions that GSA presumably accepts under GSAR 552.246–73, which, as explained above, invited the contractor to provide its commercial warranty. The commenter's recommendation is that the clause should at least revert to the standard paragraph (p) at FAR 52.212–4—GSA's deviation does not make sense in the context of GSAR 552.246–73. Moreover,

as suggested previously by the section, the limitation of the exclusion of consequential damages to only defects or deficiencies in accepted items provides a gap in coverage for unaccepted items, which is inconsistent with commercial practice and prior versions of the clause.

Response: The team proposes maintaining clauses at FAR 52.212–4(p) and GSAR 552.246–73; they include the standard commercial warranty. A deviation is not necessary.

The 35th commenter seeks clarification of the application of the Buy American Act (BAA) and the Trade Agreements Act (TAA). The commenter is concerned that contractors receive consistent treatment under the law and applicable regulations. Knowing when the BAA and TAA apply and how their respective tests will be applied to products or services is of great importance to contractors. Contractors selling commercial items to the Federal Government generally do not manufacture their products based on the origin of supplies or manufacturing location. The Government, however, requires such contractors to consider these things when they contract to sell commercial products to the Federal Government. Making it easier for contractors to know and understand how the rules will be applied can only improve the procurement system. This is particularly important because an inaccurate certification can result in loss of monies, contracts, serious civil and criminal penalties, or both. The commenter feels that there is uncertainty as to whether the BAA or TAA applies to a procurement. The TAA dollar-value applicability threshold, which is set out in FAR 25.402, can vary according to whether the country of origin is a Free Trade Agreement (FTA) country and whether the contract is for supplies, services, or construction. Generally, the BAA applies to contracts below the applicable TAA threshold, and the TAA waives application of the BAA to contracts at or above the applicable TAA threshold. But it is unclear whether the TAA threshold applies to the total contract value, the individual Contract Line Item value, or the delivery or task order value. FAR 25.402(b) and 25.403(b) identify the TAA and FTA thresholds and how they ought to apply to specific types of contracts, but it is the commenter's understanding that contracting officers routinely (and perhaps not reasonably) interpret these provisions differently. Is it GSA's belief that the TAA applies to each order regardless of order amount and what is the reason for this belief?

Response: The team agrees that the TAA and BAA apply to the total value of the contract, regardless of individual order value. Specifically, as identified in FAR 25.403(b)(3), if, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, the contracting officer is to use the total estimated value of these projected awards to determine whether the World Trade Organization (WTO), Government Procurement Agreement (GPA) or an FTA applies. Acquisitions should not be divided with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO, GPA or an FTA.

The 36th commenter was concerned about Alternate I of GSAR clause 552.232–77 (Payment by Governmentwide Commercial Purchase Card), and GSAR clause 552.232–79 (Payment by Credit Card) and their impact on small businesses. The commenter states that, with the exception of FSS Schedule 70 (Information Technology) contracts, GSAR 532.7003 requires contracting officers to insert Alternate I of the clause at GSAR 552.232–77 in FSS schedule solicitations and contracts. Moreover, for FSS Schedule 70 solicitations and contracts, GSAR 532.7003 requires contracting officers to include clause 552.232–79. The GSAR clause at 552.232–77, without Alternate I, permits government orders using the Governmentwide commercial purchase card if agreeable to the contractor. Alternate I of that clause, however, provides that the FSS contractor *must* accept the Governmentwide commercial purchase card for payments equal to or less than the micro-purchase threshold ($2500). Likewise, clause 552.232–79 provides that Schedule 70 contractors *must* accept credit card orders (including the Governmentwide commercial purchase card) for payments equal to or less than the micro-purchase threshold. Consequently, the commenter felt that this mandate may be problematic for some companies. Through reports, it was outlined that credit card companies do not permit companies participating in their programs to discriminate by accepting their cards from some customers and not others. Consequently, the requirement contained in Alternate I of GSAR 552.232–77 and in GSAR 552.232–79 for contractors to accept Government payment by the Governmentwide commercial purchase card may have the effect of compelling these contractors to accept credit card payments from all commercial customers as well. Therefore, the commenter recommends that GSA examine the current requirement in Alternate I of the clause to determine its impact and the burden it poses for contractors and potential contractors, especially small businesses that have chosen not to accept payment by credit card from their commercial customers in order to avoid the fees charged by the credit card companies.

Response: The team does not concur with this comment. Under GSAR Clause 552.232–77, Alternate I, GSA mandates that the Contractor must accept use of the Governmentwide commercial credit card for payments equal to or less than the micro-purchase threshold as part of the FSS program. This mandate leverages the streamlined and more efficient transaction process use of the credit card. Offerors should consider this mandate before submitting an offer under the FSS program. The clause has been a final rule since March 2, 2000, and does not seem to have adversely impacted the number of small businesses under the FSS Program, as nearly 80 percent of FSS contractors are small business. According to the GSA purchase card Web site, the Government saves on administrative processing costs by using the purchase card rather than traditional purchase orders. Further, use of the purchase card ensures timely payment to merchants who do business with the Federal Government. Merchants are paid for credit card transactions within 48 hours of submitting the transaction to the card network. This is a vast improvement to the lengthy invoicing and payment process without cards and improves cash flow to merchants most in need, especially small businesses. However, the team is currently coordinating with the GSA Purchase Card office to track any issues and/or concerns that may have arisen based on current requirements.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may 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 proposed rule will implement a number of provisions and clauses that are the same provisions and clauses currently in use in FSS solicitations and contracts. However, the provisions and clauses have never been vetted to the

public for comment, and must be approved by the Office of Management and Budget under the Paperwork Reduction Act.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This Initial Regulatory Flexibility Analysis has been prepared consistent with the criteria of 5 U.S.C. 604.

1. Description of the reasons why action by the agency is being considered.

GSAM coverage in Part 538 does not currently include internal policy and guidance issued in other forms such as Acquisition Letters, Procurement Information Bulletins (PIBs), Procurement Information Notices (PINs), Instructional Letters and the Supply Operations Handbook (FAS P 2901.2A). This internal FSS guidance has never been fully vetted to the regulatory level for analysis, thereby bringing about conflict and overlap within the Program. Therefore, under conventions of the General Services Administration's (GSA) rewrite of the General Services Administration Manual (GSAM), the rule proposes to implement this policy and guidance for the Federal Supply Schedule (FSS) Program.

2. Succinct statement of the objectives of, and legal basis for, the proposed rule.

The objective of the proposed rule is to implement policy and guidance currently used in Federal Supply Schedule solicitations and contracts. Essentially, the goal of the new rule is to make the process more efficient by reducing duplication of effort and to ensure currency and consistency within the program for the acquisition of supplies and services.

3. Description of, and where feasible, estimate of the number of small entities to which the proposed rule will apply.

The proposed rule will affect large and small businesses, which are awarded GSA FSS contracts. The Program contains over 17,000 long-term governmentwide contracts with commercial firms that provide over 11 million supplies and services. Approximately eighty-one percent (13,770) of GSA FSS contracts are small businesses. Over $13 billion (37 percent) of sales under the Program in FY07 went to small businesses, which is well above the 23 percent governmentwide goal. There are a total of 39 Schedules, with 17 possessing an array of Special Item Numbers (SINs) set-aside for small businesses. Overall, small businesses have benefited from GSA providing education and access to the Federal marketplace via the Pre-award phase (Pathway to Success), the Post-award phase (New Contractor Orientation), and Contractor Assistance Visits (CAVs). Additionally, this proposed rule contains changes such as the addition of a Commercial Sales Practices Format for Supplies/Services without an Established Catalog Price, which will assist in facilitating ease-of-use in the preparation of offers from prospective Contractors, inclusive of small business concerns. FSS contracts are negotiated as volume purchase agreements, with generally very favorable pricing. The ability of small businesses to be awarded under the FSS Program has enabled them to grow in the Federal marketplace as well as realize significant cost savings.

4. Description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

This rule will not pose 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 proposed rule will implement a number of provisions/clauses that are the same provisions/clauses currently in use in FSS solicitations and contracts. However, the provisions/clauses have never been vetted to the public for comment, and must be approved by the Office of Management and Budget under the Paperwork Reduction Act.

5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule.

The proposed rule when finalized does not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

There are no practical alternatives that will accomplish the objective of this rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. The GSA will consider comments from small entities concerning the affected GSAR part 538 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, *et seq.* (GSAR Case 2006–G507), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) addresses the collection of information by the Federal government from individuals, small businesses and state and local governments and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes providing answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States. In accordance with the requirements of the Paperwork Reduction Act, agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The Paperwork Reduction Act does apply; however, these changes to the GSAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 3090–0243 (GSAR 552.216–70), 3090–0250 (GSAR 552.238–70 and 552.238–74), 3090–0262 (GSAR 552.238–72), 3090–0121 (GSAR 552.238–75), and 3090–0204 (GSAR 552.211–78).

However, GSA is requesting comments on a proposed information collection. The proposed information collection is representative of required process of Federal Supply Schedule (FSS) solicitations in order to negotiate and award contracts. Offerors submit solicitations either by hard copy or electronically through GSA's eOffer system at *http://www.gsa.gov/eoffer*.

The Regulatory Secretariat will submit a request for approval of a new information collection requirement concerning Federal Supply Schedule Contracting to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Annual Reporting Burden

552.238–10—Additional Offer Submission Instructions (Federal Supply Schedules) (SCP–FSS–001), 552.238–11—Additional Evaluation Factors for Award of Services (CI–FSS–151), and 552.238–90—Dealers and Suppliers (I–FSS–644). The burden for the three clauses is combined, thereby constituting a total of 8 burden hours collectively. FSS Offerors are at liberty to submit offers for both supplies and services, which may be inclusive of acting as a Dealer/Reseller.

Number of Respondents: 4,000.
Responses per Respondent: 1.
Annual Responses: 4,000.
Average Burden per Response: 8.
Total Burden Hours: 32,000.

Public reporting burden for this collection of information is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

552.238–65—Commercial Sales Practices Format—Supplies and/or Services with an Established Catalog Price (CSP–1) and 552.238–66—Commercial Sales Practices Format—Supplies and/or Services with Market Pricing Without an Established Catalog Price (CSP–2).

Number of Respondents: 18,000.
Responses per Respondent: 3.5.

Annual Responses: 63,000.
Average Burden per Response: 5.
Total Burden Hours: 315,000.

Public reporting burden for this collection of information is estimated to average 5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

552.238–71—Submission and Distribution of Authorized FSS Schedule Price Lists, 552.238–15—Contract Price Lists (I–FSS–600), 552.238–61—Price Lists/Brochures for Non-Commercial Items (I–FSS–602), and 552.238–92—Dissemination of Information by Contractor (I–FSS–680).

Number of Respondents: 18,000.
Responses per Respondent: 3.5.
Annual Responses: 63,000.
Average Burden per Response: 5.
Total Burden Hours: 315,000.

Public reporting burden for this collection of information is estimated to average 5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

552.238–58—GSA *Advantage!*® (I–FSS–597) and 552.238–59—Electronic Commerce-FACNET (I–FSS–599).

Number of Respondents: 16,634.
Responses per Respondent: 3.5.
Annual Responses: 58,219.
Average Burden per Response: 2.
Total Burden Hours: 116,438.

Public reporting burden for this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

552.238–69, Economic Price Adjustment—Supplies and/or Services with Market Prices without an Established Catalog Price (I–FSS–969).

Number of Respondents: 11,000.
Responses per Respondent: 1.
Annual Responses: 11,000.
Average Burden per Response: 1.
Total Burden Hours: 11,000.

Public reporting burden for this collection of information is estimated to average 1 hour 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.

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than March 27, 2009 to: GSA Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the GSAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control Number 3090–XXXX, GSAR 2006–G507, Federal Supply Schedule Contracting, in all correspondence.

List of Subjects in 48 CFR Parts 538 and 552

Government procurement.

Dated: January 6, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 538 and 552 as set forth below:

1. The authority citation for 48 CFR parts 538 and 552 continues to read as follows:

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

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

Subpart 538.2 [Removed]

2. Remove Subpart 538.2, consisting of sections 538.270 through 538.273.

3. Add Subpart 538.9, consisting of section 538.906–3, to read as follows:

Subpart 538.9—Contractor Qualifications

Sec.
538.906–3 Roles and Responsibilities of a contractor partnering arrangement.

538.906–3 Roles and responsibilities of a contractor partnering arrangement.

(a) The Contractor Partnering Arrangement document should outline all FSS partners. The lead partner is responsible for identifying FSS contract numbers, Contractor's point-of-contact information, and information about what each partner is responsible for at each phase of the project. Each partner is responsible for the terms and conditions of its respective FSS contract, including any proposed unit prices or hourly rates.

(b) The CPA is solely between or among the partners and cannot conflict with the underlying terms and conditions of each partner member's Schedule contract.

(c) Schedule Contractors are responsible for crafting the CPA document. The Government is not involved in this process.

(d) The CPA document should acknowledge that any dispute involving the distribution of payment between the lead partner and the team members will be resolved by all partners, without any involvement by the Government.

4. Add Subpart 538.12, consisting of section 538.1203, to read as follows:

Subpart 538.12—Acquisition of Commercial Items—FSS

Sec.
538.1203 Solicitation provisions and contract clauses.

538.1203 Solicitation provisions and contract clauses.

(a) *Multiple and single award schedules.* The following provisions are required for all Federal Supply Schedules. As prescribed below, insert the following Cover Page language prior to the beginning of FSS solicitations:

(1) 552.238–1, Cover Page for Worldwide Multiple Award Schedules (CP–FSS–1–C). This provision is for both supply and service solicitations. For supplies, complete the information required by this paragraph (a) and delete paragraph (b) of this section in its entirety. For services, complete the information required by paragraph (b) and delete (a) in its entirety. For solicitations containing both supplies and services, complete paragraphs (a) and (b).

(2) 552.238–2, Significant Changes (CP–FSS–2). This provision outlines to Offerors the most recent solicitation revisions since its previous posting to the Government's point of entry.

(3) 552.238–3, Pricing (CP–FSS–19). This provision notifies Offerors that separate pricing may be submitted for different countries, if offered commercially.

(4) 552.238–4, Notice of Total Small Business Set-Aside (A–FSS–31). This provision notifies small business

Offerors which Special Item Numbers (SINs) are set-aside.

(5) 552.238–5, Information Collection Requirements and Hours of Operation (A–FSS–41). This provision informs Offerors that only required regulations are contained in the solicitation and the hours of operation.

(6) 552.238–6, Notice: Requests for Explanation or Information (CP–FSS–3). This provision contains the contact information to address questions regarding the solicitation.

(b) *Multiple and single award Schedules.* As prescribed below, insert the following provisions as an addendum to 52.212–1, Instructions to Offerors—Commercial Items, in solicitations issued under FSS, when applicable:

(1) 552.238–7, Estimated Sales (B–FSS–96). This provision instructs Offerors to provide the estimated annual sales anticipated under the Schedule.

(2) 552.238–8, Consideration of Offers Under Standing Solicitation (A–FSS–11). This provision outlines to Offerors the Government's contemplation of awards under a standing solicitation.

(3) 552.238–9, Period for Acceptance of Offers (A–FSS–12–C). This provision instructs the Offeror to insert the number of days that the offered pricing is firm.

(4) 552.238–10, Additional Offer Submission Instructions (Federal Supply Schedules) (SCP–FSS–001). This provision clarifies how to submit solicitation responses.

(5) 552.238–11, Additional Evaluation Factors for Award of Services (I–FSS–151). This provision provides clarification to Offerors on how solicitation responses for services will be evaluated.

(6) 552.238–12, Submission of Offers—Additional Instructions (CI–FSS–002). This provision outlines to Offerors additional instructions on how to submit an offer under the Schedules Program.

(7) 552.238–13, Impact of Mandatory Use on Quantities Ordered (B–FSS–97). In conjunction with clause 552.238–51, Scope of Contract (I–FSS–102), this provision requires that this contract is the first instance where GSA is the only agency listed as a mandatory user. This provision does not apply to the Department of Veterans Affairs.

(8) 552.238–14, Introduction of New Supplies/Services (INSS) (L–FSS–400). This provision is for use when establishing new services or supplies.

(9) 552.238–15, Contract Price Lists (I–FSS–600). This provision provides instructions to Offerors on how to create the Authorized FSS Schedule Price List. For Schedule 70, use Alternate I.

(10) 552.238–16, Ordering Information (Federal Supply Schedules). This provision outlines how Offerors will accept orders placed against the contract.

(11) 552.238–17, Contractor's Remittance (Payment) Address. This provision instructs the Offeror on how to insert its remittance/payment address.

(12) 552.238–18, Final Proposal Revision (L–FSS–101). This provision provides instructions to Offerors on how to prepare and submit a Final Proposal Revision (FPR) letter.

(13) 552.238–19, Use of Non-Government Employees to Review Offers. This provision provides notification to Offerors that non-government employees may be utilized to review their solicitation response.

(14) 552.238–20, Authorized Negotiators (K–FSS–1). This provision provides for the Offeror to outline its point-of-contact information for negotiations.

(c) *Multiple and single award schedules.* As prescribed below, insert the following clauses as an addendum to clause 52.212–4, Contract Terms and Conditions—Commercial Items, in solicitations and contracts issued under FSS, when applicable:

(1) 552.238–21, Authentication Supplies and Services (CI–FSS–52). This clause is to be used with Schedule 70 only and specifically corresponds to those Special Item Numbers (SINs) associated with the Homeland Security Presidential Directive-12 (HSPD–12).

(2) 552.238–22, Indemnification and Liability (CI–FSS–053). This clause is to be used to protect the interest of the Government for loss or damage or anticipated loss for services related to hazardous substances or waste.

(3) 552.238–23, Organizational Conflicts of Interest (CI–FSS–054). This clause is to be used when the nature of the work to be performed under a proposed ordering activity contract may either

(i) Result in an unfair competitive advantage to the Contractor or its affiliates; or

(ii) Impair the Contractor or its affiliates' objectively in performing contract work.

(4) 552.238–24, Section 508 Compliance (CI–FSS–056). This clause instructs the Contractor to insert its Web site in a location where ordering activities can verify the 508 compliance for specific items.

(5) 552.238–25, Characteristics of Electric Current (C–FSS–412). This clause is used for overseas orders when Contractors are supplying equipment which uses electrical current.

(6) 552.238–26, Separate Charge for Performance Oriented Packaging (POP) (D–FSS–447). This clause is to be used when the Offeror is requested to quote a separate charge for preservation, packaging, packing and marking and labeling of domestic and overseas HAZMAT SURFACE SHIPMENTS.

(7) 552.238–27, Special Packing (D–FSS–464). This clause instructs bidders to specify additional charges for preservation, packaging, and packing when other than the commercial standard is used.

(8) 552.238–28, Export Packing (D–FSS–465). This clause instructs Offerors to quote in their price lists accompanying their offer (or by separate attachment), additional charges or net prices covering delivery of the items furnished with commercial and/or Government export packing. This clause only applies to Schedule 70 for Information Technology.

(9) 552.238–29, Marking and Documentation Requirements Per Shipment (D–FSS–471). This clause is used when outlining the minimum information and documentation required for shipment.

(10) 552.238–30, Inspection (E–FSS–521–D). This clause is for use when all items are to be inspected at a destination by a Government representative.

(11) 552.238–31, Emergency/Expedited Delivery (CI–FSS–051). This applies to Schedule 51 V only, and is to be used when delivery terms and conditions deviate from normal delivery practices.

(12) 552.238–32, Delivery Prices (F–FSS–202–G). This clause is for use in Indefinite Delivery/Indefinite Quantity contracts and describes delivery terms and conditions for the 48 Contiguous States and Washington, DC as well as additional destinations.

(13) 552.238–33, Additional Service Charge for Delivery Within Consignee's Premises (F–FSS–244–B). This clause is for use when the Contractor charges a separate cost for each shipping container to be shipped (inclusive of items that are comparable in size and weight).

(14) 552.238–34, Additional Service Charge for Delivery Within Consignee's Premises (Specification for Inside Delivery) (F–FSS–244–C). This clause is applicable to furniture acquisitions only and is to be used in accordance with FAR 52.247–35 when an additional charge is necessary beyond F.O.B Destination within Consignee's Premises.

(15) 552.238–35, Shipping Points (F–FSS–712–B). This clause instructs the Offeror to provide shipping information,

inclusive of carrier and address, for F.O.B. Origin shipments.

(16) 552.238–36, Contact for Contract Administration (G–FSS–900–C). This clause instructs Offerors to provide points of contact for domestic and/or overseas contact information for contract administration.

(17) 552.238–37, Vendor Managed Inventory (VMI) Program (MAS) (G–FSS–906). This clause instructs Contractors to monitor and maintain specified inventory levels for selected supplies at designated stocking points.

(18) 552.238–38, Order Acknowledgement (G–FSS–907). This clause is only applicable to orders which state ''Order Acknowledgement Required'' and advises the Contractor of the receipt process within 10 days of delivery.

(19) 552.238–39, Urgent Requirements (I–FSS–140B). This clause is for use when a bona fide need exists for accelerated delivery.

(20) 552.238–40, Post-Award Samples (H–FSS–505). This clause is for use with carpet acquisitions only and is used to instruct the Contractor on submission requirements.

(21) 552.238–41, Guaranteed Minimum (I–FSS–106). This clause outlines the minimum guarantee that the Government agrees to order during the term of the contract.

(22) 552.238–42, Restriction on the Acceptance of Orders (I–FSS–107). This clause sets restrictions on orders and deliveries in connection with the United States Navy and the Military Sealift Command.

(23) 552.238–43, Clauses for Overseas Coverage (I–FSS–108). The following clauses must be inserted, when applicable, in solicitations in full text for overseas acquisitions:

(i) 52.214–34, Submission of Offers in the English Language.

(ii) 52.214–35, Submission of Offers in U.S. Currency.

(iii) 52.247–34, F.O.B. Destination.

(iv) 52.247–38, F.O.B. Inland Carrier, Country of Exportation.

(v) 52.247–39, F.O.B. Inland Point, Country of Importation.

(vi) 552.238–25, Characteristics of Electric Current (C–FSS–412).

(vii) 552.238–29, Marking and Documentation Requirements Per Shipment (D–FSS–471).

(viii) 552.238–44, Transshipments (D–FSS–477). This clause is for use for transshipments and states the terms and conditions of the use of Department of Defense forms necessary for shipment.

(ix) 552.238–45, Delivery Prices (F–FSS–202–F). This clause is for use for F.O.B. Destination in overseas deliveries.

(x) 552.238–46, Foreign Taxes and Duties (I–FSS–314). This clause delineates which fees, taxes and other foreign governmental costs are exempt/non-exempt by the U.S. Government. The prices offered must be NET delivered F.O.B.

(xi) 552.238–47, Parts and Service (I–FSS–594). This clause is used to ensure that the parts and services (including the performance of warranty or guarantee service) submitted by Offerors (dealers/distributors) is good for the entire contract period.

(24) 552.238–48, English Language and U.S. Dollar Requirements (I–FSS–109). This clause is used to instruct Contractors that all documents shall be produced in the English language, including, but not limited to, price lists and catalogs.

(25) 552.238–49, Geographic Area Address of Supply and Service Point. This clause outlines the intent for available means to maintain Government-owned items in satisfactory condition.

(26) 552.238–50, Option to Extend the Term of the Contract (Evergreen) (I–FSS–163). This clause is for use when determining continued performance of a contract for the next option period.

(27) 552.238–51, Scope of Contract (I–FSS–102). This clause is for use with single awards only and is used to outline the scope of delivery.

(28) 552.238–52, Option to Extend the Term of Contract for Period of One Year (I–FSS–165). This clause is for use when determining continued performance of a contract for an additional 12 months, inclusive of the same terms and conditions as contained in the original contract.

(29) 552.238–53, Option to Extend the Term of the Contract (I–FSS–167). This clause is for single awards only and is used when determining continued performance of a contract not to exceed 60 days.

(30) 552.238–54, Federal Excise Tax (I–FSS–311). This clause is for use with tire and tube acquisitions only and instructs ordering activities on the procedures for invoicing the Federal Excise Tax.

(31) 552.238–55, Contractor Partnering Arrangements (CPAs) (I–FSS–40). This clause instructs Contractors to abide by the terms and conditions of their respective contracts when participating in Contractor Partnering Arrangements. This clause is not applicable to the U.S. Department of Veterans Affairs.

(32) 552.238–56, Performance Reporting Requirements (I–FSS–50). This clause outlines to the Contractor the performance requirements for contracts exceeding the simplified acquisition threshold.

(33) 552.238–57, Guarantee (I–FSS–546). This clause outlines the guarantee afforded to the Government for a period of one year from the date of delivery.

(34) 552.238–58, GSA *Advantage*!® (I–FSS–597). This clause outlines to the Contractor that it must participate in the GSA *Advantage*!® online shopping service. This clause is not applicable to the U.S. Department of Veterans Affairs.

(35) 552.238–59, Electronic Commerce-FACNET (I–FSS–599). This clause outlines the use of electronic commerce/data interchange to conduct contract processes and procedures. This clause is not applicable to the U.S. Department of Veterans Affairs.

(36) 552.238–60, Performance Incentives (I–FSS–60). This clause outlines performance incentives agreed upon between the ordering activity and the Contractor.

(37) 552.238–61, Price Lists/Brochures for Non-Commercial Items (I–FSS–602). This clause outlines the requirements for submission of price lists for non-commercial items.

(38) 552.238–62, Office Copier Utilization Guidelines (I–FSS–624). This clause explains to ordering activities the guidelines for selecting the appropriate and most economical copying process.

(39) 552.238–63, Preference for Small Business Concerns (I–FSS–90). This clause advises Offerors to prioritize the small business concerns where two or more items at the same delivered price will meet the ordering activity's needs.

(40) 552.238–64, Imprest Funds (Petty Cash) (I–FSS–918). This clause outlines to the Contractor that it agrees to accept cash payment for purchases under the terms of the contract in accordance with FAR 13.305.

(41) 552.238–65, Commercial Sales Practices Format-Supplies and/or Services with an Established Catalog Price List (CSP–1). This clause provides instructions to the Offeror for completing the commercial sales practices format for supplies and services with an established catalog price list.

(42) 552.238–66, Commercial Sales Practices Format-Supplies and/or Services with Market Pricing without an Established Catalog Price (CSP–2). This clause provides instructions to the Offeror for completing the commercial sales practices format for supplies and/or services with market pricing without an established catalog price.

(43) 552.238–67, Modifications (Multiple Award Schedule) (currently 552.243–72). This clause instructs to the Contractor as to the types of contract

modifications and the procedures for requesting them.

(44) 552.238–68, Economic Price Adjustment-Supplies and/or Services with an Established Catalog Price List (currently 552.216–70). This clause provides Contractors the procedures for submitting economic price adjustments for supplies and services with an established catalog price list.

(45) 552.238–69, Economic Price Adjustment-Supplies and/or Services with Market Pricing without an Established Catalog Price (I–FSS–969). This clause provides the Contractor the procedures for submitting economic price adjustments for supplies and services with market pricing and without an established catalog price list.

(46) 552.238–70, Identification of Electronic Office Equipment Providing Accessibility for the Handicapped. This clause instructs the Offeror to identify in its offer any special peripheral that will facilitate electronic office equipment accessibility for handicapped individuals.

(47) 552.238–71, Submission and Distribution of Authorized FSS Schedule Price Lists. This clause provides to the Contractor the responsibility of printing and distributing its Authorized FSS Schedule Price List after award.

(48) 552.238–72, Identification of Products that have Environmental Attributes. This clause provides to the ordering activity the requirement to purchase supplies that are not harmful to the environment.

(49) 552.238–73, Cancellation. This clause provides to the Contractor the policy and procedures for cancelling a contract.

(50) 552.238–74, Industrial Funding Fee and Sales Reporting. This clause provides to the Contractor the requirement to report all contract sales under the contract to GSA on a quarterly basis.

(51) 552.238–75, Price Reductions. This clause provides to the Offeror the requirement to establish an agreed-upon price and discount relationship with the Government prior to award.

(52) 552.238–77, Definition (Federal Supply Schedules). This clause defines eligible ordering activities authorized to place orders under FSS contracts.

(53) 552.238–78, Scope of Contract (Eligible Ordering Activities). This clause outlines solicitations issued to establish contracts which may be used on a non-mandatory basis by designated ordering activities as a source of supply for supplies or services for domestic and/or overseas delivery.

(54) 552.238–79, Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing. This clause outlines to ordering activities the procedures for use of Federal Supply Schedules by State and Local Governments.

(55) 552.238–81, Placement of Orders by Eligible Ordering Activities. This clause instructs to eligible ordering activities the procedures for placing orders through the Electronic Data Interchange (EDI).

(56) 552.238–82, Discounts for Prompt Payments (Federal Supply Schedule). This clause provides the Offeror the Government's consideration of discount for early payment.

(57) 552.238–83, Contractor's Billing Responsibilities. This clause provides to the Contractor the requirements of billing responsibilities, particularly those associated with participating dealers.

(58) 552.238–84, Payment by Credit Card. This clause provides to the Offeror the mandatory acceptance of payment of the Governmentwide Commercial Purchase Card.

(59) 552.238–85, Payments by Non-Federal Ordering Activities. This clause provides to eligible non-federal ordering activities the procedures for payment under a State prompt payment law versus the Federal Prompt Payment Act.

(60) 552.238–86, Warranty-Multiple Award Schedule (currently 552.246–73). This clause provides, for domestic or overseas, the application of the Contractor's standard commercial warranty.

(61) 552.238–87, Warranty (I–FSS–542–A). This clause provides procedures for the necessary adjustment of procured equipment when the Government is not at fault.

(62) 552.238–88, Service Points (I–FSS–626). This clause instructs the Offeror to provide information in its price list addressing supply and service points.

(63) 552.238–89, Contract Sales Criteria (I–FSS–639). This clause provides the anticipated sales expected to be generated by a contract and the Government's right to cancel the contract if they are not met.

(64) 552.238–90, Dealers and Suppliers (I–FSS–644). This clause instructs Offerors that are other than the manufacturer the requirement to submit a letter of commitment to assure an uninterrupted source of supply to satisfy the Government's requirements.

(65) 552.238–91, Blanket Purchase Agreements (BPAs) (I–FSS–646). This clause provides to the Contractor the procedures for entering into Blanket Purchase Agreements (BPAs) with ordering activities.

(66) 552.238–92, Dissemination of Information by Contractor (I–FSS–680). This clause provides to the Contractor the responsibility of distributing Authorized Federal Supply Schedule Price Lists to all authorized sales outlets.

(67) 552.238–93, Purchase of Open Market Items (CI–FSS–055). This clause provides to the ordering activity the treatment of open market items under BPAs and individual task or delivery orders placed against a Federal Supply Multiple Award Schedule (MAS) contract.

(68) 552.238–94, Contractor Tasks/Special Requirements (C–FSS–370). This clause provides to the Contractor special requirements that may be needed when completing various tasks.

(69) 552.238–95, Commercial Delivery Schedule (Multiple Award Schedule) (currently 552.211–78). This clause provides to the Offeror the requirement to address normal commercial delivery times in its offer.

(70) 552.238–96, Preparation of Offer (Multiple Award Schedule) (currently 552.212–70). This clause provides to the Offeror the requirement of including specified information used for evaluation purposes when preparing its offer.

(71) 552.238–97, Examination of Records by GSA (Multiple Award Schedule) (currently 552.215–71). With the Senior Procurement Executive's approval, the contracting officer may modify the clause at 552.238–97 to provide for post-award access to and the right to examine records to verify that the pre-award/modification pricing, sales or other data related to the supplies or services offered under the contract which formed the basis for the award/modification was accurate, current, and complete. The following procedures apply:

(i) Such a modification of the clause must provide for the right of access to expire two years after award or modification.

(ii) Before modifying the clause, the Contracting Officer must make a determination that absent such access there is a likelihood of significant harm to the Government and submit it to the Senior Procurement Executive for approval.

(iii) The determinations under paragraph (d)(2) must be made on a schedule-by-schedule basis.

(72) 552.238–98, Price Adjustment—Failure to Provide Accurate Information (currently 552.215–72).

(i) *Multiple and single award schedules.* Insert the following alternate FAR clauses in solicitations and

contracts issued under FSS, when applicable:

(A) Alternate IV of the FAR provision at 52.215–20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data. The Contracting Officer should insert the following in paragraph (b) of the provision:

(B) An offer prepared and submitted in accordance with the clause at 552.238–96, Preparation of Offer (Multiple Award Schedule) (currently 552.212–70).

(C) The Offeror shall submit commercial sales practices in the format provided in this solicitation in accordance with the instructions in 552.238–65, Commercial Sales Practices Format—Supplies and/or Services with an Established Catalog Price List (CSP–1); or 552.238–66, Commercial Sales Practices Format—Supplies and/or Services with Market Pricing Without an Established Catalog Price (CSP–2).

(D) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.

(E) By submission of an offer in response to this solicitation, the Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before initial award, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to Offeror's cost or profit information or other data relevant solely to the Offeror's determination of the prices to be offered in the catalog or marketplace.

(ii) Alternate IV of FAR 52.215–21, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data-Modifications. The Contracting Officer should insert the following in paragraph (b) of the clause:

(A) Information required by the clause at GSAR 552.238–67, Modifications (Multiple Award Schedule) (currently 552.243–72).

(B) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.

(C) By submitting a request for modification, the Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before agreeing to a modification, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to Contractor's cost or profit information or other data relevant solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

(73) 552.238–99, Task Order Period of Performance. This clause indicates that orders placed under a FSS contract which include priced options that were evaluated at the time the order was placed, allows those options to be exercised if the contract has expired.

(74) 552.238–100, Deliveries Beyond the Contractual Period—Placing of Orders (G–FSS–910). This clause allows orders to be processed if they were received prior to the expiration of the contract.

(75) 552.238–101, Award (L–FSS–59). This provision lets Offerors know that only a formal written notification from the Government can be interpreted as a notice of award.

(76) 552.238–102, Interpretation of Contract Requirements (I–FSS–965). This indicates that only written clarifications regarding interpretation of contract clauses may only be made by the Contracting Officer or his/her designated representative.

5. Add Subpart 538.15, consisting of sections 538.1504 and 538.1508, to read as follows:

Subpart 538.15—Negotiation and Award of Contracts

Sec.
538.1504 Evaluation of commercial pricing practices.
538.1508 Price reductions.

538.1504 Evaluation of commercial pricing practices.

(a) The Government will seek to obtain the Offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.

(b) The contracting officer will establish negotiation objectives based on a review of relevant data, and determine price reasonableness.

(c) When establishing negotiation objectives and determining price reasonableness, the contracting officer shall compare the terms and conditions of the FSS solicitation with the terms and conditions of agreements with the Offeror's commercial customers. When determining the Government's price negotiation objectives, the following factors, at a minimum, shall be considered:

(1) Aggregate volume of anticipated sales.

(2) The purchase of a minimum quantity or a pattern of historic purchases.

(3) Pricing, taking into consideration any combination of discounts and concessions offered to commercial customers. In the case of services, geographic location, description of duties, education and experience.

(4) Length of the contract period.

(5) Warranties, training, and/or maintenance included in the purchase price or provided at additional cost to the product prices.

(6) Ordering and delivery practices.

(7) Any other relevant information, including differences between the FSS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s). For example, an Offeror may incur more expense selling to the Government than to the customer who receives the Offeror's best price, or the customer (*e.g.*, dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the Offeror that the Government does not perform. In such cases, some reduction in the discount given to the Government may be appropriate. If the best price is not offered to the Government, the contracting officer should ask the Offeror to identify and explain the reason for any differences. Offerors should not be required to provide detailed cost breakdowns.

(d) The contracting officer may award a contract containing pricing which is less favorable than the best price the Offeror extends to any commercial customer for similar purchases if the contracting officer makes a determination that both of the following conditions exist:

(1) The prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated.

(2) Award is otherwise in the best interest of the Government.

538.1508 Price reductions.

(a) Section 552.238–75, Price Reductions, requires the Contractor to maintain during the contract period the negotiated price/discount relationship (and/or term and condition relationship)

between the Government and the Offeror's customer or category of customers on which the contract award was predicated. If a change occurs in the Contractor's commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the Government and this customer or category of customers, the change constitutes a ''price reduction.''

(b) The contracting officer shall ensure that the Contractor understands the requirements of section 552.238–75 and agrees to report all price reductions as provided for in the clause to the Government.

6. Add Subpart 538.25, consisting of section 538.2502, to read as follows:

Subpart 538.25—Requirement for Foreign Entities

Sec.
538.2502 English language and U.S. dollar requirements.

538.2502 English language and U.S. dollar requirements.

(a) Offerors shall reprint their commercial price list in English if it is not published and disseminated commercially in English.

(b) Overseas customers may make payments for supplies or services in local currencies.

7. Add Subpart 538.42, consisting of sections 538.4201–3, 538.4206, and 538.4206–1, to read as follows:

Subpart 538.42—Contract Administration

Sec.
538.4201–3 IFF and Contractor partnering arrangements.
538.4206 Contractor cancellation of FSS contract.
538.4206–1 Processing cancellation of a Contractor request.

538.4201–3 IFF and Contractor partnering arrangements.

Contractors participating in Contractor Partnering Arrangements must abide by all terms and conditions of their respective contracts, including compliance with clause 552.238–74, Industrial Funding Fee and Sales Reporting.

538.4206 Contractor cancellation of FSS contract.

538.4206–1 Processing cancellation at Contractor request.

Contractor-requested cancellations shall be formalized by a contract modification, which incorporates the Contractor's letter and indicates the effective date of the cancellation (30 days after written notice). The contracting officer is responsible for ensuring that the modification distributed to the Contractor and the administrative contracting officer. The modification will provide a formal notice to the administrative contracting officer and an appropriate closure to the contract file. Contractors should be reminded that they are responsible for completion of any outstanding orders. The contracting officer must cancel the contract in FSS Online.

8. Add Subpart 538.43, consisting of section 538.4303–3, to read as follows:

Subpart 538.43—Contract Modifications

Sec.
538.4303–3 Contractor initiated modifications.

538.4303–3 Contractor initiated modifications.

All Contractor modification requests must adequately describe and justify the proposed changes. However, there are certain modification requests that require additional documentation before they can be evaluated and approved. Examples of such modification requests include economic price adjustments, price reductions, and the addition/deletion of items. The specific documentation required to be submitted for each of these actions is identified under the Modifications and/or Economic Price Adjustment clauses that are applicable to the contract. If any modification request fails to provide current, accurate, and complete information as required by the terms and conditions in the contract, the contracting officer should return the request and detail its deficiencies to the Contractor.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.211–78 [Redesignated as 552.238–95]

9. Redesignate section 552.211.78 as 552.238–95.

552.212–70 [Redesignated as 552.238–96]

10. Redesignate section 552.212.70 as 552.238–96.

552.215–71 [Redesignated as 552.238–97]

11. Redesignate section 552.215–71 as 552.238–97.

552.215–72 [Redesignated as 552.238–98]

12. Redesignate section 552.215.72 as 552.238–98.

552.216–70 [Redesignated as 552.238–68]

13. Redesignate section 552.216–70 as section 552.238–68.

14. Add sections 552.238–1 through 552.238–66 to read as follows:

552.238–1 Cover Page for Worldwide Multiple Award Schedules (CP–FSS–1–C).

As prescribed in 538.1203(a)(1), insert the following provision:

WORLDWIDE FEDERAL SUPPLY SCHEDULE CONTRACT (CP–FSS–1–C) (DATE)

Solicitation No. *_____*

Federal Supply Schedule Contract for All Geographic Areas

FSC Group *_____* Part *_____* Section *_____*.

Supply: *_____*.

FSC Class(es)/Product Code(s)/NAICS: *_____* and/or

Service: *_____*.

Service Code(s)/NAICS: *_____*.

Any information that may be desired on this particular solicitation can be obtained from the issuing office; address shown herein.

(End of Provision)

552.238–2 Significant Changes (CP–FSS–2).

As prescribed in 538.1203(a)(2), insert the following provision:

SIGNIFICANT CHANGES (CP–FSS–2) (DATE)

The following changes have been made since the issuance of the solicitation for the supplies and/or services covered herein: *_____*.

(End of Provision)

552.238–3 Pricing (CP–FSS–19).

As prescribed in 538.1203(a)(3), insert the following provision:

PRICING (CP–FSS–19) (DATE)

Offerors are advised that separate pricing may be submitted for different countries if separate pricing is consistent with the Offeror's commercial sales practice.

(End of Provision)

552.238–4 Notice of Total Small Business Set-Aside (A–FSS–31).

As prescribed in 538.1203(a)(4), insert the following provision:

NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (A–FSS–31) (DATE)

The clause entitled ''Notice of Total Small Business Set-Aside,'' applies to the following items in this solicitation: *_____*.

(End of Provision)

552.238–5 Information Collection Requirements and Hours of Operation (A–FSS–41).

As prescribed in 538.1203(a)(5), insert the following provision:

INFORMATION COLLECTION REQUIREMENTS AND HOURS OF OPERATION (A–FSS–41) (DATE)

(a) ''The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0163.''

(b) ''GSA's hours of operation are 8:00 a.m. to 4:30 p.m. Requests for preaward debriefings postmarked or otherwise submitted after 4:30 p.m. will be considered submitted the following business day. Requests for postaward debriefings delivered after 4:30 p.m. will be considered received and filed the following business day.''

(End of Provision)

552.238–6 Notice: Requests for Explanation or Information (CP–FSS–3).

As prescribed in 538.1203(a)(6), insert the following provision:

NOTICE: REQUESTS FOR EXPLANATION OR INFORMATION (CP–FSS–3) (DATE)

Oral or written requests for explanation or information regarding this solicitation should be directed to:

General Services Administration

_____

_____

_____

or

Phone *_____*.

Note: *Important.* Do not address offers, modifications or withdrawals to the address in this provision. The address designated for receipt of offers is contained elsewhere in this solicitation.

(End of Provision)

552.238–7 Estimated Sales (B–FSS–96).

As prescribed in 538.1203(b)(1), insert the following provision:

ESTIMATED SALES (B–FSS–96) (DATE)

The ''Estimated Sales'' column of the Schedule of Items shows (1) a twelve-month reading of purchases in dollars or purchases in units as reported by the previous Contractor(s), or (2) estimates of the anticipated dollar volume where the item is new. The absence of a figure indicates that neither reports of previous purchases nor estimates of sales are available.

_____.

(End of Provision)

552.238–8 Consideration of Offers Under Standing Solicitation (A–FSS–11).

As prescribed in 538.1203(b)(2), insert the following provision:

CONSIDERATION OF OFFERS UNDER STANDING SOLICITATION (A–FSS–11) (DATE)

(a) This solicitation is a standing solicitation from which the Government contemplates award of contracts for supplies/services listed in the Schedule of Items. This solicitation will remain in effect unless replaced by a refreshed solicitation.

(b) There is no closing date for receipt of offers; therefore, offers may be submitted for consideration at any time.

(c) Contracts awarded under this solicitation will be in effect for 5 years from the date of award, unless further extended, pursuant to clause 552.238–50/I–FSS–163, Option to Extend the Term of the Contract (Evergreen), canceled pursuant to the Cancellation clause, or terminated pursuant to the termination provisions of the contract.

(End of Provision)

552.238–9 Period for Acceptance of Offers (A–FSS–12–C).

As prescribed in 538.1203(b)(3), insert the following provision:

PERIOD FOR ACCEPTANCE OF OFFERS (A–FSS–12–C) (DATE)

Paragraph (c) of the provision 52.212–1, Instructions to Offerors—Commercial Items, is revised to read as follows: ''The Offeror agrees to hold the prices in its offer for *_____* calendar days from the date of the offer, within which the offer may be accepted.''

(End of Provision)

552.238–10 Additional Offer Submission Instructions (Federal Supply Schedules) (SCP–FSS–001).

As prescribed in 538.1203(b)(4), insert the following provision:

ADDITIONAL OFFER SUBMISSION INSTRUCTIONS (FEDERAL SUPPLY SCHEDULES) (DATE)

(a) All information provided by the Offeror shall be current, accurate, and complete, and shall demonstrate a thorough understanding of the scope of this solicitation and where applicable, described in the Statement of Work. By signing the offer, the Offeror attests that there have been no changes to the text of this solicitation. Proposed exceptions shall be stated in writing and submitted with Administration/Contract Data.

(b) All offers must include the following, as applicable to the solicitation. Any deficiencies or omitted information may result in the offer being returned without further consideration.

(c) *Solicitation response/vendor response document.* (1) If available, the preferred submission method is electronically via eOffer (*http://eOffer.gsa.gov*). Offerors must have a digital certificate, which is available at the eOffer Web site, to submit an electronic offer.

(2) Alternately, submit the entire paper solicitation with a signed Standard Form 1449, unless otherwise directed in the solicitation. The most recent refresh of this solicitation can be viewed on FedBizOpps. Submissions of previous versions received more than thirty (30) calendar days after the issuing date of the current version of the solicitation will be rejected.

(d) *Exhibit I—Administrative/Contract Data.* (1) ''Pathway to Success'' training certificate. ''Pathway to Success'' training is available through the Vendor Support Center Web site at *http://vsc.gsa.gov.* Click on the tab ''Vendor Training'' to access this free, Web-based training. The training session is less than two hours total and covers the major factors your organization should consider prior to submitting an offer to a FSS solicitation.

(2) If a consultant or an agent, other than an employee of the company, is being used during or after award, submit an agent authorization letter signed by a company official.

(3) A copy of the current and up-dated registration in Central Contractor Registry (CCR).

(4) The complete Online Representations and Certifications Application (ORCA). The information is current, accurate, and complete, and reflects the North American Industrial Classification System (NAICS) code(s) for this solicitation.

(5) A completed Open Ratings, Inc. (ORI) Past Performance Evaluation and Order Form (references).

(6) When applicable, a Small Business Subcontracting Plan. A sample outline that may be used in preparing a subcontracting plan is included at FedBizOpps. (ref. FAR 19.704).

(7) Offeror shall provide the current contract number(s) and price lists of any other FSS Schedule contract(s).

(8) If other than the manufacturer, Offeror must provide guaranteed source of supply letters (letters of commitment).

(9) Additional solicitation specific instructions: *_____*.

(d) *Exhibit II, Technical Offer.* (1) Technical Offer for supplies—

(i) Refer to 552.212–73.

(ii) Other pertinent factors, if any: *____*

(2) Technical Offer for Services: The technical offer is comprised of three factors—Factor One (Corporate Experience), Factor Two (Relevant Project Experience), and Factor Three (Past Performance). All offers shall address these factors as instructed in this provision. If the Offeror is proposing multiple Special Item Numbers (SINs), they shall clearly identify each SIN with the corresponding technical information. Please provide a narrative for each of the following sections to demonstrate the company's capabilities in satisfying ALL underlying requirements as listed in this provision.

(i) Factor One—Corporate Experience: Submit a (three page maximum) narrative describing the company's corporate experience in a market relevant to this solicitation, regardless of the number of SINs being offered. Company must have provided the offered services for at least two years. At a minimum, the narrative must include the following:

(A) Number of years of corporate experience; to include quality control measures to facilitate high quality

performance. A brief history of the organization's activities contributing to experience in the field and to the development of expertise and capabilities.

(B) If applicable, Offeror must submit a Professional Compensation Plan as defined by 29 CFR 541 and in accordance with clause 52.222–16 and a copy of the Offeror's policy that addresses uncompensated overtime in accordance with provision 52.237–10, Identification of Uncompensated Overtime.

(C) Additional solicitation specific instructions: *____*

(ii) *Factor Two—Relevant Experience.* (A) For each SIN, the Offeror must provide descriptions (four page maximum) of two (2) contracts/agreements/projects, with similar scope and complexity to the work relevant to the scope of the solicitation. Each description must demonstrate how it is relevant to the SIN(s).

(B) To be relevant, the service must either have been completed within the last two years or be on-going. Additional solicitation specific instructions: *____*

(C) Each contract/agreement/project description shall include the following customer reference information:

(1) Contract/Agreement/Project name;

(2) Project description, including any challenges, actions and resolutions;

(3) Dollar amount of contract;

(4) Project duration, which includes the original estimated completion date and the actual completion date; and

(5) Point of contact, telephone number, and email address.

(D) Substitution For Relevant Contract/Agreement/Project Experience—If contract/agreement/project experience does not exist, the Offeror may substitute relevant contract/agreement/project of predecessor company(ies) and personnel that have a vested interest in the company (*i.e.*, substantial financial interest). If the Offeror chooses to make such a substitution, the narratives must clearly identify the predecessor company(ies) and personnel. (Refer to FAR 15.305(a)(2) and Comptroller General Decision: B–296197 June 30, 2005).

(iii) Factor Three—Past Performance: The Offeror shall provide a Past Performance Evaluation from Open Ratings, Inc. (ORI) dated within 12-months of offer submission. Offerors are responsible for payment to ORI for the Past Performance Evaluation. See attached form.

(e) *Exhibit III—Price Offer.* (1) For supplies and/or services based on an established catalog price, Offerors must submit:

(i) The commercial catalog, price list, schedule, and/or other pricing document(s) used as the basis of the offer; and

(ii) The proposed discount(s) and/or concession(s) offered under this solicitation.

(2) For supplies and/or services based on market prices without an established catalog price, the Offeror must submit a document including description of line item, proposed pricing, concessions, terms and conditions offered under the solicitation. Travel cost shall not be included in the proposed pricing. Additional solicitation specific instructions: *____*

(3) Any deficiencies or omitted information may result in the offer being returned without further consideration.

(End of Provision)

552.238–11 Additional Evaluation Factors for Award of Services (CI–FSS–151).

As prescribed in 538.1203(b)(5), insert the following provision:

ADDITIONAL EVALUATION FACTORS FOR AWARD OF SERVICES (CI–FSS–151) (DATE)

The Government will consider award for a responsible Offeror, whose offer conforms to all solicitation requirements, is determined technically acceptable, has acceptable past performance, and whose prices are determined fair and reasonable.

(a) *Exhibit II—Technical Offer.* Technical Offer will be reviewed, evaluated and rated acceptable or unacceptable based on the three evaluation factors described in this provision. Award will be made on a SIN basis. A rating of ''unacceptable'' under any evaluation factor, by SIN, will result in an ''unacceptable'' rating overall for that SIN. Offers determined unacceptable for all proposed SIN(s) will be rejected.

(1) *Factor One—Corporate Experience.* Failure to provide the information as described in the 552.238–10 will result in an ''unacceptable'' rating for that SIN.

(i) *____* years corporate experience in the industry relevant to the scope of the solicitation.

(ii) Description of quality control measure(s) evaluated as set forth in FAR 12.208 and FAR 46.4.

(iii) Review the compensation plans as set forth in FAR 52.222–46 Evaluation of Compensation for Professional Employees and FAR 52.237–10 Identification of Uncompensated Overtime for acceptability.

(iv) Additional solicitation specific evaluation factors: *____*

(2) *Factor Two—Relevant Experience.* The Offeror must demonstrate the satisfactory completion of contracts/agreements/projects, which are of a similar size and scope as anticipated under this contract.

(i) Contracts/agreements/projects have been completed within two years of the submission of the offer.

(ii) In order for the projects to be acceptable, the Offeror must demonstrate a commitment to customer service, timeliness, quality of services and personnel provided, and resolution of conflicts.

(3) *Factor Three—Past Performance.* Past performance evaluation will be conducted as set forth in FAR 12.206 and FAR 15.3.

(i) Open Ratings Past Performance Evaluation will be considered, along with other information available to the Contracting Officer in determining the past performance rating of the Offeror. The government reserves the right to consider any other pertinent information.

(ii) The Government will evaluate the Offeror's performance in the following key areas: overall performance, reliability, order accuracy, delivery/timeliness, quality, business relations, personnel, customer support, and responsiveness. Those Offerors demonstrating a pattern of consistent acceptable performance will receive an acceptable rating.

(iii) Those Offerors with no relevant performance history will received a neutral rating.

(b) *Exhibit III—Price Offer.* (1) In order for the offer to be rated acceptable, the Contracting Officer must determine that the proposed pricing is fair, reasonable, and supportable, based on the submission of sufficient pricing information as outlined in the 552.238–65/CSP–1 and/or 552.238–66/CSP–2.

(2) The proposed pricing must be advantageous to the government. If the pricing offered is not ''equal to or lower than'' the lowest billable net rate, an acceptable justification must be provided.

(3) Additional evaluation factors unique to this solicitation: *_____*

(c) The government reserves the right to award without discussions. Therefore, the Offeror's initial offer should contain the best terms from a price and technical standpoint.

(End of Provision)

552.238–12 Submission of Offers—Additional Instructions (CI–FSS–002).

As prescribed in 538.1203(b)(6), insert the following provision:

SUBMISSION OF OFFERS—ADDITIONAL INSTRUCTIONS (CI–FSS–002) (DATE)

Offerors are requested to submit a signed original and *____* copies of SF 1449 together with all addenda and attachments complete in every respect with the exception of oversized blueprints, drawings, or similar documents attached to the solicitation. Oversized blueprints, drawings, or similar documents are not required to be duplicated for the purpose of submitting a duplicate copy of the offer.

(End of Provision)

552.238–13 Impact of Mandatory Use on Quantities Ordered (B–FSS–97).

As prescribed in 538.1203(b)(7), insert the following provision:

IMPACT OF MANDATORY USE ON QUANTITIES ORDERED (B–FSS–97) (DATE)

This solicitation represents the first instance where the General Services Administration is the only agency listed as a mandatory user. It is not known how this change will impact on the quantities ordered under this contract.

(End of Provision)

552.238–14 Introduction of New Supplies/Services (INSS) (L–FSS–400).

As prescribed in 538.1203(b)(8), insert the following provision:

INTRODUCTION OF NEW SUPPLIES/SERVICES (INSS) (L–FSS–400) (DATE)

(a) *Definition. Introduction of New Supplies/Services Special Item Number (INSS SIN)* means a new or improved supply or service within the scope of the Federal Supply Schedule (FSS), but not currently

available under any Federal Supply Service contract—that provides a new service, function, task, or attribute that may provide a more economical or efficient means for ordering activities to accomplish their missions. It may significantly improve an existing supply or service. It may be a supply or service existing in the commercial market, but not yet introduced to the Federal Government.

(b) Offerors are encouraged to introduce new or improved supplies or services via INSS SIN at any time by clearly identify the INSS SIN item in the offer.

(c) The Contracting Officer has the sole discretion to determine whether a supply or service will be accepted as an INSS SIN item. The Contracting Officer will evaluate and process the offer and may perform a technical review. The INSS SIN provides temporary placement until the Contracting Officer formally categorizes the new supply or service.

(d) If the Contractor has an existing schedule contract, the Government may, at the sole discretion of the Contracting Officer, modify the existing contract to include the INSS SIN item in accordance with 552.238–67, Modifications (Multiple Award Schedule) (currently 552.243–72).

(End of Provision)

552.238–15 Contract Price List (I–FSS–600).

As prescribed in 538.1203(b)(9), insert the following provision:

CONTRACT PRICE LIST (I–FSS–600) (DATE)

(a) *Electronic Contract Data.* (1) At the time of award, the Contractor will be provided instructions and is responsible for submitting electronic contract data in a prescribed electronic format as required by clause 552.238–71, Submission and Distribution of Authorized FSS Schedule Price Lists.

(2) The Contractor will have a choice to transmit its file submissions electronically through Electronic Data Interchange (EDI) in accordance with the Federal Implementation Convention (IC) or use the application made available at the time of award. The Contractor's electronic files must be complete; correct; readable; virus-free; and contain only those supplies and services, prices, and terms and conditions that were accepted by the Government. They will be added to GSA's electronic ordering system known as GSA *Advantage*!®, a menu-driven database system that provides online access to contract ordering information, terms and conditions, up-to-date pricing, and the option to create an electronic order. The Contractor's electronic files must be received no later than sixty (60) days after award, unless addition time is approved by the Contracting Officer. Contractors should refer to clause 552.238–58 GSA *Advantage*!® (I–FSS–597) for further information.

(3) Further details on EDI, ICs, and GSA *Advantage*!® can be found in clause 552.238–59 Electronic Commerce—FACNET (I–FSS–599).

(4) The Contractor is encouraged to place the GSA identifier (logo) on their website for those supplies or services covered by this contract. The logo can link to the Contractor's FSS price list. The identifier URL is located at *www.gsa.gov/logo.* All resultant ''web price lists'' shown on the Contractor's website must be in accordance with section (b)(3)(ii) of this clause and nothing other than what was accepted/awarded by the Government may be included. If the Contractor elects to use contract identifiers on its website (either logos or contact number) the website must clearly distinguish between those items awarded on the contract and any other items offered by the Contractor on an open market basis.

(5) The Contractor is responsible for keeping all electronic catalog data up to date; *e.g.,* prices, supply deletions and replacements.

(b) *FSS Price List.* (1) When requested by an ordering activity, the Contractor must prepare, print, and distribute a paper FSS Price List as required by clause 552.238–71 Submission and Distribution of Authorized FSS Price Lists. This must be done as set forth in this paragraph (b).

(2) When required, the Contractor must prepare a paper FSS Price List by either:

(i) Using the commercial catalog, price list, schedule, or other document as accepted by the Government, showing accepted discounts, and removing all items, terms, and conditions not accepted by the Government by lining out those items or by a stamp across the face of the item stating ''NOT UNDER CONTRACT'' or ''EXCLUDED''; or

(ii) Composing a price list in which only those items, terms, and conditions accepted by the Government are included, and which contain only net prices, based upon the commercial price list less discounts accepted by the Government. In this instance, the Contractor must show on the cover page the notation, ''Prices Shown Herein are Net (discount deducted)''.

(3) The FSS Price List format must include the following information:

(i) *Cover page.* The cover page should include the following information:

(A) Authorized FSS Price List.

(B) On-line access to contract ordering information, terms and conditions, up-to-date pricing, and the option to create an electronic delivery order are available through GSA *Advantage*!®, a menu-driven database system. The INTERNET address GSA *Advantage*!® is: *www.GSAAdvantage.gov.*

(C) Schedule Title.

(D) FSC Group, Part, and Section.

(E) FSC Class(es)/Product Code(s) and/or Service Codes (as applicable).

(F) Contract number.

(G) For more information on ordering from Schedules click on the link titled ''Schedules'' under Acquisition Solutions from at *gsa.gov/fas.*

(H) Contract period.

(I) Contractor's name, address, email, fax number and phone number (as applicable).

(J) Contractor's internet address/website where schedule information can be found (as applicable). Contract administration source (if different from preceding entry).

(K) Business size.

(L) This price list is current through modification/refresh number: (sequentially numbered).

(ii) *Customer information.* The following information should be placed under this heading in consecutively numbered paragraphs in the sequence set forth in this provision. If this information is placed in another part of the FSS Price List, a table of contents must be shown on the cover page that refers to the exact location of the information.

1. Table of awarded special item number(s) with appropriate cross-reference to category descriptions.

2. Maximum order.

3. Minimum order.

4. Geographic coverage (delivery area).

5. Point(s) of Production (city, county, and State or foreign country). All items are Trade Agreement Act, as amended, compliant.

6. Discount from list prices or statement of net price.

7. Quantity discounts.

8. Prompt payment terms.

9a. Notification that payment by credit cards must be accepted at or below the micro-purchase threshold.

9b. Notification whether payment by credit cards are accepted or not accepted above the micro-purchase threshold.

10. Foreign items (list items by country of origin).

11a. Time of delivery. (Contractor insert number of days.)

11b. Expedited Delivery. The Contractor will insert the sentence ''Items available for expedited delivery are noted in this price list.'' under this heading. The Contractor may use a symbol of its choosing to highlight items in its price lists that have expedited delivery.

11c. Overnight and 2-day delivery. The Contractor will indicate whether overnight and 2-day delivery are available. Also, the Contractor will indicate that the schedule customer may contact the Contractor for rates for overnight and 2-day delivery.

11d. Urgent Requirements. The Contractor will note in its price list the ''Urgent Requirements'' clause of its contract and advise agencies that they can also contact the Contractor's representative to effect a faster delivery.

12. F.O.B. point(s).

13a. Ordering address(es).

13b. Ordering procedures: For supplies and services, the ordering procedures, information on Blanket Purchase Agreements (BPA's) are found in Federal Acquisition Regulation (FAR) 8.405–3.

14. Payment address(es).

15. Warranty provision.

16. Export packing charges, if applicable.

17. Terms and conditions of payment by credit cards acceptance (any thresholds above the micro-purchase level).

18. Terms and conditions of rental, maintenance, and repair (if applicable).

19. Terms and conditions of installation (if applicable).

20. Terms and conditions of repair parts indicating date of parts price lists and any discounts from list prices (if applicable).

20a. Terms and conditions for any other services (if applicable).

21. List of service and distribution points (if applicable).

22. List of participating dealers (if applicable).

23. Preventive maintenance (if applicable).

24a. Special attributes such as environmental attributes (*e.g.*, recycled content, energy efficiency, and/or reduced pollutants).

24b. If applicable, indicate that Section 508 compliance information is available on Electronic and Information Technology (EIT) supplies and services and show where full details can be found (*e.g.* Contractor's Web site or other location). The EIT standards can be found at: *www.Section508.gov*.

25. Data Universal Number System (DUNS) number.

26. Notification regarding registration in Central Contractor Registration (CCR) database.

27a. Identification of the lowest priced model number and lowest unit price for that model for each special item number awarded in the contract. This price is the Government price based on a unit of one, exclusive of any quantity/dollar volume, prompt payment, or any other concession affecting price. Those contracts that have unit prices based on the geographic location of the customer, should show the range of the lowest price, and cite the areas to which the prices apply.

27b. If the Contractor is proposing hourly rates, a description of all corresponding commercial job titles, experience, functional responsibility and education for those types of employees or subContractors who will perform services shall be provided. If hourly rates are not applicable, indicate ''Not applicable'' for this item.

(4) When requested, the Contractor must provide, in the format requested by the Contracting Officer (electronic or paper) of the FSS Price Lists (including covering letters) within 30 days after the date of award. Accuracy of information and computation of prices is the responsibility of the Contractor. Note: The removal discussed in subdivision (b)(2) of this provision must be accomplished prior to the printing and distribution of the FSS Lists.

(5) Inclusion of incorrect information (electronically or paper) will cause the Contractor to reprint/resubmit/correct and redistribute the FSS Price List, and may constitute sufficient cause for Cancellation, applying the provisions of 52.212–4, Contract Terms and Conditions (paragraph (m), Termination for Cause), and application of any other remedies as provided by law—including monetary recovery.

(6) In addition, one copy of the FSS Price List must be submitted to the: GSA, Federal Acquisition Service, National Customer Service Center (QC0CC), Bldg. #4, 1500 E. Bannister Road, Kansas City, MO 64131–3009, Telephone: 1 (800) 488–3111.

Alternate I—use for Schedule 70 only. Replace paragraph (b) of the base clause with the following paragraph (b) (Date):

(b) *FSS Price List.* (1) When submitting a paper offer, the Offeror should prepare a paper Information Technology Schedule Price List in accordance with the Attachment titled ''Guidelines for Format and Content of Authorized Information Technology Schedule Price List''. Two (2) copies of the proposed Information Technology Schedule Price List shall be submitted with the Offeror's proposal.

(2) The Contracting Officer will return one copy of the Authorized Information Technology Schedule Price List to the Contractor with the notification of contract award. In accordance with GSAR clause 552.238–71 the Contractor may print and distribute the awarded price list without written approval from the Contracting Officer. The price list must include all applicable terms and conditions of the cited contract. The Contractor will be responsible for the accuracy of the price list.

(3) As an option, the Contractor may provide one (1) copy (including cover letter) of the Authorized Information Technology Schedule Price List to the Contracting Officer for review prior to distribution. Accuracy of information and computation of prices is the responsibility of the Contractor.

(4) The Contractor may formally print and distribute the Authorized Information Technology Schedule Price List. Inclusion of incorrect information (electronically or in paper) will cause the Contractor to reprint/resubmit/correct and redistribute the price list, and may constitute sufficient cause for Cancellation, applying the provisions of 52.212–4, Contract Terms and Conditions (paragraph (m), Termination for Cause) and application of any other remedies as provided by law—including monetary recovery.

(6) In addition, one copy of the Authorized Information Technology Schedule Price List must be submitted to the: GSA, Federal Acquisition Service, National Customer Service Center (QC0CC), Bldg. #4, 1500 E. Bannister Road, Kansas City, MO 64131–3009, Telephone: 1 (800) 488–3111.

(End of Provision)

552.538–16 Ordering Information (Federal Supply Schedules).

As prescribed in 538.1203(b)(10), insert the following provision:

ORDERING INFORMATION (FEDERAL SUPPLY SCHEDULES) (DATE)

(a) In accordance with the Placement of Orders clause of this solicitation, the Offeror elects to receive orders placed by either [ ] facsimile transmission or [ ] computer-to-computer Electronic Data Interchange (EDI).

(b) An Offeror electing to receive computer-to-computer EDI is requested to indicate the name, address, and telephone number of the representative to be contacted regarding establishment of an EDI interface:

Name: _____

Address: _____

Telephone number: _____

(c) An Offeror electing to receive orders by facsimile transmission is requested to indicate the telephone number(s) for facsimile transmission equipment where orders should be forwarded:

Telephone number: _____

Telephone number: _____

Telephone number: _____

(d) For mailed orders, the Offeror is requested to include the postal mailing address(es) where paper form orders should be mailed.

Name: _____

Address: _____

_____

(e) Offerors marketing through dealers are requested to indicate whether those dealers will be participating in the proposed contract:

YES____ NO____

If ''yes'' is checked, ordering information to be inserted in paragraphs (b) or (c) in this section shall reflect that in addition to Offeror's name, address, and facsimile transmission telephone number, orders can be addressed to the Offeror's name, c/o nearest local dealer. In this event, two copies of a list of participating dealers shall accompany this offer, and shall also be included in Contractor's Federal Supply Schedule price list.

(End of Provision)

552.238–17 Contractor's Remittance (Payment) Address.

As prescribed in 538.1203(b)(11), insert the following provision:

CONTRACTOR'S REMITTANCE (PAYMENT) ADDRESS (DATE)

(a) Payment by electronic funds transfer (EFT) is the preferred method of payment. However, under certain conditions, the ordering activity may elect to make payment by check. The Offeror shall indicate the payment address to which checks should be mailed for payment of proper invoices submitted under a resultant contract:

Payment: _____

Address: _____

(b) Offeror shall furnish by attachment to this solicitation, the remittance (payment) addresses of all authorized participating dealers receiving orders and accepting payment by check in the name of the Contractor in care of the dealer, if different from their ordering address(es) specified elsewhere in this solicitation. If a dealer's ordering and remittance address differ, both must be furnished and identified as such.

(c) All Offerors are cautioned that if the remittance (payment) address shown on an actual invoice differs from that shown in paragraph (b) of this provision or on the attachment, the remittance address(es) in paragraph (b) of this provision or attached will govern. Payment to any other address, except as provided for through EFT payment methods, will require an administrative change to the contract.

Note: All orders placed against a Federal Supply Schedule contract are to be paid by the individual ordering activity placing the order. Each order will cite the appropriate ordering activity payment address, and proper invoices should be sent to that address. Proper invoices should be sent to GSA only for orders placed by GSA. Any other ordering activity's invoices sent to GSA will only delay your payment.

(End of Provision)

552.238–18 Final Proposal Revision (L–FSS–101).

As prescribed in 538.1203(b)(12), insert the following provision:

FINAL PROPOSAL REVISION (L–FSS–101) (DATE)

(a) Upon the conclusion of discussions the Contracting Officer will request a final proposal revision. Oral requests will be confirmed in writing.

(b) The request will include—

(i) Notice that discussions are concluded;

(ii) Notice that this is the opportunity to submit a final proposal revision;

(iii) The specified cutoff date and time;

(iv) A statement that any modification proposed as a result of the final proposal revision must be received by the date and time specified and will be subject to the Late Submissions, Modifications, and Withdrawals of Proposals provision of this solicitation.

(c) The Contracting Officer will not reopen discussions after receipt of final proposal revisions unless it is clearly in the interests of the Government to do so. If discussions are reopened, the Contracting Officer will issue an additional request for final proposal revision.

(d) It is the Contracting Officer's desire to conclude negotiations by *____*.

(End of Provision)

552.238–19 Use of Non-Government Employees to Review Offers.

As prescribed in 538.1203(b)(13), insert the following provision:

USE OF NON-GOVERNMENT EMPLOYEES TO REVIEW OFFERS (DATE)

(a) The Government may employ individual technical consultants/advisors/contractors from the listed organizations in this provision to review limited portions of the technical, management and price proposals to assist the government in both pre-award and post-award functions.

_____

(b) These representatives will be used to advise on specific technical, management, and price matters and shall not, under any circumstances, be used as voting evaluators. However, the Government may consider the advice provided in its evaluation process. In addition, contractor personnel may be used in specific contract administration tasks (*e.g.*, administrative filing, review of deliverables, etc.).

(c) If so utilized, personnel from these organizations will be required to execute a non-disclosure and organizational conflict of interest statements.

(End of Provision)

552.238–20 Authorized Negotiators (K–FSS–1).

As prescribed in 538.1203(b)(14), insert the following provision:

AUTHORIZED NEGOTIATORS (K–FSS–1) (DATE)

The offeror shall, in the spaces provided, fill in the names of all persons authorized to negotiate with the Government in connection with this request for proposals or quotations:

_____

_____

_____

(*List the names, titles, telephone numbers and electronic mail address of the authorized negotiators.*)

(End of Provision)

552.238–21 Authentication Supplies and Services (CI–FSS–52).

____As prescribed in 538.1203(c)(1), insert the following clause:

AUTHENTICATION SUPPLIES AND SERVICES (CI–FSS–52) (DATE)

(a) *General Background.* (1) Authentication Supplies and Services provide for authentication of individuals for purposes of physical and logical access control, electronic signature, and performance of E-business transactions and delivery of Government services. Authentication Supplies and Services consist of hardware, software components and supporting services that provide for identity assurance.

(2) Homeland Security Presidential Directive 12 (HSPD–12), ''Policy for a Common Identification Standard for Federal Employees and Contractors'' establishes the requirement for a mandatory Governmentwide standard for secure and reliable forms of identification issued by the Federal Government to its employees and Contractor employees assigned to Government contracts in order to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy. Further, the Directive requires the Department of Commerce to promulgate a Federal standard for secure and reliable forms of identification within six months of the date of the Directive. As a result, the National Institute of Standards and Technology (NIST) released Federal Information Processing Standard (FIPS) 201: Personal Identity Verification of Federal Employees and Contractors on February 25, 2005. FIPS 201 requires that the digital certificates incorporated into the Personal Identity Verification (PIV) identity credentials comply with the X.509 Certificate Policy for the U.S. Federal PKI Common Policy Framework. In addition, FIPS 201 requires that Federal identity badges referred to as PIV credentials, issued to Federal employees and Contractors comply with the Standard and associated NIST Special Publications 800–73, 800–76, 800–78, and 800–79.

(b) *Special Item Numbers.* The General Services Administration has established the E-Authentication Initiative (see URL: *http://cio.gov/* eauthentication) to provide common infrastructure for the authentication of the public and internal federal users for logical access to Federal E-Government applications and electronic services. To support the government-wide implementation of HSPD–12 and the Federal E-Authentication Initiative, GSA is establishing the following Special Item Numbers (SINs):

- SIN 132–60: Access Certificates for Electronic Services (ACES) Program. This program provides identity management and authentication services and ACES digital certificates for use primarily by external end users to access Federal Government electronic services and transactions in accordance with the X.509 Certificate Policy for the Federal ACES Program.
- SIN 132–61: PKI Shared Service Providers (PKI SSP) Program. This program provides PKI services and digital certificates for use by Federal employees and Contractors to the Federal Government in accordance with the X.509 Certificate Policy for the U.S. Federal PKI Common Policy Framework.
- SIN 132–62: HSPD–12 Supply and Service Components. SIN 132–62 is established for supplies and services for agencies to implement the requirements of HSPD–12, FIPS–201 and associated NIST special publications. The HSPD–12 implementation components specified under this SIN are:

PIV Enrollment and Registration Services and Supplies Hardware and Software Supplies Deployment Services\Managed Service;
PIV Systems Infrastructure Services and Supplies Hardware and Software Supplies Deployment Services\Managed Service;
PIV Card Management and Production Services, and Supplies Hardware and Software Products Deployment Services\Managed Services;
PIV Card Finalization Services and Supplies Hardware and Software Products Deployment Services/Managed Services;
PIV System Integration Services, and Supplies (Bundled) ''Pure'' Integration Services Turn-Key Integrated Services and Supplies Managed Services;
Physical Access Control Supplies and Services;
Logical Access Control Supplies and Services; and
Approved FIPS 201-Compliant Supplies and Services.

(c) *Qualification Information.* (1) All of the supplies and services for the SINs listed in paragraph (b) of this clause must be qualified as being compliant with Governmentwide requirements before they will be included on a FSS Information Technology (IT) Schedule contract. The Qualification Requirements and associated evaluation procedures against the Qualification Requirements for each SIN and the specific Qualification Requirements for HSPD–12 implementation components are presented at the following URL: *http://www.idmanagement.gov.*

(2) In addition, the National Institute of Standards and Technology (NIST) has established the NIST Personal Identity Verification Program (NPIVP) to evaluate integrated circuit chip cards and supplies against conformance requirements contained in FIPS 201. FSS has established the FIPS 201Evaluation Program to evaluate other supplies needed for agency implementation of HSPD–12 requirements where normative requirements are specified in FIPS 201 and to perform card and reader interface testing for interoperability. Products that are approved as FIPS–201 compliant through these evaluation and testing programs may be offered directly through SIN 132–62 under the category ''Approved FIPS 201–Compliant Products and services.

(d) *Qualification Requirements.* Offerors proposing supplies and services under

Special Item Numbers (SINs) 132–60, 132–61 and 132–62 are required to provide the following:

(1) Proposed items must be determined to be compliant with Federal requirements for that Special Item Number. Qualification Requirements and procedures for the evaluation of supplies and services are posted at the URL: *http://www.idmanagement.gov.* GSA will follow these procedures in qualifying Offeror's supplies and services against the Qualification Requirements applicable to SIN. Offerors must submit all documentation certification letter(s) for HSPD–12, SINs 132–60, 132–61 and 132–62 at the same time as submission of proposal. Award will be dependent upon receipt of official documentation from the Acquisition Program Management Office (APMO) listed in this clause verifying satisfactory qualification against the Qualification Requirements of the proposed SIN(s).

(2) After award, Contractor agrees that certified supplies and services will not be offered under any other SIN on any FSS Multiple Award Schedule.

(3)(i) If the Contractor changes the supplies or services previously qualified, GSA may require the Contractor to resubmit the supplies or services for re-qualification.

(ii) If the Federal Government changes the qualification requirements or standards, Contractor must resubmit the supplies and services for re-qualification.

(e) *Demonstrating Conformance.* The Federal Government has established Qualification Requirements for demonstrating conformance with the Standards. The following Web sites provide additional information regarding the evaluation and qualification processes:

(1) For Access Certificates for Electronic Services (ACES) and PKI Shared Service Provider (SSP) Qualification Requirements and evaluation procedures: *http://www.idmanagement.gov;*

(2) For HSPD–12 Product and Service Components Qualification Requirements and evaluation procedures: *http://www.idmanagement.gov;*

(3) For FIPS 201 compliant supplies and services qualification and approval procedures: *http://www.csrc.nist.gov/piv-project* and *http://www.smart.gov.*

(f) *Acquisition Program Management Office (APMO).* GSA has established the APMO to provide centralized technical oversight and management regarding the qualification process to industry partners and Federal agencies. Contact the following APMO for information on the E-Authentication Qualification process.

(1) The Acquisition Program Management Office point-of-contact for Access Certificates for Electronic Services (ACES—SIN 132–60) is: Stephen P. Duncan, Program Manager, E-Authentication Program Management Office, 2011 Crystal Drive, Suite 911, Arlington, VA 22202, *stephen.duncan@gsa.gov,* 703–872–8537.

(2) The Acquisition Program Management Office Point-of-contact for Shared Services Provider (SSP) Program (SIN 132–61) is: Judith Spencer, Office of Electronic Gov't & Technology, 1800 F Street, NW., Room 2011, Washington, DC 20405, *Judith.spencer@gsa.gov,* 202–208–6576.

(3) The Acquisition Program Management Office point-of-contact for HSPD–12 Products and Services or bundled Solutions (SIN 132–62) is: Mike Brooks, Director, Center for Smartcard Solutions, Office of Center for Smartcard Solutions, 1800 F Street, NW., Room 5010, Washington, DC 20405, 202–501–2765 (telephone), 202–208–3133 (fax).

(4) The Acquisition Program Management Office point-of-contact for FIPS 201 Evaluation Program Approved Products List (Sin 132–62) is: April Giles, FIPS 201 Evaluation Program Chief Architect, Identity Management Division, GSA Office of Governmentwide Policy, 202–501–1123 (telephone).

(End of Provision)

552.238–22 Indemnification and Liability (CI–FSS–053).

As prescribed in 538.1203(c)(2), insert the following clause:

INDEMNIFICATION AND LIABILITY (CI–FSS–053) (DATE)

For services related to hazardous substances or wastes under this contract, it is understood that the General Services Administration (GSA) and/or Department of Veterans Affairs (VA) does not become an owner, operator, generator, arranger, or transporter of hazardous substances or wastes by executing a schedule contract or by the award of a task order by an ordering activity. As a result, GSA/VA shall not incur any liability under any environmental laws for contamination to the extent resulting from the negligent acts or omissions of a schedule Contractor performing the services. In addition, the Contractor shall be liable for, and shall indemnify and hold harmless the GSA/VA against, all actions or claims for loss of or damage to property or the injury or death of persons to the extent resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees. EXCEPTION: The aforementioned does not apply when GSA/VA is the ordering activity and is procuring the services for property it owns and/or has legal jurisdiction.

(End of Clause)

552.238–23 Organizational Conflicts of Interest (CI–FSS–054).

As prescribed in 538.1203(c)(3), insert the following clause:

ORGANIZATIONAL CONFLICTS OF INTEREST (CI–FSS–054) (DATE)

(a) *Definitions.*

Contractor means the person, firm, unincorporated association, joint venture, partnership, or corporation that is a party to this contract.

Contractor and its affiliates and *Contractor or its affiliates* refers to the Contractor, its chief executives, directors, officers, subsidiaries, affiliates, subcontractors at any tier, and consultants and any joint venture involving the Contractor, any entity into or with which the Contractor subsequently merges or affiliates, or any other successor or assignee of the Contractor.

An *Organizational conflict of interest* exists when the nature of the work to be performed under a proposed ordering activity contract, without some restriction on ordering activities by the Contractor and its affiliates, may either (i) result in an unfair competitive advantage to the Contractor or its affiliates or (ii) impair the Contractor's or its affiliates' objectivity in performing contract work.

(b) The Contractor shall promptly notify the Ordering Activity of any known or reasonably anticipated potential organizational conflicts of interest when submitting a quote or proposal in response to a solicitation for services, or once the conflict of interest becomes apparent, whichever circumstance arises first.

(c) The Contractor shall not provide any personnel to perform services under this contract that it knows or reasonably anticipates will result in an individual conflict of interest. In the event that a conflict of interest arises involving the Contractor's personnel, the Contractor shall promptly notify the Ordering Activity of the facts and circumstances and take all necessary steps to mitigate or eliminate the conflict of interest while ensuring acceptable service delivery.

(d) To avoid an organizational, individual or financial conflict of interest and to avoid prejudicing the best interests of the ordering activity, ordering activities may place restrictions on the Contractor(s), its affiliates, chief executives, directors, subsidiaries and subcontractors at any tier when placing orders against schedule contracts. Such restrictions shall be consistent with FAR 9.505 and shall be designed to avoid, neutralize, or mitigate organizational conflicts of interest that might otherwise exist in situations related to individual orders placed against the schedule contract. Examples of situations, which may require restrictions, are provided at FAR 9.508.

(End of Clause)

552.238–24 Section 508 Compliance (CI–FSS–056).

As prescribed in 538.1203(c)(4), insert the following clause:

SECTION 508 COMPLIANCE (CI–FSS–056) (DATE)

If applicable, Section 508 compliance information on the supplies and services in this contract are available in Electronic and Information Technology (EIT) at the following:

Note: Contractor should insert the Contractor's Web site or other location where full details can be found.

The EIT standard can be found at: *www.Section508.gov.*

(End of Clause)

552.238–25 Characteristics of Electric Current (C–FSS–412).

As prescribed in 538.1203(c)(5), insert the following clause:

CHARACTERISTICS OF ELECTRIC CURRENT (C–FSS–412) (DATE)

Contractors supplying equipment which uses electrical current are required to supply equipment suitable for the electrical system at the location at which the equipment is to be used as specified on the order.

(End of Clause)

552.238–26 Separate Charge For Performance Oriented Packaging (POP) (D–FSS–447).

As prescribed in 538.1203(c)(6), insert the following clause:

SEPARATE CHARGE FOR PERFORMANCE ORIENTED PACKAGING (POP) (D–FSS–447) (DATE)

(a) Offerors are requested to quote a separate charge for providing preservation, packaging, packing, and marking and labeling of domestic and overseas HAZMAT SURFACE SHIPMENTS in compliance with all requirements of the following:

(1) International Maritime Dangerous Goods (IMDG) Code established by the International Maritime Organization (IMO) in accordance with the United Nations (UN) Recommendations on the Transportation of Dangerous Goods (Note: Marine pollutants must be labeled as required by the IMDG Code);

(2) The performance oriented packaging requirements contained in the U. S. Department of Transportation (DOT) Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) effective October 1, 1991 (Note: The ''Combustible'' and ''ORM'' classifications contained these requirements are not permitted by the IMDG Code and can not be used);

(3) Occupational Safety and Health Administration (OSHA) Regulations 29 CFR Parts 1910.101–1910.120 and 1910.1000–1910.1500, relating to Hazardous and Toxic Substances; and

(4) Any preservation, packaging, packing, and marking and labeling requirements contained elsewhere in the solicitation.

(b) Offerors are requested to list the hazardous material item to which the separate charge applies in the spaces provided in this clause or on a separate attachment. These separate charges will be accepted as part of the award, if considered reasonable, and shall be included in the Contractor's published catalog and/or price list.

ITEMS (NSN'S, SIN'S or Descriptive Name of Articles, as appropriate) Packaging

_____

_____

_____

Charge for Performance Oriented

_____

_____

_____

(c) Ordering activities will not be obligated to utilize the Contractor's services for Performance Oriented Packaging, and they may obtain such services elsewhere if desired. However, the Contractor shall provide items in Performance Oriented Packaging when such packing is specified on the delivery order. The Contractor's contract price and the charge for Performance Oriented Packaging will be shown as separate entries on the delivery order.

(d) The test reports showing compliance with package requirements will be made available to contract administration/management representatives upon request.

(End of clause)

552.238–27 Special Packing (D–FSS–464).

As prescribed in 538.1203(c)(7), insert the following clause:

SPECIAL PACKING (D–FSS–464) (DATE)

(a) Bidders are requested to furnish, in the spaces provided elsewhere in this invitation, additional charges for Level B and Level A preservation, packaging and packing (hereinafter referred to as ''packing'') in accordance with *_____*. These additional charges shall include any differentials in transportation and other costs incidental to handling and shipment of the items to destination.

(b) Additional charges submitted for Level B and/or Level A packing will not be considered in evaluating bids. However, award will be made for such packing to the bidder receiving award on the basic item when the prices offered for the higher level of packing are considered reasonable.

(c) Ordering activities will not be obligated to utilize the Contractor's services for special packing awarded under this invitation, and they may obtain such services elsewhere if desired. However, the Contractor shall fulfill all orders for items packed Level B or Level A at the accepted price when such packing is specified on the purchase order.

(End of clause)

552.238–28 Export Packing (D–FSS–465).

As prescribed in 538.1203(c)(8), insert the following clause:

EXPORT PACKING (D–FSS–465) (DATE)

(a) Offerors are requested to quote, in the price list accompanying their offer (or by separate attachment), additional charges or net prices covering delivery of the items furnished with commercial and/or Government export packing. Government export packing, if offered, shall be in accordance with *_____*. If commercial export packing is offered, the offer or price list shall include detailed specifications describing the packing to be furnished at the price quoted.

(b) Ordering activities will not be obligated to utilize the Contractor's services for export packing accepted under this solicitation, and they may obtain such services elsewhere if desired. However, the Contractor shall furnish items export packed when such packing is specified on the purchase order.

(End of clause)

552.238–29 Marking and Documentation Requirements Per Shipment (D–FSS–471).

As prescribed in 538.1203(c)(9), insert the following clause:

MARKING AND DOCUMENTATION REQUIREMENTS PER SHIPMENT (D–FSS–471) (DATE)

It shall be the responsibility of the ordering office to determine the full marking and documentation requirements necessary under the various methods of shipment authorized by the contract. Set forth in this clause is the minimum information and documentation that will be required for shipment. In the event the ordering office fails to provide the essential information and documentation, the Contractor shall, within three days after receipt of order, contact the ordering office and advise them accordingly. The Contractor shall not proceed with any shipment requiring transshipment via U.S. Government facilities without the stated prerequisites in this clause:

Direct *Shipments.* The Contractor shall mark all items ordered against this contract with indelible ink, paint or fluid, as follows:

(a) Traffic Management or Transportation Officer at FINAL destination.

(b) Ordering Supply Account Number.

(c) Account number.

(d) Delivery Order or Purchase Order Number.

(e) National Stock Number, if applicable; or Contractor's item number.

(f) Box _____ of _____ Boxes.

(g) Nomenclature (brief description of items).

(End of clause)

552.238–30 Inspection (E–FSS–521–D).

As prescribed in 538.1203(c)(10), insert the following clause:

INSPECTION (E–FSS–521–D) (DATE)

Inspection of all purchases under this contract will be made at destination by an authorized Government representative.

(End of clause)

552.238–31 Emergency/Expedited Delivery Times (I–FSS–051).

As prescribed in 538.1203(c)(11), insert the following clause:

EMERGENCY/EXPEDITED DELIVERY TIMES (I–FSS–051) (DATE)

In the case of an Emergency, ordering activities may require 24-hour access or delivery. The Offeror is requested to annotate on the offer or by a separate attachment a willingness to provide this service and identify any additional cost associated with such request.

(a) *AbilityOne (formerly JWOD) (NIB/NISH) RETURN POLICY (Applicable to all AbilityOne (formerly JWOD) (NIB/NISH) distributors).* The AbilityOne (formerly JWOD) Program stands behind the quality of its supplies and will replace or credit authorized AbilityOne (formerly JWOD) distributors 100% of the purchase price for any merchandise that is defective upon

receipt by the Contractor and/or its carrier. In such cases, the distributor should contact the AbilityOne (formerly JWOD) Program for instructions on whether to dispose of or return the defective supply to the manufacturing agency. NIB and NISH must be notified of damaged supply (s) within 48 hours of receipt of supply by the Contractor. Any defective merchandise must be identified and returned within one year of receipt.

(b) In the case of damaged merchandise that was shipped FOB Destination, the distributor should contact the AbilityOne (formerly JWOD) Program for instructions on handling the damaged goods. Damaged goods must be identified in writing within five (5) days of signing the bill of lading and damage should be noted on the bill of landing before the receiving personnel sign for the shipment. For damaged merchandise that was shipped FOB Origin (using the distributor's freight carriers), the distributor must file a claim with the freight carrier.

(c) In addition to paragraph (a) of this clause, the AbilityOne (formerly JWOD) Program allows returns on a limited basis for supplies that are not damaged or defective but unsold by wholesale or commercial distributors (see attached AbilityOne (formerly JWOD) Return Policy effective May 1, 2003.

(End of clause)

552.238–32 Delivery Prices (F–FSS–202–G).

As prescribed in 538.1203(c)(12), insert the following clause:

DELIVERY PRICES (F–FSS–202–G) (DATE)

(a) Prices offered must cover delivery as provided in this clause, to destinations located within the 48 contiguous States and the District of Columbia.

(1) Delivery to the door of the specified Government activity by freight or express common carriers on articles for which store-door delivery is provided, free or subject to a charge, pursuant to regularly published tariffs duly filed with the Federal and/or State regulatory bodies governing such carrier; or, at the option of the Contractor, by parcel post on mailable articles, or by the Contractor's vehicle. Where store-door delivery is subject to a charge, the Contractor shall (a) place the notation ''Delivery Service Requested'' on bills of lading covering such shipments, and (b) pay such charge and add the actual cost thereof as a separate item to his invoice.

(2) Delivery to siding at destinations when specified by the ordering office, if delivery is not covered under paragraph (a)(1) of this clause.

(3) Delivery to the freight station nearest destination when delivery is not covered under paragraph (a)(1) or (a)(2) of this clause.

(b) The Offeror is requested to indicate whether or not prices submitted cover delivery f.o.b. destination in Alaska, Hawaii, and the Commonwealth of Puerto Rico:

	(Yes)	(No)
Alaska	.....	.....
Hawaii	.....	.....
Puerto Rico	.....	.....

(c) When deliveries are made to destinations outside the contiguous 48 States; *i.e.*, Alaska, Hawaii, and the Commonwealth of Puerto Rico, and are not covered by paragraph (b) of this clause, the following conditions will apply:

(1) Delivery will be f.o.b. inland carrier, point of exportation (FAR 52.247–38), with the transportation charges to be paid by the Government from point of exportation to destination in Alaska, Hawaii, or the Commonwealth of Puerto Rico, as designated by the ordering office. The Contractor shall add the actual cost of transportation to destination from the point of exportation in the 48 contiguous States nearest to the designated destination. Such costs will, in all cases, be based upon the lowest regularly established rates on file with the Interstate Commerce Commission, the U.S. Maritime Commission (if shipped by water), or any State regulatory body, or those published by the U.S. Postal Service; and must be supported by paid freight or express receipt or by a statement of parcel post charges including weight of shipment.

(2) The right is reserved to ordering agencies to furnish Government bills of lading.

(End of clause)

552.238–33 Additional Service Charge for Delivery Within Consignee's Premises (F–FSS–244–B).

As prescribed in 538.1203(c)(13), insert the following clause:

ADDITIONAL SERVICE CHARGE FOR DELIVERY WITHIN CONSIGNEE'S PREMISES (F–FSS–244–B) (DATE)

(a) Offerors are requested to insert, in the spaces provided in this clause or by attachment hereto, a separate charge for ''Delivery Within Consignee's Premises'' applicable to each shipping container to be shipped. (Articles which are comparable in size and weight, and for which the same charge is applicable, should be grouped under an appropriate item description.) These additional charges will be accepted as part of the award, if considered reasonable, and shall be included in the Contractor's published catalog and/or price list.

(b) Ordering activities are not obligated to issue orders on the basis of ''Delivery Within Consignee's Premises,'' and Contractors may refuse delivery on that basis provided such refusal is communicated in writing to the ordering activity issuing such orders within 5 days of the receipt of such order by the Contractor and provided further, that delivery is made in accordance with the other delivery requirements of the contract. Failure of the Contractor to submit this notification within the time specified shall constitute acceptance to furnish ''Delivery Within Consignee's Premises'' at the additional charge awarded. When an ordering activity issues an order on the basis of ''Delivery Within Consignee's Premises'' at the accepted additional charge awarded and the Contractor accepts such orders on that basis, the Contractor will be obligated to provide delivery ''F.o.b. Destination, Within Consignee's Premises'' in accordance with FAR 52.247–35, which is then incorporated by reference, with the exception that an additional charge as provided herein is allowed for such services. Unless otherwise stipulated by the Offeror, the additional charges awarded hereunder may be applied to any delivery within the 48 contiguous States and the District of Columbia.

(c) When exercising their option to issue orders on the basis of delivery service as provided herein, ordering activities will specify ''Delivery Within Consignee's Premises'' on the order, and will indicate the exact location to which delivery is to be made. The Contractor's delivery price and the additional charge(s) for ''Delivery Within Consignee's Premises'' will be shown as separate entries on the order.

ITEMS (NSN's or Special Item Numbers or Descriptive Name of Articles)

ADDITIONAL CHARGE (Per shipping container) FOR ''DELIVERY WITHIN CONSIGNEE'S PREMISES''

552.238–34 Additional Service Charge for Delivery Within Consignee's Premises (Specification for Inside Delivery) (F–FSS–244–C).

As prescribed in 538.1203(c)(14), insert the following clause:

ADDITIONAL SERVICE CHARGE FOR DELIVERY WITHIN CONSIGNEE'S PREMISES (F–FSS–244–C) (DATE)

The Government reserves the right to require ''delivery within consignee's premises'' on any order placed against this contract. When ''Inside Delivery'' is specified on the purchase order the Contractor will be required to provide delivery in accordance with FAR 52.247–35, which is then incorporated by reference, with the exception that an additional charge as provided herein is allowed for this service. The Contractor will be paid for this additional service at the following rates which will be shown as a separate item on the order:

Number of units of * _____ * to be delivered ''within consignee's premises''	Rate
* _____ *	* _____ *
* _____ *	* _____ *
* _____ *	* _____ *
* _____ *	* _____ *

(End of clause)

552.238–35 Shipping Points (F–FSS–712–B).

As prescribed in 538.1203(c)(15), insert the following clause:

SHIPPING POINTS (F–FSS–712–B) (DATE)

Offerors submitting F.O.B. origin (or F.O.B. shipping point) prices shall indicate, in the spaces provided, the complete address (street, city, and State) from which the items offered will be shipped, and the name of the rail carrier serving plant (if any). If more than one shipping point is designated for an item, ordering activities will have the option of specifying the shipping point unless the Offeror otherwise qualifies his offer:

Item Nos.	Name of facility	Address	Rail carrier
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(End of clause)

552.238–36 Contact for Contract Administration (G–FSS–900–C).

As prescribed in 538.1203(c)(16), insert the following clause:

CONTACT FOR CONTRACT ADMINISTRATION (G–FSS–900–C) (DATE)

(a) Offerors should complete paragraphs (a) and (b) if providing both domestic and overseas delivery. Complete paragraph (a) if providing domestic delivery only. Complete paragraph (b) if providing overseas delivery only.

(b) The Contractor shall designate a person to serve as the contract administrator for the contract both domestically and overseas. The contract administrator is responsible for overall compliance with contract terms and conditions. The contract administrator is also the responsible official for issues concerning 552.238–74, Industrial Funding Fee and Sales Reporting (July 2003), including reviews of Contractor records. The Contractor's designation of representatives to handle certain functions under this contract does not relieve the contract administrator of responsibility for contract compliance. Any changes to the designated individual must be provided to the Contracting Officer in writing, with the proposed effective date of the change.

(c) *Domestic:*

Name
Title
Address
Zip Code
Telephone No. (_____) Fax No.
E-Mail Address

(d) *Overseas:* Overseas contact points are mandatory for local assistance with the resolution of any delivery, performance, or quality complaint from customer agencies. (Also, see the requirement in 552.238–47, Parts and Service (I–FSS–594).) At a minimum, a contact point must be furnished for each area in which deliveries are contemplated, *e.g.*, Europe, South America, Far East, etc.

Name
Title
Address
Zip Code
Telephone No. (_____) Fax No.
E-Mail Address

(End of clause)

552.238–37 Vendor Managed Inventory (VMI) Program (MAS) (G–FSS–906).

As prescribed in 538.1203(c)(17), insert the following clause:

VENDOR MANAGED INVENTORY (VMI) PROGRAM (MAS) (G–FSS–906) (DATE)

(a) The term ''Vendor Managed Inventory'' describes a system in which the Contractor monitors and maintains specified inventory levels for selected items at designated stocking points. VMI enables the Contractor to plan production and shipping more efficiently. Stocking points benefit from reduced inventory but steady stock levels.

(b) Contractors that commercially provide a VMI-type system may enter into similar partnerships with customers under a Blanket Purchase Agreement.

(End of clause)

552.238–38 Order Acknowledgement (G-FSS–907).

As prescribed in 538.1203(c)(18), insert the following clause:

ORDER ACKNOWLEDGEMENT (G–FSS–907) (DATE)

Contractors shall acknowledge only those orders which state ''Order Acknowledgement Required.'' These orders shall be acknowledged within 10 days after receipt. Such acknowledgement shall be sent to the activity placing the order and contain information pertinent to the order, including the anticipated delivery date.

(End of clause)

552.238–39 Urgent Requirements (I–FSS–140–B).

As prescribed in 538.1203(c)(19), insert the following clause:

URGENT REQUIREMENTS (I–FSS–140–B) (DATE)

When the Federal Supply Schedule contract delivery period does not meet the bona fide urgent delivery requirements of an ordering agency, agencies are encouraged, if time permits, to contact the Contractor for the purpose of obtaining accelerated delivery. The Contractor shall reply to the inquiry within 3 workdays after receipt. (Telephonic replies shall be confirmed by the Contractor in writing.) If the Contractor offers an accelerated delivery time acceptable to the ordering agency, any order(s) placed pursuant to the agreed upon accelerated delivery time frame shall be delivered within this shorter delivery time and in accordance with all other terms and conditions of the contract.

(End of clause)

552.238–40 Post-Award Samples (H–FSS–505).

As prescribed in 538.1203(c)(20), insert the following clause:

POST-AWARD SAMPLES (H–FSS–505) (DATE)

(a) Within 20 days after approval of the brochure proof, Contractors who have received an award on carpet items are required to:

(1) Furnish the Contracting Officer with 5 sets (by sets, not loosely packed) of samples approximately 12 by 12 inches of all patterns and/or colors awarded.

(2) Furnish such additional sets of samples as may be requested during the contract period.

(3) Furnish a set of small cuttings approximately 3 by 5 inches of each quality carpet awarded to all ordering activities to which brochures are mailed, except that such sample cuttings need not be furnished when the brochure distributed by the Contractor was fully swatched with all available colors for each quality carpet awarded.

(4) Furnish sets of 3 by 5 inch samples to any agency when specifically requested to do so notwithstanding the fact that the brochure was fully swatched.

(5) Furnish the Contracting Officer with one 18 inch by 24 inch sample of each quality carpet and in each color or pattern covered by the contract, with the clear understanding that the Government reserves the right at its option to request one additional 18 inch by 24 inch sample in any one or all qualities in each pattern and/or color specified, and the Contractor agrees to honor such request. These samples will be returned at the Contractor's expense after expiration of the contract provided they have not been consumed as a result of the Government's sample requirements.

(b) Each individual sample, or cutting, shall bear the Contractor's name, manufacturer's name, brand or quality name, pattern or color number and name, and the National Stock Number.

(End of clause)

552.238–41 Guaranteed Minimum (I–FSS–106).

As prescribed in 538.1203(c)(21), insert the following clause:

GUARANTEED MINIMUM (I–FSS–106) (DATE)

The minimum that the Government agrees to order during the period of this contract is $2,500. If the Contractor receives total orders for less than $2,500 during the term of the contract, the Government will pay the difference between the amount ordered and $2,500:

(a) Payment of any amount due under this clause shall be contingent upon the Contractor's timely submission of GSA Form 72A reports (see GSAR 552.238–74 ''Industrial Funding Fee and Sales Reporting'') during the period of the contract and receipt of the close-out sales report pursuant to GSAR 552.238–74.

(b) The guaranteed minimum applies only if the contract expires or contract cancellation is initiated by the Government. The guaranteed minimum does not apply if the contract is terminated for cause or if the contract is canceled at the request of the Contractor.

(End of clause)

552.238–42 Restriction on the Acceptance of Orders (I–FSS–107).

As prescribed in 538.1203(c)(22), insert the following clause:

RESTRICTION ON THE ACCEPTANCE OF ORDERS (I–FSS–107) (DATE)

No orders shall be accepted from, and no deliveries shall be made to any ship of the United States Navy or the Military Sealift Command. This prohibition shall include all electrostatic copying equipment, supplies (toner, developer, fuser oil) for such equipment, repair or replacement parts for such equipment, and maintenance or repair service for such equipment.

(End of clause)

552.238–43 Clauses for Overseas Coverage (I–FSS–108).

As prescribed in 538.1203(c)(23), insert the following clause:

CLAUSES FOR OVERSEAS COVERAGE (I–FSS–108) (DATE)

The following clauses apply to overseas coverage:

(a) 52.214–34, Submission of Offers in the English Language.

(b) 52.214–35, Submission of Offers in U.S. Currency.

(c) 52.247–34, FOB Destination.

(d) 52.247–38, FOB Inland Carrier, Country of Exportation.

(e) 52.247–39, FOB Inland Point, Country of Importation.

(f) 552.238–25, Characteristics of Electric Current (C–FSS–412).

(g) 552.238–29, Marking and Documentation Requirements Per Shipment (D–FSS–471).

(h) 552.238–44, Transshipments (D–FSS–477).

(i) 552.238–45, Delivery Prices (F–FSS–202–F).

(j) 552.238–46, Foreign Taxes and Duties (I–FSS–314).

(k) 552.238–47, Parts and Service (I–FSS–594).

(End of clause)

552.238–44 Transshipments (D–FSS–477).

As prescribed in 538.1203(c)(23)(viii), insert the following clause:

TRANSSHIPMENTS (D–FSS–477) (DATE)

The Contractor shall complete TWO DD Forms 1387, Military Shipment Labels and, if applicable, four copies of DD Form 1387—2, Special Handling/Data Certification—used when shipping chemicals, dangerous cargo, etc. Two copies of the DD Form 1387 will be attached to EACH shipping container delivered to the port Transportation Officer for subsequent transshipment by the Government as otherwise provided for under the terms of this contract. These forms will be attached to one end and one side (NOT on the top or bottom) of the container. The Contractor will complete the bottom line of these forms, which pertains to the number of pieces, weight and cube of each piece, using U.S. weight and cubic measures. Weights will be rounded off to the nearest pound. (One kg = 2.2 U.S. pounds; one cubic meter = 35.3156 cubic feet.) In addition, if the cargo consists of chemicals, or is dangerous, one copy of the DD Form 1387–2 will be attached to the container, and three copies will be furnished to the Transportation Officer with the Bill of Lading. DANGEROUS CARGO WILL NOT BE INTERMINGLED WITH NONDANGEROUS CARGO IN THE SAME CONTAINER. Copies of the forms and preparation instructions will be obtained from the Ordering Office issuing the Delivery Order. Reproduced copies of the forms are acceptable. FAILURE TO INCLUDE DD FORMS 1387 (AND DD FORM 1387–2, IF APPLICABLE) ON EACH SHIPPING CONTAINER WILL RESULT IN REJECTION OF SHIPMENT BY THE PORT TRANSPORTATION OFFICER.

(End of clause)

552.238–45 Delivery Prices (F–FSS–202–F).

As prescribed in 538.1203(c)(23)(ix), insert the following clause:

DELIVERY PRICES (F–FSS–202–F) (DATE)

(a) Prices offered must cover delivery to destinations as provided in this clause:

(1) Direct delivery to consignee. F.O.B. Inland Point, Country of Importation (FAR 52.247–39). (Offeror should indicate countries where direct delivery will be provided.)

(2) Delivery to overseas assembly point for transshipment when specified by the ordering office, if delivery is not covered under paragraph (a) of this clause.

(3) Delivery to the overseas port of entry when delivery is not covered under paragraphs (a) or (b) of this clause.

(b) Offerors are requested to furnish the geographic area(s)/countries/zones which are intended to be covered:

_____

_____

(End of clause)

552.238–46 Foreign Taxes and Duties (I–FSS–314).

As prescribed in 538.1203(c)(23)(x), insert the following clause:

FOREIGN TAXES AND DUTIES (I–FSS–314) (DATE)

Prices offered must be net, delivered, F.O.B. to the destinations accepted by the Government.

(a) The Offeror warrants that such prices do not include any tax, duty, customs fees, or other foreign Governmental costs, assessments, or similar charges from which the U.S. Government is exempt. The Offeror further warrants that any applicable taxes duties, customs fees, other Government costs, assessments or similar charges from which the U.S. Government is not exempt are included in the prices quoted and that such prices are not subject to increases for any such charges applicable at the time of acceptance of this offer by the Government.

(b) Standard commercial export packaging, including containerization, if necessary, packaging, preservation, marking are included in the pricing offered and accepted by the Government.

(End of clause)

552.238–47 Parts and Service (I–FSS–594).

As prescribed in 538.1203(c)(23)(xi), insert the following clause:

PARTS AND SERVICE (I–FSS–594) (DATE)

(a) For equipment under items listed in the schedule of items or services on which offers are submitted, the Offeror certifies by submission of this offer that parts and services (including the performing of warranty or guarantee service) are now available from dealers or distributors serving the areas of ultimate overseas destination or that such facilities will be established and will be maintained throughout the contract period. If a new servicing facility is to be established, the facility shall be established no later than the beginning of the contract period.

(b) Each Contractor shall be fully responsible for the services to be performed by the named servicing facilities, or by such facilities to be established, and fully guarantees performance of such services if the original service proves unsatisfactory.

(c) Offerors are requested to include in the price list, the names and addresses of all supply and service points maintained in the geographic area in which the Contractor will perform. Please indicate opposite each point whether or not a complete stock of repair parts for items offered is carried at that point, and whether or not mechanical service is available.

(End of clause)

552.238–48 English Language and U.S. Dollar Requirements (I–FSS–109).

As prescribed in 538.1203(c)(24), insert the following clause:

ENGLISH LANGUAGE AND U.S. DOLLAR REQUIREMENTS (I–FSS–109) (DATE)

(a) All documents produced by the Contractor to fulfill requirements of this contract including, but not limited to, Federal Supply Schedule catalogs and price lists, must reflect all terms and conditions in the English language.

(b) U.S. dollar equivalency, if applicable, will be based on the rates published in the ''Treasury Reporting Rates of Exchange'' in effect as of the date of the agency's purchase order or in effect during the time period specified elsewhere in this contract.

(End of clause)

552.238–49 Geographic Area Address of Supply and Service Point.

As prescribed in 538.1203(c)(25), insert the following clause:

GEOGRAPHIC AREA ADDRESS OF SUPPLY AND SERVICE POINT (DATE)

It is desired to have available means for maintaining Government-owned items in satisfactory operating condition and to receive service at least as good as that extended to commercial customers.

(End of clause)

552.238–50 Option To Extend the Term of the Contract (Evergreen) (I–FSS–163).

As prescribed in 538.1203(c)(26), insert the following clause:

OPTION TO EXTEND THE TERM OF THE CONTRACT (EVERGREEN) (I–FSS–163) (DATE)

(a) The Government may require continued performance of this contract for an additional 5-year period when it is determined that exercising the option is advantageous to the Government considering price and other factors. The option clause may not be exercised more than three times. When the option to extend the term of this contract is exercised the following conditions are applicable:

(1) It is determined that exercising the option is advantageous to the Government considering price and the other factors covered in paragraphs (a)(2) through (a)(4) of this clause).

(2) The Contractor's electronic catalog/price list has been received, approved, posted, and kept current on GSA Advantage!® in accordance with clause 552.238–15, Contract Price Lists (I–FSS–600).

(3) Performance has been acceptable under the contract.

(4) Subcontracting goals have been reviewed and approved.

(b) The Contracting Officer may exercise the option by providing a written notice to the Contractor within 30 days, unless otherwise noted, prior to the expiration of the contract or option.

(c) When the Government exercises its option to extend the term of this contract, prices in effect at the time the option is exercised will remain in effect during the option period, unless an adjustment is made in accordance with another contract clause (*e.g.*, Economic Price Adjustment Clause or Price Reduction Clause).

(End of clause)

552.238–51 Scope of Contract (I–FSS–102).

As prescribed in 538.1203(c)(27), insert the following clause:

SCOPE OF CONTRACT (I–FSS–102) (DATE)

This solicitation is issued to establish contracts which may be used on a nonmandatory basis by the agencies and activities named in this clause, as a source of supply for the supplies or services described herein, for delivery within *_____* and Washington, DC.

(a) All Federal agencies and activities in the executive, legislative, and judicial branches.

(b) Government Contractors authorized in writing by a Federal agency pursuant to 48 CFR 51.1.

(c) Mixed ownership Government corporations (as defined in the Government Corporation Control Act).

(d) The Government of the District of Columbia.

(e) Other activities and organizations authorized by statute or regulation to use GSA as a source of supply. (Questions regarding activities authorized to use this schedule should be directed to the Contracting Officer.)

Articles or services may be ordered from time to time in such quantities as may be needed to fill any requirement, subject to the Order Limitations thresholds which will be specified in resultant contracts. Overseas activities may place orders directly with schedule Contractors for delivery to CONUS port or consolidation point.

For orders received from activities within the executive branch of the Government, each Contractor is obligated to deliver all articles or services contracted for that may be ordered during the contract term, except as otherwise provided herein.

The Contractor is not obligated to accept orders received from activities outside the executive branch; however, the Contractor is encouraged to accept such orders. If the Contractor is unwilling to accept such an order, the Contractor shall return it by mailing it or delivering it to the ordering office within 5 workdays from receipt. Failure to return an order shall constitute acceptance whereupon all provisions of the contract shall apply.

The Government is obligated to purchase under each resultant contract a guaranteed minimum of one hundred dollars during the contract term.

(End of clause)

552.238–52 Option to Extend the Term of Contract for Period of One (1) Year (I–FSS–165).

As prescribed in 538.1203(c)(28), insert the following clause:

OPTION TO EXTEND THE TERM OF CONTRACT FOR PERIOD OF ONE (1) YEAR (I–FSS–165) (DATE)

(a) The Government shall have the unilateral option of extending this contract for an additional twelve (12) months upon the same terms and conditions as are contained in this contract at the time said option is exercised. The total duration of this contract inclusive of the option period shall not exceed 24 months.

(1) Said options shall be deemed to have been exercised upon formal written notification (mail or otherwise furnished) to the Contractor at least thirty (30) calendar days prior to the expiration of the contract. The Contracting Officer shall have given preliminary notice of the Government's intention to extend at least ninety (90) calendar days before this contract is to expire. (Such a preliminary notice will not be deemed to commit the Government to exercise the option.)

(2) Offerors are cautioned that the exercise of the option is a Government prerogative, not a contractual right on the part of the Contractor. If the Government exercises the option, the Contractor shall be contractually bound to perform the services for the option period, or in the event it fails to perform, be subject to the termination for default provisions of this contract.

(b) If the option to extend is exercised by the Government, the contract price(s) may be adjusted upward or downward at that time in accordance with Section (b) of this clause. The Government will notify the Contractor of the percentage change in the Bureau of Labor Statistics (BLS) Producer Price Index when it becomes aware of the adjusting price index.

(1) *Definitions.* As used in this provision.

(i) The price index for the purpose of price adjustment for the option period shall be the originally released Producer Price Index stated in this clause, not seasonally adjusted, published by the Bureau of Labor Statistics, U. S. Department of Labor. The applicable Producer Price Index under Table *_____* is:

Code number *_____*.

Commodity *_____*.

(ii) The base price index for the purpose of price adjustment shall be the originally released index listed in paragraph (b)(1)(A) of this clause for the month of the contract date;

(iii) The term ''contract date'' means:

(A) The date of bid opening in the case of sealed bid solicitations;

(B) The date of award in the case of negotiated solicitations, except that with respect to any set-aside portion (Combined Small Business-Labor Surplus Area, Labor Surplus Area, or Small Business) of this solicitation, the date of bid opening for the non-set-aside portion, if sealed bid, or the date of award for the non-set-aside portion, if negotiated; or

(C) The effective date(s) of the contract modification(s) adding line items to the contract.

(iv) The ''adjusting price'' index shall be the originally released index listed in (b)(1)(A) of this clause for the ninth month of any twelve month contract or, if the contract period is less than twelve months, the month which would occur three full months before contract performance ends.

(2) The original unit prices for supplies, as of the contract date, shall be subject to adjustment upward or downward by the percent of difference between the base price index and the adjusting price index. This price adjustment shall become effective on the date performance under the option period begins. If orders are issued under the contract, the adjustment shall apply only to those orders mailed to the Contractor after the date performance under the option period begins.

(3) If base price index data are not available for the month in which the contract date occurs or if adjusting price index data are not available as specified in this clause, the month with the most recently published data before the contract date or the option exercise date, as applicable, shall be the basis for adjustment.

(4) If any of the BLS series specified in this clause are discontinued, the Government shall determine a substitute series. If BLS designates an index with a new title and/or code number as being continuous with one of the indexes cited in this clause, the new index will be used.

(5) Price adjustments pursuant to this provision will be made by contract modification issued by the Contracting Officer which will show the base price index, the adjusting price index, the percent of difference and the new contract price.

(6) No adjustment will be made under this provision unless the total change in the contract amount is *_____* or more.

(7) Increases shall not exceed 10 percent of the contract price as of the contract date.

(End of clause)

552.238–53 Option To Extend the Term of the Contract (I–FSS–167).

As prescribed in 538.1203(c)(29), insert the following clause:

OPTION TO EXTEND THE TERM OF THE CONTRACT (I–FSS–167) (DATE)

(a) The Government may extend the term of this contract by written notice to the Contractor within the time specified in this clause; provided, that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option provision.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed 14 months.

(d) Prices in effect at the end of the 12th month shall remain unchanged during the period of the extension.

(End of clause)

552.238–54 Federal Excise Tax (I–FSS–311).

As prescribed in 538.1203(c)(30), insert the following clause:

FEDERAL EXCISE TAX (I–FSS–311) (DATE)

Prices offered shall exclude Federal Excise Tax. Ordering agencies will be notified that the Federal Excise Tax will be invoiced and paid for by them as a separate item based upon published Rubber Manufacturer's Association average weights effective at time of delivery, unless the ordering activity is exempt from such tax.

(End of clause)

552.238–55 Contractor Partnering Arrangements (I–FSS–40).

As prescribed in 538.1203(c)(31), insert the following clause:

CONTRACTOR PARTNERING ARRANGEMENTS (I–FSS–40) (DATE)

Contractors participating in contractor partnering arrangements must abide by all terms and conditions of their respective contracts. This includes compliance with contract clause 552.238–74, Industrial Funding Fee and Sales Reporting, *i.e.*, each Contractor (partner member) must report sales and remit the IFF for all supplies and services provided under its individual contract.

(End of clause)

552.238–56 Performance Reporting Requirements (I–FSS–50).

As prescribed in 538.1203(c)(32), insert the following clause:

PERFORMANCE REPORTING REQUIREMENTS (I–FSS–50) (DATE)

(a) This clause applies to all contracts estimated to exceed $100,000.

(b) Unless notified otherwise in writing by the Contracting Officer, the Contractor may assume contract performance is satisfactory.

(c) If negative performance information is submitted by customer agencies, the Contracting Officer will notify the Contractor in writing and provide copies of any complaints received. The Contractor will have 30 calendar days from receipt of this notification to submit a rebuttal and/or a report of corrective actions taken.

(End of clause)

552.238–57 Guarantee (I–FSS–546).

As prescribed in 538.1203(c)(33), insert the following clause:

GUARANTEE (I–FSS–546) (DATE)

The Contractor guarantees the equipment furnished will be free from defects in material and workmanship for a period of not less than 1 year from date of delivery. All parts found defective within that period shall be replaced, with the cost of replacement, including shipping charges, to be borne by the Contractor. Under no circumstances will any equipment covered by this guarantee be returned without (a) advance written notice to the Contractor, or (b) obtaining shipping instructions from the Contractor.

(End of clause)

552.238–58 GSA Advantage!® (I–FSS–597).

As prescribed in 538.1203(c)(34), insert the following clause:

GSA ADVANTAGE!® (I–FSS–597) (DATE)

(a) The Contractor must participate in the GSA *Advantage!®* online shopping service. Information and instructions regarding Contractor participation are contained in clause 552.238–59, Electronic Commerce—FACNET (I–FSS–599).

(b) The Contractor also should refer to contract clauses 552.238–71, Submission and Distribution of Authorized FSS Schedule Price Lists (which provides for submission of price lists on a common-use electronic medium), 552.238–15, Contract Pricelists (I–FSS–600) (which provides information on electronic contract data), and 552.238–67, Modifications (Multiple Award Schedule) (currently 552.243–72) (which addresses electronic file updates).

(End of clause)

552.238–59 Electronic Commerce—FACNET (I–FSS–599).

As prescribed in 538.1203(c)(35), insert the following clause:

ELECTRONIC COMMERCE—FACNET (I–FSS–599) (DATE)

(a) *General Background*. The Federal Acquisition Streamlining Act (FASA) of 1994 establishes the Federal Acquisition Computer Network (FACNET) requiring the Government to evolve its acquisition process from one driven by paperwork into an expedited process based on electronic commerce/electronic data interchange (EC/EDI). EC/EDI means more than merely automating manual processes and eliminating paper transactions. It can and will help to move business processes (*e.g.*, procurement, finance, logistics, etc.) into a fully electronic environment and fundamentally change the way organizations operate.

(b) *Trading Partners and Value-Added Networks (VAN's)*.

(1) Within the FACNET architecture, electronic documents (*e.g.*, orders, invoices, etc.) are carried between the Federal Government's procuring office and Contractors (now known as ''trading partners''). These transactions are carried by commercial telecommunications companies called Value-Added Networks (VAN's).

(2) EDI can be done using commercially available hardware, software, and telecommunications. The selection of a VAN is a business decision Contractors must make. There are many different VAN's which provide a variety of electronic services and

different pricing strategies. If your VAN only provides communications services, you may also need a software translation package.

(c) *Registration Instructions.* (1) DOD will require Contractors to register as trading partners to do business with the Government. This policy can be reviewed via the INTERNET at *http://www.defenselink.mil/releases/1999/b03011999_bt079-99.html.*

(2) To do EDI with the Government, Contractors must register as a trading partner. Contractors will provide regular business information, banking information, and EDI capabilities to all agencies in this single registration. A central repository of all trading partners, called the Central Contractor Registration (CCR) *http://www.ccr.gov/*, has been developed. All Government procuring offices and other interested parties will have access to this central repository. The database is structured to identify the types of data elements which are public information and those which are confidential and not releasable.

(3) To register, Contractors must provide their Dun and Bradstreet (DUNS) number. The DUNS number is available by calling 1 (800) 333–0505. It is provided and maintained free of charge and only takes a few minutes to obtain. Contractors will need to provide their Tax Identification Number (TIN). The TIN is assigned by the Internal Revenue Service by calling 1 (800) 829–1040. Contractors will also be required to provide information about company bank or financial institution for electronic funds transfer (EFT).

(4) Contractors may register through online at *http://www.ccr.gov/* or through their Value Added Network (VAN) using an American National Standards Institute (ANSI) ASC X12 838 transaction set, called a ''Trading Partner Profile.'' A transaction set is a standard format for moving electronic data. VAN's will be able to assist Contractors with registration.

(d) *Implementation Conventions.* All EDI transactions must comply with the Federal Implementation Conventions (IC's). Many VAN's and software providers have already built the IC requirements into their supplies. If you need to see the IC's, they are available on a registry maintained by the National Institute of Standards and Technology (NIST). It is accessible via the INTERNET at *http://www.itl.nist.gov/lab/csl-pubs.htm.* IC's are available for common business documents such as Purchase Order, Price Sales Catalog, Invoice, Request for Quotes, etc.

(e) *Additional Information.* GSA has additional information available for Contractors who are interested in starting to use EC/EDI. Contact the Contracting Officer for a copy of the latest handbook. Several resources are available to Contractors to assist in implementing EC/EDI; specific addresses are available in the handbook or from the Contracting Officer:

(1) Electronic Commerce Resource Centers (ECRC's) are a network of U.S. Government sponsored centers that provide EC/EDI training and support to the Contractor community. They are found in over a dozen locations around the country.

(2) Procurement Technical Assistance Centers (PTAC's) and Small Business Development Centers (SBDC's) provide management assistance to small business owners. Each state has several locations.

(3) Most major U.S. cities have an EDI user group of companies who meet periodically to share information on EDI related subjects.

(f) *GSA Advantage!®.* (1) GSA *Advantage!®* will use this FACNET system to receive catalogs, invoices and text messages; and to send purchase orders, application advice, and functional acknowledgments. GSA *Advantage!®* enables customers to:

(i) Perform database searches across all contracts by manufacturer; manufacturer's model/part number; Contractor; and generic supply categories:

(ii) Generate their own EDI delivery orders to Contractors, generate EDI delivery orders from the Federal Supply Service to Contractors, or download files to create their own delivery orders; and

(iii) Use the Federal IMPAC VISA.

(2) GSA *Advantage!®* may be accessed via the GSA Home Page. The Internet address is: *http://www.gsa.gov*, or *http://www.fss.gsa.gov.*

(End of clause)

552.238–60 Performance Incentives (I–FSS–60).

As prescribed in 538.1203(c)(36), insert the following clause:

PERFORMANCE INCENTIVES (I–FSS–60) (DATE)

(a) Performance incentives may be agreed upon between the Contractor and the ordering office on individual orders or Blanket Purchase Agreements under this contract in accordance with this clause.

(b) The ordering office must establish a maximum performance incentive price for these services and/or total solutions, on individual orders or Blanket Purchase Agreements.

(c) Incentives should be designed to relate results achieved by the Contractor to specified targets. To the maximum extent practicable, ordering offices shall consider establishing incentives where performance is critical to the agency's mission and incentives are likely to motivate the Contractor. Incentives shall be based on objectively measurable tasks.

(End of clause)

552.238–61 Price Lists/Brochures for Non-Commercial Items (I–FSS–602).

As prescribed in 538.1203(c)(37), insert the following clause:

PRICE LISTS/BROCHURES FOR NON-COMMERCIAL ITEMS (I–FSS–602) (DATE)

(a) Each Contractor shall furnish price lists containing reproductions of actual photograph(s) or line drawing(s) of the items awarded. These price lists are to be sent to the list of addressees which will be provided, after formal approval of the price list format, by the Contracting Officer.

(b) Only those items awarded under this contract shall be shown in the price lists or catalogs for these items. Commercial advertising or sales promotional language is not permitted. As the price lists become one of the primary working tools of agencies, it is important that they accurately portray the contract items.

(c) The cover page format, certification and distribution for these items shall be in accordance with paragraph (b) of 552.238–15, Contract Price Lists (I–FSS–600).

(End of clause)

552.238–62 Office Copier Utilization Guidelines (I–FSS–624).

As prescribed in 538.1203(c)(38), insert the following clause:

OFFICE COPIER UTILIZATION GUIDELINES (I–FSS–624) (DATE)

(a) Ordering offices using this Federal Supply Schedule should select the appropriate and most economical copier equipment and/or plans for the application intended. The selection process should include a review of the functional and financial advantage of all available copying processes. FAR 7.4, Equipment Lease or Purchase, provides guidance in determining whether equipment should be acquired by lease or purchase; (FAR 8.404 provides ordering procedures applicable to Federal Supply Schedules).

(b) Pursuant to a recommendation of the General Accounting Office and in order to assist ordering offices in this evaluation, office copying machine Contractors are requested to include in their authorized price lists specific factual and objective information concerning the productivity and supply use associated with each copier. Such information should relate to the price of equipment and/or plans, price of supplies, rates of consumption, machine production rate, etc., and may include price-per-copy computations. The information furnished should be predicated upon equipment and supplies at prices awarded on the schedule contract. Supply costs should be based on the use of supplies offered by the Contractor for the specific model. Contractors should state all assumptions and the basis for their calculations.

(c) The principal value of the information requested will be to expedite the selection of the appropriate and most economical equipment and/or plan. This will largely depend upon the clarity and reliability of the information furnished. The Contractor should state that all calculations are his own and that he is solely responsible for their accuracy.

(End of clause)

552.238–63 Preference for Small Business Concerns (I–FSS–90).

As prescribed in 538.1203(c)(39), insert the following clause:

PREFERENCE FOR SMALL BUSINESS CONCERNS (I–FSS–90) (DATE)

Offerors are advised that the following statement will be included in the resultant Federal Supply Schedule: Where two or more

items at the same delivered price will meet the ordering agency's needs equally well, selection should be based on preference for the item of a small business concern that is also a labor surplus area concern. In making a selection on that basis, the same order of priority shall be used as that established for processing equal low bids in FAR 14.408–6. In making such a selection, the information in the Federal Supply Schedule as to the business size status or points of production of Contractors may be used for preliminary, but not conclusive, determination as to whether small business policies might be furthered through preferential award of the order. The extent to which additional and current information is obtained by an ordering agency is left to the discretion of the agency which should take into account the size of the order and other factors which the agency considers pertinent.

(End of clause)

552.238–64 Imprest Funds (Petty Cash) (I–FSS–918).

As prescribed in 538.1203(c)(40), insert the following clause:

IMPREST FUNDS (PETTY CASH) (I–FSS–918) (DATE)

The Contractor agrees to accept cash payment for purchases made under the terms of the contract in conformance with Federal Acquisition Regulation (FAR) 13.305.

(End of clause)

552.238–65 Commercial Sales Practices Format—Supplies and/or Services With an Established Catalog Price (CSP–1).

As prescribed in 538.1203(c)(41), insert the following clause:

COMMERCIAL SALES PRACTICES FORMAT—SUPPLIES AND/OR SERVICES WITH AN ESTABLISHED CATALOG PRICE (CSP–1) (DATE)

(a) Instructions for completing the commercial sales practices format:

(1) Provide information required in this clause in accordance with these instructions that is, to the best of your knowledge and belief, current, accurate, and complete on the date the offer is signed.

(2) Notify the contracting officer of any changes to catalog price or practices for discounts and/or concessions which occur after the date the offer is signed but before the close of negotiations.

(3) Provide discount information by model/supply line and/or service when discounts vary, as appropriate.

(4) When proposed services are subject to the Service Contract Act (SCA) of 1965, as amended, and pricing is equal to or higher than the appropriate wage determination, follow the format under (c)(5) of this clause. All wage determinations are included within the solicitation and follow procedures under FAR 22.10. If commercial labor category titles and duties/functions do not match the wage determination titles and duties/functions, then provide a ''cross walk'' to match up the titles and duties/functions.

(5) The Contracting Officer may ask for additional information to demonstrate that the products and/or services offered meet the definition of a commercial item and/or to determine whether the offered price(s) is fair and reasonable. When additional information is requested, the Contracting Officer will limit the request to information needed to complete the review.

(b) Guidance for completing (c)(5) is as follows:

Column 1—Customer (*e.g.*, a single customer or group).

''Customer'' or category of customer—The term customer includes, but is not limited to original equipment manufacturers (OEM), value added resellers (VARS), state and local Governments, distributors, educational institutions (an elementary, junior high, or degree granting school which maintains a regular faculty and established curriculum and an organized body of students), dealers, national accounts, and end users. As further clarification, distributors only sell to dealers/reseller/VARS; who only sell to end users.

Column 2—Base/Standard discount (%).

Indicate the best discount or range of discounts* given to the customer identified on column 1 (based on written discounting policies or standard commercial practices in the event they are not written discounting policies) and identify the catalog, price list, schedule, or other document the discount was given from without regard to quantity; terms and conditions of the agreements under which the discounts are given; and whether the agreements are written or oral.

If the discount disclosed is a combination of various discounts (prompt payment, FOB, etc.), separate the percentage for each type of discount. If the pricing document from which the discount was given to the customer identified in column 1 is different than the pricing document submitted upon which the offer is based, provide a copy of the pricing document to expedite the evaluation process.

Note: The intent is that the Offeror may have base/standard discounts, quantity/volume discounts, or both. Provide the discount information using the definitions of those columns as guidance.

* If a range of discounts is offered commercially, provide an explanation.

Column 3—Quantity/Volume Discount (%).

Insert the minimum quantity or sales volume which the identified customer must either purchase/order, per order or within a specified time period, to earn the discount. In addition, provide the terms necessary to obtain the minimum quantity or sales volume.

Column 4–FOB Term (Origin/Destination)

See FAR 47.3 for an explanation of FOB delivery terms.

For supplies, identify the shipping term necessary for the customer identified in column 1 to achieve the discount.

For services, performance will be assumed to be at the government facility, unless otherwise stated.

Column 5—Other Concessions (*e.g.*, Prompt Payment, etc.)

Identify other concessions and discounts offered to the customer identified in column 1 to include, but not limited to, prompt payment, freight allowances, extended warranties, extended price guarantees, free installation, bonus goods, rebates, purchase option credits, etc.

Discounts and concessions are defined in solicitation clause 552.212–70, Preparation of Offers (Multiple Award Schedule).

If the space provided is inadequate, the disclosure should be made on a separate sheet by reference.

(c) Commercial Sales Practices Format-Supplies and/or Services with an Established Catalog List.

(1) Name of Offeror_____ (SINs) _____

Note: Provide the following information for each SIN (or SINs for which information is the same). If discount information is different for SINs offered, duplicate this format.

(2) Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12-month period: $_____.

State the beginning and ending of the 12 month period. Beginning_____, ending_____.

(3) Show your total projected annual sales for each SIN offered. If a current Federal Supply Schedule Contractor for the SIN, use the previous 12 months of sales under the contract. If NOT a current Schedule Contractor, base projected sales on the previous 12 months of sales to the general public. Identify the basis of the projected sales.

SIN_____ $_____
SIN_____ $_____
SIN_____ $_____

(4) Provide the discount, including concessions being offered in response to this solicitation:_____

Based on written discounting policies (standard commercial practices in the event they are not written discounting policies), are the discounts and/or concessions, in any combination, which are being offered under this solicitation equal to or better than the best price offered to any customer acquiring the same items regardless of quantity or terms and conditions?

YES____ NO____

If yes, provide, in its entirety the data in paragraph (c)(5) of this clause, ONLY for the commercial customer with the greatest discount, including concessions.

If no, provide in its entirety, the data in paragraph (c)(5) of this clause, for ALL commercial customer(s) who receive the discounts and/or concessions, in any combination, that are equal to or greater than offered in response to this solicitation. In addition, provide an explanation of why the discounts and/or concessions are not being offered.

(5) Based on written discounting policies (standard commercial practices in the event they are not written discounting policies), provide information as requested for each SIN (or group of SINs for which the information is the same), or in an equivalent format developed by the Offeror. Rows should be added to accommodate as many customers as required:

Column 1 customer (*e.g.*, a single customer or group)	Column 2 base/standard discount (%) (Note: if there is a base discount and a volume discount, disclose both on the same row.)	Column 3 quantity/volume discount (%)	Column 4 FOB term (origin/destination)	Column 5 other concessions and discounts (*e.g.*, prompt payment, etc.) in any combination.

(6) Do any deviations from your written discounting policies (standard commercial practices in the event they are not written discounting policies), in any combination, disclosed in the (5) above ever result in better discounts (lower prices) or concessions than indicated? YES____ NO____. If yes, provide an explanation of the circumstances under which you deviate from your written policies or standard commercial sales practices disclosed in the chart and explain how often they occur.

Your explanation should include a discussion of situations that lead to deviations from standard practice, an explanation of how often they occur (frequency), and the controls you employ to assure the integrity of your pricing. Examples of typical deviations may include, but are not limited to, one time goodwill discounts to charity organizations or to compensate an otherwise disgruntled customer; a limited sale of obsolete or damaged goods; the sale of sample goods to a new customer; or the sales of prototype goods for testing purposes.

(d) If other than the manufacturer, *i.e.*, dealer/reseller, without significant sales to the general public:

(1) Provide manufacturers' information required by paragraphs (c)(1) through (6) of this clause for each item/SIN offered, if the manufacturer's sales under any resulting contract are expected to exceed $500,000.

(2) Obtain written authorization from the manufacturer(s) that grants the Contracting Officer or an authorized government representative access, at any time before award or before agreeing to a modification, to the manufacturer's sales records for the purpose of verifying the information submitted by the manufacturer.

(3) The contracting officer may require the information be submitted on electronic media with commercially available spreadsheet(s). The information may be provided by the manufacturer directly to the Government. If the manufacturer's item(s) is being offered by multiple dealers/resellers, only one copy of the requested information should be submitted to the Government, at a minimum, the commercial sales data must be updated annually.

(4) The Offeror must submit the following pricing information along with a listing of contact information regarding each of the manufacturers whose products included in the offer (include the manufacturer's name, address, the manufacturer's contact point, telephone number, and FAX number) for each model offered by SIN:

(i) Manufacturer's Name.

(ii) Manufacturer's Part Number.

(iii) Dealer's/Reseller's Part Number.

(iv) Product Description.

(v) Manufacturer's List Price.

(vi) Dealer's/Reseller's percentage discount from list price or net prices.

(vii) Proposed price excluding IFF.

(viii) Proposed discount from manufacturer's list price.

(ix) Proposed price including IFF (calculation: proposed price divided by (1 minus IFF rate)).

(End of clause)

552.238–66 Commercial Sales Practices Format—Supplies and/or Services with Market Pricing Without an Established Catalog Price (CSP–2).

As prescribed in 538.71(c)(42), insert the following clause:

COMMERCIAL SALES PRACTICES FORMAT—SUPPLIES AND/OR SERVICES WITH MARKET PRICING WITHOUT AN ESTABLISHED CATALOG PRICE (CSP–2) (DATE)

(a) Instructions for completing the commercial sales practices format.

(1) Provide information required of this clause in accordance with these instructions that is, to the best of your knowledge and belief, current, accurate, and complete on the date the offer is signed.

(2) Notify the contracting officer of any changes to pricing, terms or conditions that occur after the date the offer is signed, but before the close of negotiations.

(3) If pricing varies by line item, the information must be submitted per line item.

(4) When proposed line item(s) is subject to the Service Contract Act (SCA) of 1965, as amended, and pricing is equal to or higher than the appropriate wage determination, follow the format under paragraph (c)(4) of this clause. All wage determinations are included within the solicitation and follow procedures under FAR 22.10. If commercial labor category titles and duties/functions do not match the wage determination titles and duties/functions, then provide a ''cross walk'' to match up the titles and duties/functions.

(5) The Contracting Officer may ask for additional information to demonstrate that the line item(s) offered meets the definition of a commercial item and/or to determine whether the offered price(s) is fair and reasonable. When additional information is requested, the Contracting Officer will limit the request to information needed to complete the review.

(b)(1) Guidance for completing (b)(2) of this section, disclosures for supplies and/or services:

Column 1—Customer.

''Customer'' or category of customer—The term customer includes, but is not limited to original equipment manufacturers (OEM), value added resellers (VARS), state and local Governments, distributors, educational institutions (an elementary, junior high, or degree granting school which maintains a regular faculty and established curriculum and an organized body of students), dealers, national accounts, and end users, as applicable. For Offerors proposing supplies, as further clarification, distributors only sell to dealers/resellers/VARS; who only sell to end users.

Column 2—Contract/Agreement Number.

Indicate the contract/agreement number that corresponds with the pricing information being provided.

Columns 3—Type of Contract/Agreement.

Indicate if the referenced contract/agreement is a firm, fixed price (FFP); firm, fixed price with economic price adjustment (FFP EPA), etc.

Column 4—Contract/Agreement Period.

Provide the initial award date and end date. If options were part of the original award, indicate the option(s) periods independently.

Column 5—Acted as a Prime or a Sub on the Contract/Agreement.

State in what capacity, prime or sub, the Offeror acted as on the referenced contract/agreement.

Column 6—Customer Point of Contact and Contact Information.

Provide the contact information for the purchaser/buyer for the referenced contract/agreement.

(2) Previous commercial contract information:

Contract	*Column 1* Customer	*Column 2* Contract/ agreement number	*Column 3* Type of contract/agreement (*ex.*, firm fixed price, cost plus, etc.)	*Column 4* Contract/ agreement period	*Column 5* Acted as prime or sum on contract agreement	*Column 6* Customer point of contact and contact information
1						
2						
3						

(c)(1) Guidance for completing (c)(2) of this section, disclosures for services ONLY:

Column 1—Labor Category or Title.

Provide the title of the labor category that is being proposed, as awarded under the referenced contract/agreement from (c)(4).

Column 2-Experience/Education/ Certification Level.

Indicate the level of experience, education (degree) and/or certification associated with the proposed labor category or title. (e.g., 7–10 yrs/BA/BS/MBA/Level III).

Columns 3A–3C Billed Rates.

Indicate the lowest net billable rate offered to any commercial customer at Offeror site and/or other than Offeror site in the appropriate columns of this clause. ''Billed Rates'' means fully, loaded/burdened rates which may be indicated on the invoice to the customer listed in (c)(4). In the event the Offeror does not have significant commercial sales, provide disclosures for government sales. As used in this solicitation, ''commercial sales'' are defined as sales to the general public, including state and local government. Unit of measure is hourly rate.

If the billable rates being offered to the government under this solicitation are equal to or lower than the lowest net billable rate offered to any commercial customer, then fill in column 3A only.

If the billable rates being offered to the government under this solicitation are not equal to or lower than the lowest net billable rate offered to any commercial customer, provide an explanation and complete columns 3A, 3B and 3C.

Column 4—Discount, If Offered.

Insert the discount, if any, being offered off the lowest net billable rate.

Column 5—Rate Offered to FSS (Excluding IFF).

Insert the rate for the labor category/title that is being proposed. This does not include the Industrial Funding Fee.

Column 6—Rate Offered to FSS (Including IFF).

Insert the rate for the labor category/title that is being proposed. This includes the Industrial Funding Fee.

Note: The correct method for calculating the IFF is:

Proposed FSS rate/(1 minus the applicable IFF) = correct calculated proposed FSS Rate.

Example: FSS rate = $100.00. IFF = 0.75%. $100.00 / (1 − .0075) = $100.00 / .9925 = $100.7556 which rounds to $100.76.

(2) Commercial Sales Practices Format—Services with Market Prices without an Established Catalog Price.

(1) Name of Offeror _____ SIN(s) _____.

Note: Provide the following information for each SIN (or SINs for which information is the same). For each SIN with different services, the Offeror must duplicate this format.

(2) Provide the total dollar sales for all customers, including government, for the most recently available 12-month period: $.

The beginning and ending of the 12-month period. Beginning _____, ending _____.

(3) For each SIN being proposed, provide the actual sales for the most recent available 12-month period:

The beginning and ending of the 12-month period. Beginning _____, ending _____.

SIN _____

Commercial Sales _____

Federal Government Sales _____

(4) Show your total projected annual sales for each SIN offered. If a current Federal Supply Schedule Contractor for the SIN, use the previous 12 months of sales under the contract. If NOT a current Schedule Contractor, base projected sales on the previous 12 months of sales to the general public. Identify the basis of the projected sales.

SIN_____ $_____

SIN_____ $_____

SIN_____ $_____

LABOR RATE INFORMATION:

SIN(s): _____

Column 1 Customer	*Column 2* Experience/ education cert. level	*Column 3A* Contract/ agreement 1 billed rates	*Column 3B* Contract/ agreement 2 billed rates	*Column 3C* Contract/ agreement 3 billed rates	*Column 4* Discount, if offered	*Column 5* Rate offered to FSS (excluding IFF)	*Column 6* Rate offered to FSS (including IFF)
Labor category or title	Experience/ education/cert. level	Offeror site/ other than offeror site	Offeror site/ other than offeror site	Offeror site/ other than offeror site	Percent (%)	Offeror site/ other than offeror site	Offeror site/ other than offeror site

(d)(1) Guidance for completing (d)(2) of this section, disclosures for flat rate services and/or supplies ONLY:

Column 1—Title of flat rate services and/or supplies.

Under this solicitation, ''flat rate'' is defined as comprehensive, fixed pricing that includes all elements of the proposed supply and/or service and is not based on an established catalog price.

Provide the title of the flat rate services and/or supplies that are being proposed, as awarded under the referenced contract/agreement from (b).

Column 2—Itemized description of tasks, outcome, or supply.

Provide a concise description of the end deliverable, as awarded under the referenced contract/agreement from (b). This could include descriptive literature, reports, etc.

Columns 3A–3C Contract/Agreement Billed Pricing.

If offering flat rate services, indicate the lowest net billable price offered to any commercial customer at Offeror site and/or other than Offeror site in the appropriate columns of this clause, as awarded under the referenced contract/agreement from (b).

If offering flat rate supplies, indicate the lowest net billable price offered to any commercial customer at FOB terms under the appropriate column, as awarded under the referenced contract/agreement from (b).

If the billable prices being offered to the government under this solicitation are equal to or lower than the lowest net billed price offered to any commercial customer, then fill in column 3A only.

If the billable prices being offered to the government under this solicitation are not equal to or lower than the lowest net billable price offered to any commercial customer, provide an explanation and complete columns 3A, 3B and 3C.

Column 4—Discount, If Offered.

Insert the discount, if any, being offered off the lowest net billable rate.

Column 5—Rate Offered to FSS (Excluding IFF).

Insert the pricing for the service and/or supply that is being proposed. This does not include the Industrial Funding Fee.

Column 6—Rate Offered to FSS (Including IFF).

Insert the pricing for the service and/or supply that is being proposed. This includes the Industrial Funding Fee.

Note: The correct method for calculating the IFF is:

Proposed FSS pricing / (1 minus the applicable IFF) = correct calculated proposed FSS price.

Example:

FSS pricing = $100.00.

IFF = 0.75%.

$100.00 / (1-.0075) = $100.00 / .9925 = $100.7556, which rounds to $100.76.

(d)(2) Commercial Sales Practices Format—Flat Rate Services and/or Supplies with Market Prices without an Established Catalog Price.

(1) Name of Offeror _____ SIN(s) _____.

Note: Provide the following information for each SIN (or SINs for which information is the same). For each SIN with different services, the Offeror must duplicate this format.

(2) Provide the total dollar sales for all customers, including government, for the most recently available 12-month period: $_____. The beginning and ending of the 12-month period. Beginning _____, ending _____.

(3) For each SIN being proposed, provide the actual sales for the most recent available 12-month period:

The beginning and ending of the 12-month period. Beginning _____, ending _____.

SIN sales _____

Commercial Sales _____

Federal Government Sales _____

(4) Show your total projected annual sales for each SIN offered. If a current Federal Supply Schedule Contractor for the SIN, use the previous 12 months of sales under the contract. If NOT a current Schedule Contractor, base projected sales on the previous 12 months of sales to the general public. Identify the basis of the projected sales.

SIN _____ $ _____

SIN _____ $ _____

SIN _____ $ _____

(5) FLAT RATE SERVICES AND/OR SUPPLIES INFORMATION:

SIN(s): _____.

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Column 1	Column 2	Column 3A Contract / Agreement 1 Billed Pricing		Column 3B Contract / Agreement 2 Billed Pricing		Column 3C Contract / Agreement 3 Billed Pricing		Column 4 Discount, if Offered	Column 5 Pricing Offered To FSS (excluding IFF)		Column 6 Pricing Offered To FSS (including IFF)	
Labor Category or Title	Itemized description of task, outcome, or supply	Performance at Offeror site (service) / FOB Origin (supplies	Performance at Other than Offeror Site (service) / FOB Destination (supplies)	Performance at Offeror site (service) / FOB Origin (supplies)	Performance at Other than Offeror Site (service) / FOB Destination (supplies)	Performance at Offeror site (service) / FOB Origin (supplies)	Performance at Other than Offeror Site (service) / FOB Destination (supplies)	Percent (%)	Performance at Offeror site (service) / FOB Origin (supplies)	Performance at Other than Offeror Site (service) / FOB Destination (supplies)	Performance at Offeror site (service) / FOB Origin (supplies)	Performance at Other than Offeror Site (service) / FOB Destination (supplies)

BILLING CODE 6820–61–C

(End of clause)

552.243–72 [Redesignated as 552.238–67 and Revised]

15. Redesignate section 552.243.72 as section 552.238–67 and revise it to read as follows:

552.238–67 MODIFICATIONS (MULTIPLE AWARD SCHEDULE).

As prescribed in 538.1203(c)(43), insert the following clause:

MODIFICATIONS (MULTIPLE AWARD SCHEDULE) (DATE)

(a) *General.* The Contractor may request a contract modification by submitting a request to the Contracting Officer for approval, except as noted in paragraph (d) of this clause. At a minimum, every request shall describe the proposed change(s) and provide the rationale for the requested change(s).

(b) *Types of Modifications.* (1) Additional items/additional SIN's. When requesting additions, the following information must be submitted:

(i) Information requested in paragraphs (1) and (2) of the Commercial Sales Practice Format to add SIN's.

(ii) Discount information for the new items(s) or new SIN(s). Specifically, submit the information requested in paragraphs 3 through 5 of the Commercial Sales Practice Format. If this information is the same as the initial award, a statement to that effect may be submitted instead.

(iii) Information about the new item(s) or the item(s) under the new SIN(s) as described in 552.238–96, Preparation of Offer (Multiple Award Schedule) is required.

(iv) Delivery time(s) for the new item(s) or the item(s) under the new SIN(s) must be submitted in accordance with 552.238–95, Commercial Delivery Schedule (Multiple Award Schedule).

(v) Production point(s) for the new item(s) or the item(s) under the new SIN(s) must be submitted if required by 52.215 6, Place of Performance.

(vi) Hazardous Material information (if applicable) must be submitted as required by 52.223 3 (ALT I), Hazardous Material Identification and Material Safety Data.

(vii) Any information requested by 52.212 3(f), Offeror Representations and Certifications—Commercial Items, that may be necessary to assure compliance with FAR 52.225 1, Buy American Act-Balance of Payments Programs—Supplies.

(2) *Deletions.* The Contractors shall provide an explanation for the deletion. The Government reserves the right to reject any subsequent offer of the same item or a substantially equal item at a higher price during the same contract period, if the Contracting Officer finds the higher price to be unreasonable when compared with the deleted item.

(3) *Price Reduction.* The Contractor shall indicate whether the price reduction falls under the item (i), (ii), or (iii) of paragraph (c)(1) of the Price Reductions clause at 552.238–75. If the Price reduction falls under item (i), the Contractor shall submit a copy of the dated commercial price list. If the price reduction falls under item (ii) or (iii), the Contractor shall submit a copy of the applicable price list(s), bulletins or letters or customer agreements which outline the

effective date, duration, terms and conditions of the price reduction.

(c) *Effective dates.* The effective date of any modification is the date specified in the modification, except as otherwise provided in the Price Reductions clause at 552.238–75.

(d) *Electronic File Updates.* The Contractor shall update electronic file submissions to reflect all modifications. For additional items or SINs, the Contractor shall obtain the Contracting Officer's approval before transmitting changes. Contract modifications will not be made effective until the Government receives the electronic file updates. The Contractor may transmit price reductions, item deletions, and corrections without prior approval. However, the Contractor shall notify the Contracting Officer as set forth in the Price Reductions clause at 552.238–75.

(e) *Amendments to Paper Federal Supply Schedule Price Lists.* (1) The Contractor must provide supplements to its paper price lists, reflecting the most current changes. The Contractor may either:

(i) Distribute a supplemental paper Federal Supply Schedule Price List within 15 workdays after the effective date of each modification.

(ii) Distribute quarterly cumulative supplements. The period covered by a cumulative supplement is at the discretion of the Contractor, but may not exceed three calendar months from the effective date of the earliest modification. For example, if the first modification occurs in February, the quarterly supplement must cover February–April, and every 3 month period after. The Contractor must distribute each quarterly cumulative supplement within 15 workdays from the last day of the calendar quarter.

(2) At a minimum, the Contractor shall distribute each supplement to those ordering activities that previously received the basic document. In addition, the Contractor shall submit two copies of each supplement to the Contracting Officer and one copy to the FSS Schedule Information Center.

(End of clause)

16. Revise the newly designated section 552.238–68 to read as follows:

552.238–68 Economic Price Adjustment—Supplies and/or Services With an Established Catalog Price.

As prescribed in 538.1203(c)(44), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—SUPPLIES AND/OR SERVICES WITH AN ESTABLISHED CATALOG PRICE (DATE)

Price adjustments include price increases and price decreases. Adjustments will be considered as follows:

(a) Contractors shall submit price decreases anytime during the contract period in which they occur. Price decreases will be handled in accordance with the provisions of the Price Reduction Clause.

(b) Contractors may request price increases providing all of the following conditions are met:

(1) Increases resulting from a reissue or other modification of the Contractor's commercial catalog/price list that was used as the basis for the contract award.

(2) Increases are requested before the last 60 days of the contract period.

(3) At least 30 days elapse between requested increases.

(c) The following material shall be submitted with the request for a price increase:

(1) A copy of the commercial catalog/price list showing the price increase and the effective date for commercial customers.

(2) Commercial Sales Practice format regarding the Contractor's commercial pricing practice relating to the reissued or modified catalog/price list, or a certification that no change has occurred in the data since completion of the initial negotiation or a subsequent submission.

(3) Documentation supporting the reasonableness of the price increase.

(d) The Government reserves the right to exercise one of the following options:

(1) Accept the Contractor's price increases as requested when all conditions of (b), (c), and (d) of this clause are satisfied;

(2) Negotiate more favorable discounts from the new commercial prices when the total increase requested is not supported; or

(3) Remove the supply(s) from contract involved pursuant to the Cancellation Clause of this contract, when the increase requested is not supported.

(e) The contract modification reflecting the price adjustment shall be made effective upon signature of the Contracting Officer, provided that in no event shall such price adjustment be effective prior to the effective date of the commercial price increases. The increased contract prices shall apply to delivery orders issued to the Contractor on or after the effective date of the contract modification.

(End of clause)

Alternate I (Date), for the AbilityOne Schedule ONLY, add the following paragraph before paragraph (a) in this clause and renumber the paragraphs.

(a) AbilityOne (formerly Javits-Wagner-O'Day (JWOD)) items are not covered by this Economic Price Adjustment Clause. The Committee for Purchase from People who are Blind or Severely Disabled is responsible for determining fair market prices are paid by the Government customers for AbilityOne (formerly JWOD) items, the Distributor must agree to charge prices that are acceptable to the Committee. The Committee for Purchase from People who are Blind or Severely Disabled will administer price changes on an annual basis.

17. Add section 552.238–69 to read as follows:

552.238–69 Economic Price Adjustment—Supplies and/or Services With Market Pricing Without an Established Catalog Price (I–FSS–969).

As prescribed in 538.1203(c)(45), insert the following clause:

ECONOMIC PRICE ADJUSTMENT-SUPPLIES AND/OR SERVICES WITH MARKET PRICING WITHOUT AN ESTABLISHED CATALOG PRICE (I–FSS–969) (DATE)

Price adjustments include price increases and price decreases. Adjustments will be considered as follows:

(a) Contractors shall submit price decreases anytime during the contract period in which they occur. Price decreases will be handled in accordance with the provisions of the Price Reduction Clause.

(b) There are two types of economic price adjustments (EPAs) possible under the Schedules program for contracts not based on commercial catalogs or price lists as described in this clause. Price adjustments may be effective on or after the first 12 months of the contract period on the following basis:

(1) Adjustments based on escalation rates negotiated prior to contract award. Normally, when escalation rates are negotiated, they result in a fixed price for the term of the contract. No separate contract modification will be provided when increases are based on negotiated escalation rates. Price increases will be effective on the 12-month anniversary date of the contract effective date, subject to paragraph (f) of this clause.

(2) Adjustments based on an agreed-upon market indicator prior to award. The market indicator, as used in this clause, means the originally released public index, public survey or other public, based market indicator. The market indicator shall be the originally released index, survey or market indicator, not seasonally adjusted, published by the [to be negotiated] and made available at [to be identified]. Any price adjustment shall be based on the percentage change in the designated (*i.e.*, indicator identification and date) market indicator from the initial award to the latest available as of the anniversary date of the contract effective date, subject to paragraph (e) of this clause. If the market indicator is discontinued or deemed no longer available or reliable by the Government, the Government and the Contractor will mutually agree to a substitute. The contract modification reflecting the price adjustment will be effective upon approval by the Contracting Officer, subject to paragraph (g) of this clause. The adjusted prices shall apply to orders issued to the Contractor on or after the effective date of the contract modification.

(c) Notwithstanding the two economic price adjustments discussed in this clause, the Government recognizes the potential impact of unforeseeable major changes in market conditions. For those cases where such changes do occur, the Contracting Officer will review requests to make adjustments, subject to the Government's examination of industry-wide market conditions and the conditions in paragraphs (d) and (e) of this clause. If adjustments are accepted, the contract will be modified accordingly. The determination of whether or not extra-ordinary circumstances exist rests with the Contracting Officer. The determination of an appropriate mechanism of adjustment will be subject to negotiations.

(d) Conditions of Price change requests under paragraphs (b)(2) and (c) of this clause:

(1) No more than three increases will be considered during each succeeding 12-month period of the contract. (For succeeding contract periods of less than 12 months, up to three increases will be considered subject to the other conditions of subparagraph (b)).

(2) Increases are requested before the last 60 days of the contract period, including options.

(3) At least 30 days elapse between requested increases.

(4) In any contract period during which price increases will be considered, the aggregate of the increases during any 12-month period shall not exceed *_____* percent (*_____* percent) of the contract unit price in effect at the end of the preceding 12-month period. The Government reserves the right to raise the ceiling when market conditions during the contract period support such a change.

(e) The following material shall be submitted with request for a price increase under paragraphs (b)(2) and (c) of this clause:

(1) A copy of the index, survey or pricing indicator showing the price increase and the effective date.

(2) Commercial Sales Practice format, per contract clause 52.215–21 Alternate IV, demonstrating the relationship of the Contractor's commercial pricing practice to the adjusted pricing proposed or a certification that no change has occurred in the data since completion of the initial negotiation or a subsequent submission.

(3) Any other documentation requested by the Contracting Officer to support the reasonableness of the price increase.

(f) The Government reserves the right to exercise one of the following options:

(1) Accept the Contractor's price increases as requested when all conditions of (b), (c), (d), and (e) of this clause are satisfied;

(2) Negotiate more favorable prices when the total increase requested is not supported; or

(3) Decline the price increase when the request is not supported. The Contractor may remove the item(s) from contract involved pursuant to the Cancellation Clause of this contract.

(g) Effective Date of Increases: No price increase shall be effective until the Government receives the electronic file updates pursuant to GSAR 552.238–67, Modifications (Multiple Award Schedule) (Currently 552.243–72).

(h) All MAS contracts remain subject to contract clauses GSAR 552.238–75, ''Price Reductions''; and 552.238–98, ''Price Adjustment—Failure to Provide Accurate Information.'' In the event the application of an economic price adjustment results in a price less favorable to the Government than the price relationship established during negotiation between the MAS price and the price to the designated customer, the Government will maintain the price relationship to the designated customer.

(End of clause)

552.238–70 [Amended]

18. Amend section 552.238–70 by removing from the introductory paragraph ''538.273(a)(1)'' and adding ''538.1203(c)(46)'' in its place.

19. Revise section 552.238–71 to read as follows:

552.238–71 Submission and Distribution of Authorized FSS Schedule Price Lists.

As prescribed in 538.1203(c)(47), insert the following clause:

SUBMISSION AND DISTRIBUTION OF AUTHORIZED FSS PRICE LISTS (DATE)

(a)(1) The Contracting Officer will return one copy of the Authorized FSS Schedule Pricelist to the Contractor with the notification of contract award.

(2) The Contractor may print and distribute the awarded price list without written approval from the Contracting Officer. The price list must include all terms and conditions of the cited contract. Note: It shall not absolve the Contractor from responsibility for the accuracy of the price list. Consequently, the Contractor would be required to revise the price list to correct any significant errors subsequently found by the Contracting Officer and reprint and distribute at the Contractor's expense. If significant pricing errors are found, the Government may cancel the contract and the Contractor may be liable for any price adjustments for overpricing.

(b)(1) The Contractor shall provide to the GSA Contracting Officer:

(i) Two paper copies of Authorized FSS Schedule Pricelist; and

(ii) The Authorized FSS Schedule Pricelist on a common-use electronic medium.

Note: The Contracting Officer will provide detailed instructions for the electronic submission with the award notification. Some structured data entry in a prescribed format may be required.

(2) The Contractor shall provide to each addressee on the mailing list either:

(i) One paper copy of the Authorized FSS Schedule Price List; or

(ii) A self-addressed, postage-paid envelope or postcard to be returned by addressees that want to receive a paper copy of the price list. The Contractor shall distribute price lists within 20 calendar days after receipt of returned requests.

(3) The Contractor shall advise each addressee of the availability of price list information through the online Multiple Award Schedule electronic data base.

(c) The Contracting Officer will provide detailed instructions for the electronic submission with the award notification. Some structured data entry in a prescribed format may be required.

(d) During the period of the contract, the Contractor shall provide one copy of its Authorized FSS Schedule Pricelist to any authorized schedule user, upon request.

(End of clause)

552.238–72 [Amended]

20. Amend section 552.238–72 by removing from the introductory paragraph ''538.273(a)(3)'' and adding ''538.1203(c)(48)'' in its place.

552.238–73 [Amended]

21. Amend section 552.238–73 by removing from the introductory paragraph ''538.273(a)(4)'' and adding ''538.1203(c)(49)'' in its place.

22. Revise section 552.238–74 to read as follows:

552.238–74 Industrial Funding Fee and Sales Reporting.

As prescribed in 538.1203(c)(50), insert the following clause:

INDUSTRIAL FUNDING FEE AND SALES REPORTING (DATE)

(a) Reporting Federal Supply Schedule Sales. The Contractor shall report all contract sales under this contract as follows:

(1) The Contractor shall accurately report the dollar value, in U.S. dollars and rounded to the nearest whole dollar, of all sales under this contract by calendar quarter (January 1–March 31, April 1–June 30, July 1–September 30, and October 1–December 31). The dollar value of a sale is the price paid by the Schedule ordering activity for supplies and/or services on a Schedule task or delivery order. The reported contract sales value shall include the Industrial Funding Fee (IFF). The Contractor shall maintain a consistent accounting method of sales reporting, based on the Contractor's established commercial accounting practice. The acceptable points at which sales may be reported include—

(i) Receipt of order;

(ii) Shipment or delivery, as applicable;

(iii) Issuance of an invoice; or

(iv) Payment.

(2) Contract sales shall be rounded to the nearest whole dollar and reported within 30 calendar days following the completion of each reporting quarter. The Contractor shall electronically report the quarterly dollar value of sales, including ''zero'' sales, by utilizing the automated reporting system. Prior to using this automated system, the Contractor shall complete contract registration at the Vendor Support Center (VSC) website. The website address, as well as registration instructions and reporting procedures, will be provided at the time of award. The Contractor shall report sales separately for each Special Item Number (SIN) and shall continue to furnish quarterly reports through physical completion of the last outstanding task order or delivery order of the contract.

(3) Reportable sales under the contract are those resulting from sales of contract items to authorized users unless the purchase was conducted pursuant to a separate contracting authority such as a Governmentwide Acquisition Contract (GWAC); a separately awarded FAR Part 12, FAR Part 13, FAR Part 14, or FAR Part 15 procurement; or a non-FAR contract. Sales made to state and local governments under Cooperative Purchasing, Recovery Purchasing, or other similar authority are reportable sales.

(4) The Contractor shall convert the total value of sales made in foreign currency to U.S. dollars using the ''Treasury Reporting Rates of Exchange'' issued by the U.S. Department of Treasury, Financial Management Service. The Contractor shall

use the issue of the Treasury report in effect on the last day of the calendar quarter. The report is available from Financial Management Service, International Funds Branch, Telephone: (202) 874–7994, Internet: *http://www.fms.treas.gov/intn.html.*

(b) Remitting the Industrial Funding Fee (IFF). The Contractor shall remit the IFF at the rate set by GSA's FSS.

(1) The Multiple Award Schedule Program recoups it operating costs by charging an Industrial Funding Fee (IFF) to ordering activities. GSA receives the IFF from ordering activities by including the fee in prices/rates of awarded schedule supplies and/or services. The fee is collected by the Contractor and is passed to GSA. Offerors must include the IFF in their prices/rates. Contractors may NOT absorb the fee and the fee is non-negotiable. GSA will post notice of the current IFF rate at the Vendor Support Center.

(2) The Contractor shall remit the IFF electronically, rounded to the nearest whole U.S. dollar. The IFF must be received by GSA within 30 calendar days after the end of the reporting quarter. Final payment must be received by GSA within 30 days after physical completion of the last outstanding task order or delivery order of the contract. Specific instructions for electronically remitting the IFF will be made available through the Vendor Support Center website.

(3) The IFF represents a percentage of the total quarterly sales reported. This percentage is set at the discretion of GSA, with the unilateral right to change the percentage at any time, but not more than once per year. Reasonable notice prior to the effective date of the change will be provided.

(4) Failure to remit the full amount of the IFF within 30 calendar days after the end of the applicable reporting period constitutes a contract debt to the United States Government under the terms of FAR Subpart 32.6. The Government may exercise all rights under the Debt Collection Improvement Act of 1996, including withholding payments or interest on the debt (see FAR clause 52.232–17, Interest). Should the Contractor fail to submit the required sales reports, falsify them, or fail to timely pay the IFF, this is sufficient cause for the Government to terminate the contract for cause.

(End of clause)

552.238–75 [Amended]

23. Amend section 552.238–75 by removing from the introductory paragraph ''538.273(b)(2)'' and adding ''538.1203(c)(51)'' in its place.

552.238–77 [Amended]

24. Amend section 552.238–77 by removing from the introductory paragraph ''538.7004(a)'' and adding ''538.1203(c)(52)'' in its place.

552.238–78 [Amended]

25. Amend section 552.238–78 by—

a. Removing from the introductory paragraph ''538.7004(b)'' and adding ''538.1203(c)(53)'' in its place; and

b. Removing from Alternate I ''538.7104(b)'' and adding ''538.1203(c)(53)'' in its place; and

552.238–79 [Amended]

26. Amend section 552.238–79 by removing from the introductory paragraph ''538.7004(c)'' and adding ''538.1203(c)(54)'' in its place;

27. Add sections 552.238–81 through 552.238–85 to read as follow:

552.238–81 Placement of Orders by Eligible Ordering Activities.

As prescribed in 538.1203(c)(55) insert the following clause:

PLACEMENT OF ORDERS BY ELIGIBLE ORDERING ACTIVITIES (DATE)

(a) See 552.238–78, Scope of Contract (Eligible Ordering Activities), for who may order under this contract.

(b) Orders may be placed through Electronic Data Interchange (EDI) or mailed in paper form. EDI orders shall be placed using the American National Standards Institute (ANSI) X12 Standard for Electronic Data Interchange (EDI) format.

(c) If the Contractor agrees, GSA's Federal Acquisition Service (FAS) will place all orders by EDI using computer-to-computer EDI. If computer-to-computer EDI is not possible, FAS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission. Subject to the Contractor's agreement, other eligible ordering activities may place orders by EDI.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into one or more Trading Partner Agreements (TPA) with each ordering activity placing orders electronically in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify, among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation. Ordering activities may obtain a sample format to customize as needed from the office specified in paragraph (g) of this clause.

(e) The Contractor shall be responsible for providing its own hardware and software necessary to transmit and receive data electronically. Additionally, each party to the TPA shall be responsible for the costs associated with its use of third party provider services.

(f) Nothing in the TPA will invalidate any part of this contract between the Contractor and the General Services Administration. All terms and conditions of this contract that otherwise would be applicable to a mailed order shall apply to the electronic order.

(g) The basic content and format of the TPA will be provided by: General Services Administration, Acquisition Operations and Electronic Commerce Center (FCS) Washington, DC 20406, Telephone: [Contracting Officer insert appropriate telephone numbers], FAX: [Contracting Officer insert appropriate telephone numbers].

(End of clause)

Alternate I (Date). As prescribed in 538.1203(c)(55), substitute the following paragraphs (a), (c), and (d) for paragraphs (a), (c), and (d) of the basic clause:

(a) See 552.238–78, Scope of Contract (Eligible Ordering Activities), Alternate I for who may order under this contract.

(c) If the Contractor agrees, GSA's Federal Acquisition Service (FAS) will place all orders by EDI using computer-to-computer EDI. If computer-to-computer EDI is not possible, FAS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission. Subject to the Contractor's agreement, other eligible ordering activities may place orders by EDI.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into one or more Trading Partner Agreements (TPA) with each ordering activity placing orders electronically in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify, among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation. Ordering activities may obtain a sample format to customize as needed from the office specified in paragraph (g) of this clause.

Alternate II (Date). As prescribed in 538.1203(c)(55) substitute the following paragraphs (a), (c), and (d) for paragraphs (a), (c), and (d) of the basic clause:

(a) See 552.238–78, Scope of Contract (Eligible Ordering Activities), Alternate II for who may order under this contract.

(c) If the Contractor agrees, GSA's Federal Acquisition Service (FAS) will place all orders by EDI using computer-to-computer EDI. If computer-to-computer EDI is not possible, FAS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission. Subject to the Contractor's agreement, other eligible ordering activities may place orders by EDI.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into one or more Trading Partner Agreements (TPA) with each ordering activity placing orders electronically in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify, among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation. Ordering activities may obtain a sample format to customize as needed from the office specified in paragraph (g) of this clause.

(End of clause)

552.238–82 Discounts for Prompt Payment (Federal Supply Schedule).

As prescribed in 538.1203(c)(56), insert the following clause:

DISCOUNTS FOR PROMPT PAYMENT (FEDERAL SUPPLY SCHEDULES) (DATE)

(a) Discounts for early payment (hereinafter referred to as ''discounts'' or ''the discount'') will be considered in evaluating the relationship of the Offeror's concessions to the Government vis-a-vis the Offeror's concessions to its commercial customers, but only to the extent indicated in this clause.

(b) Discounts will not be considered to determine the low Offeror in the situation described in the ''Offers on Identical Products'' provision of this solicitation.

(c) Uneconomical discounts will not be considered as meeting the criteria for award established by the Government. In this connection, a discount will be considered uneconomical if the annualized rate of return for earning the discount is lower than the ''value of funds'' rate established by the Department of the Treasury and published quarterly in the **Federal Register**. The ''value of funds'' rate applied will be the rate in effect on the date specified for the receipt of offers.

(d) Discounts for early payment may be offered either in the original offer or on individual invoices submitted under the resulting contract. Discounts offered will be taken by the Government if payment is made within the discount period specified.

(e) Discounts that are included in offers become a part of the resulting contracts and are binding on the Contractor for all orders placed under the contract. Discounts offered only on individual invoices will be binding on the Contractor only for the particular invoice on which the discount is offered.

(f) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of clause)

552.238–83 Contractor's Billing Responsibilities.

As prescribed in 538.1203(c)(57) insert the following clause:

CONTRACTOR'S BILLING RESPONSIBILITIES (DATE)

(a) The Contractor is required to perform all billings made pursuant to this contract. However, if the Contractor has dealers that participate on the contract and the billing/payment process by the Contractor for sales made by the dealer is a significant administrative burden, the following alternative procedures may be used. Where dealers are allowed by the Contractor to bill ordering activities and accept payment in the Contractor's name, the Contractor agrees to obtain from all dealers participating in the performance of the contract a written agreement, which will require dealers to—

(1) Comply with the same terms and conditions regarding prices as the Contractor for sales made under the contract;

(2) Maintain a system of reporting sales under the contract to the manufacturer, which includes—

(i) The date of sale;

(ii) The ordering activity to which the sale was made;

(iii) The service or supply/model sold;

(iv) The quantity of each service or supply/model sold;

(v) The price at which it was sold, including discounts; and

(vi) All other significant sales data.

(3) Be subject to audit by the Government, with respect to sales made under the contract; and

(4) Place orders and accept payments in the name of the Contractor in care of the dealer.

(b) An agreement between a Contractor and its dealers pursuant to this procedure will not establish privity of contract between dealers and the Government.

(End of clause)

552.238–84 Payment by Credit Card.

As prescribed in 538.1203(c)(58) insert the following clause:

PAYMENT BY CREDIT CARD (DATE)

(a) *Definitions.*

Credit card means any credit card used to pay for purchases, including the Governmentwide Commercial Purchase Card.

Governmentwide commercial purchase card means a uniquely numbered credit card issued by a Contractor under GSA's Governmentwide Contract for Fleet, Travel, and Purchase Card Services to named individual Government employees or entities to pay for official Government purchases.

Oral order means an order placed orally either in person or by telephone.

(b) The Contractor must accept the credit card for payments equal to or less than the micro-purchase threshold (see Federal Acquisition Regulation 2.101) for oral or written orders under this contract.

(c) The Contractor and the ordering agency may agree to use the credit card for dollar amounts over the micro-purchase threshold, and the Government encourages the Contractor to accept payment by the purchase card. The dollar value of a purchase card action must not exceed the ordering agency's established limit. If the Contractor will not accept payment by the purchase card for an order exceeding the micro-purchase threshold, the Contractor must so advise the ordering agency within 24 hours of receipt of the order.

(d) The Contractor shall not process a transaction for payment through the credit card clearinghouse until the purchased supplies have been shipped or services performed. Unless the cardholder requests correction or replacement of a defective or faulty item under other contract requirements, the Contractor must immediately credit a cardholder's account for items returned as defective or faulty.

(e) Payments made using the Governmentwide commercial purchase card are not eligible for any negotiated prompt payment discount. Payment made using an ordering activity debit card will receive the applicable prompt payment discount.

(End of clause)

552.238–85 Payments by Non-Federal Ordering Activities.

As prescribed in 538.1203(c)(59), insert the following clause:

PAYMENTS BY NON-FEDERAL ORDERING ACTIVITIES (DATE)

If eligible non-federal ordering activities are subject to a State prompt payment law, the terms and conditions of the applicable State law apply to the orders placed under this contract by such activities. If eligible non-federal ordering activities are not subject to a State prompt payment law, the terms and conditions of the Federal Prompt Payment Act as reflected in Federal Acquisition Regulation clause 52.232–25, Prompt Payment, or 52.212–4, Contract Terms and Conditions—Commercial Items, apply to such activities in the same manner as to Federal ordering activities.

(End of clause)

552.246–73 [Redesignated as 552.238–86 and Revised]

28. Redesignate section 552.246–73 as section 552.238–86 and revise it to read as follows:

552.238–86 Warranty-Multiple Award Schedule.

As prescribed in 538.1203(c)(60), insert the following clause:

WARRANTY-MULTIPLE AWARD SCHEDULE (DATE)

(a) *Applicable to domestic locations.* Unless specified otherwise in this contract, the Contractor's standard commercial warranty as stated in the Contractor's commercial price list applies to this contract.

(b) *Applicable to overseas destinations.* Unless specified otherwise in this contract, the Contractor's standard commercial warranty as stated in the commercial price list applies to this contract, except as follows:

(1) The Contractor must provide, at a minimum, a warranty on all non-consumable parts for a period of 90 days from the date that the ordering activity accepts the supply.

(2) The Contractor must supply parts and labor required under the warranty provisions free of charge.

(3) The Contractor must bear the transportation costs of returning the supplies to and from the repair facility, or the costs involved with Contractor personnel traveling to the ordering activity facility for the purpose of repairing the supply onsite, during the 90-day warranty period.

(End of clause)

29. Add sections 552.238–87 through 552.238–94 to read as follows:

552.238–87 Warranty (I–FSS–542–A).

As prescribed in 538.1203(c)(61), insert the following clause:

WARRANTY (I–FSS–542–A) (DATE)

All necessary adjustments of equipment procured hereunder not occasioned by accident or misuse through fault or negligence by the Government shall be made by the Contractor at his own expense, including transportation costs, if any, during the 90-day period after acceptance by the Government. All equipment procured hereunder is guaranteed for a period of 1 year from date of acceptance. During the guarantee period all broken or defective parts not caused by accident or misuse through fault or negligence by the Government must be replaced, and all necessary equipment adjustment occasioned by such defective parts must be made, at the Contractor's expense, including labor, parts, and transportation cost, if any.

(End of clause)

552.238–88 Service Points (I–FSS–626).

As prescribed in 538.1203(c)(62), insert the following clause:

SERVICE POINTS (I–FSS–626) (DATE)

Offerors are required to include in their price lists the names and addresses of supply and service points and indicate whether they are stocking or service points, or both.

(End of clause)

552.238–89 Contract Sales Criteria (I–FSS–639).

As prescribed in 538.1203(c)(63), insert the following clause:

CONTRACT SALES CRITERIA (I–FSS–639) (DATE)

(a) A contract will not be awarded unless anticipated sales are expected to exceed $25,000 within the first 24 months following contract award, and are expected to exceed $25,000 in sales each 12-month period thereafter.

(b) The Government may cancel the contract in accordance with clause 552.238–73, Cancellation, unless reported sales are at the levels specified in paragraph (a) of this clause.

(End of clause)

552.238–90 Dealers and Suppliers (I–FSS–644).

As prescribed in 538.1203(c)(64), insert the following clause:

DEALERS AND SUPPLIERS (I–FSS–644) (DATE)

When requested by the Contracting Officer, if other than the manufacturer, the Offeror must submit prior to award of a contract, either (1) a letter of commitment from the manufacturer which will assure the Offeror of a source of supply sufficient to satisfy the Government's requirements for the contract period; or (2) evidence that the Offeror will have an uninterrupted source of supply from which to satisfy the Government's requirements for the contract period.

(End of clause)

552.238–91 Blanket Purchase Agreements (I–FSS–646).

As prescribed in 538.1203(c)(65), insert the following clause:

BLANKET PURCHASE AGREEMENTS (I–FSS–646) (DATE)

Blanket Purchase Agreements (BPAs) can reduce costs and save time because individual orders and invoices are not required for each procurement but can instead be documented on a consolidated basis. The Contractor agrees to enter into BPAs with ordering activities provided that:

(a) The period of time covered by such agreements shall not exceed the period of the contract including option year period(s);

(b) Orders placed under such agreements shall be issued in accordance with all applicable regulations and the terms and conditions of the contract; and

(c) BPAs may be established to obtain the maximum discount (lowest net price) available in those schedule contracts containing volume or quantity discount arrangements.

(End of clause)

552.238–92 Dissemination of Information by Contractor (I–FSS–680).

As prescribed in 538.1203(c)(66), insert the following clause:

DISSEMINATION OF INFORMATION BY CONTRACTOR (I–FSS–680) (DATE)

The Government will provide the Contractor with a single copy of the resulting Federal Supply Schedule. However, it is the responsibility of the Contractor to furnish all sales outlets authorized to participate in the performance of the contract with the terms, conditions, pricing schedule, and other appropriate information.

(End of clause)

552.238–93 Purchase of Open Market Items (CI–FSS–055).

As prescribed in 538.1203(c)(67), insert the following clause:

PURCHASE OF OPEN MARKET ITEMS (CI–FSS–055) (DATE)

For administrative convenience, an ordering activity Contracting Officer may add items not on the Federal Supply Multiple Award Schedule (MAS)—referred to as open market items—to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order, only if—

(a) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed (*e.g.*, publicizing (Part 5), competition requirements (Part 6), acquisition of commercial items (Part 12), contracting methods (Parts 13, 14, and 15), and small business programs (Part 19));

(b) The ordering activity Contracting Officer has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;

(c) The items are clearly labeled on the order as items not on the Federal Supply Schedule; and

(d) All clauses applicable to items not on the Federal Supply Schedule are included in the order.

Note: Open Market Items are also known as incidental items, noncontract items, non-Schedule items, and items not on a Federal Supply Schedule contract. ODCs (Other Direct Costs) are not part of this contract and should be treated as open market purchases. Ordering Activities procuring open market items must follow FAR 8.402(f).

(End of clause)

552.238–94 Contractor Tasks/Special Requirements (C–FSS–370).

As prescribed in 538.1203(c)(68), insert the following clause:

CONTRACTOR TASKS/SPECIAL REQUIREMENTS (C–FSS–370) (DATE)

(a) *Security Clearances:* The Contractor may be required to obtain/possess varying levels of security clearances in the performance of orders issued under this contract. All costs associated with obtaining/possessing such security clearances should be factored into the price offered under the Multiple Award Schedule.

(b) *Travel:* The Contractor may be required to travel in performance of orders issued under this contract. Allowable travel and per diem charges are governed by Pub. L. 99–234 and FAR Part 31, and are reimbursable by the ordering agency or can be priced as a fixed price item on orders placed under the Multiple Award Schedule. Travel in performance of a task order will only be reimbursable to the extent authorized by the ordering agency. The Industrial Funding Fee does NOT apply to travel and per diem charges.

(c) *Certifications, Licenses and Accreditations:* As a commercial practice, the Contractor may be required to obtain/possess any variety of certifications, licenses and accreditations for specific FSC/service code classifications offered. All costs associated with obtaining/ possessing such certifications, licenses and accreditations should be factored into the price offered under the Multiple Award Schedule program.

(d) *Insurance:* As a commercial practice, the Contractor may be required to obtain/possess insurance coverage for specific FSC/service code classifications offered. All costs associated with obtaining/possessing such insurance should be factored into the price offered under the Multiple Award Schedule program.

(e) *Personnel:* The Contractor may be required to provide key personnel, resumes or skill category descriptions in the performance of orders issued under this contract. Ordering activities may require agency approval of additions or replacements to key personnel.

(f) *Organizational Conflicts of Interest:* Where there may be an organizational conflict of interest as determined by the ordering agency, the Contractor's

participation in such order may be restricted in accordance with FAR Part 9.5.

(g) *Documentation/Standards:* The Contractor may be requested to provide supplies or services in accordance with rules, regulations, OMB orders, standards and documentation as specified by the agency's order.

(h) *Data/Deliverable Requirements:* Any required data/deliverables at the ordering level will be as specified or negotiated in the agency's order.

(i) *Government-Furnished Property:* As specified by the agency's order, the Government may provide property, equipment, materials or resources as necessary.

(j) *Availability of Funds:* Many Government agencies' operating funds are appropriated for a specific fiscal year. Funds may not be presently available for any orders placed under the contract or any option year. The Government's obligation on orders placed under this contract is contingent upon the availability of appropriated funds from which payment for ordering purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are available to the ordering Contracting Officer.

(k) *Overtime:* For professional services, the labor rates in the Schedule should not vary by virtue of the Contractor having worked overtime. For services applicable to the Service Contract Act (as identified in the Schedule), the labor rates in the Schedule will vary as governed by labor laws (usually assessed at time and a half of the labor rate).

(End of clause)

552.238–95 [Amended]

30. Amend newly designated section 552.238–95 by removing from the introductory paragraph ''511.404(a)(2)'' and adding ''538.1203(c)(69)'' in its place.

552.238–96 [Amended]

31. Amend newly designated section 552.238–96 by—

a. Removing from the introductory paragraph ''512.301(a)(1)'' and adding ''538.1203(c)(70)'' in its place;

b. Removing from the clause heading ''(Aug 1997)'' and adding ''(Date)'' in its place;

c. Removing from the introductory text of paragraph (b) ''products'' and ''product'' and adding ''supplies'' and ''supply'' in its place, respectively; and

d. Removing from paragraph (c)(2) ''offeror'' and adding ''Offeror'' in its place.

552.238–97 [Amended]

32. Amend the newly designated 552.238–97 by removing from the introductory paragraph ''515.209–70(c)'' and adding ''538.1203(c)(71)'' in its place.

552.238–98 [Amended]

33. Amend the newly designated section by removing from the introductory paragraph ''515.408(d)'' and adding ''538.1203(c)(72)'' in its place.

34. Add sections 552.238–99 through 552.238–102 to read as follows:

552.238–99 Task Order Period of Performance.

As prescribed in 538.1203(c)(73), insert the following clause:

TASK ORDER PERIOD OF PERFORMANCE (DATE)

The term for each order placed under the basic contract shall be specified in the individual order. Under no circumstances may an order be placed under the basic contract if the basic contract has expired, or has been terminated or cancelled by the government. No orders may exceed ten (10) years, inclusive of options, from the date that the order is placed; however, no orders may extend more than five (5) years after the expiration of the basic contract. Priced order options, if included in the initial evaluation and issuance of the order, may be exercised after the expiration date of the basic contract. Notwithstanding anything to the contrary clause, a multi-year order placed under the basic contract must be consistent with FAR Subpart 17.1 and any applicable funding restrictions.

(End of Clause)

552.238–100 Deliveries Beyond the Contractual Period—Placing of Orders (G–FSS–910).

As prescribed in 538.1203(c)(74), insert the following clause:

DELIVERIES BEYOND THE CONTRACTUAL PERIOD—PLACING OF ORDERS (G–FSS–910) (DATE)

In accordance with the Scope of Contract clause, this contract covers all requirements that may be ordered, as distinguished from delivered during the contract term. This is for the purpose of providing continuity of supply or operations by permitting ordering activities to place orders as requirements arise in the normal course of operations. Accordingly, any order mailed (or received, if forwarded by other means than through the mail) to the Contractor on or before the expiration date of the contract, and providing for delivery within the number of days specified in the contract, shall constitute a valid order.

(End of Clause)

552.238–101 Award (L–FSS–59).

As prescribed in 538.1203(c)(75), insert the following provision:

AWARD (L–FSS–59) (DATE)

Until a formal notice of award is issued, no communication by the Government, whether written or oral, shall be interpreted as a promise that an award will be made.

(End of Provision)

552.238–102 Interpretation of Contract Requirements (I–FSS–965).

As prescribed in 538.1203(c)(76), insert the following provision:

INTERPRETATION OF CONTRACT REQUIREMENTS (I–FSS–965) (DATE)

No interpretation of any provision of this contract, including applicable specifications, shall be binding on the Government unless furnished or agreed to in writing by the Contracting Officer or his designated representative.

(End of Provision)

[FR Doc. E9–1096 Filed 1–23–09; 8:45 am]

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Federal Register

Monday,
January 26, 2009

Part V

Department of Housing and Urban Development

24 CFR Parts 17, 20, 30 et al.
HUD Office of Hearings and Appeals; Conforming Changes To Reflect Office Address and Staff Title Changes, and Notification of Retention of Chief Administrative Law Judge; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 17, 20, 30, 103, 180, 570, 954, and 3500

[Docket No. FR–5265–F–01]

RIN 2501–AD46

HUD Office of Hearings and Appeals; Conforming Changes To Reflect Office Address and Staff Title Changes, and Notification of Retention of Chief Administrative Law Judge

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations to reflect the office address and staff title changes regarding HUD's Office of Hearings and Appeals (OHA). This rule makes conforming changes to HUD regulations to reflect that the title of ''Chief Docket Clerk'' has been changed to ''Docket Clerk'' and that the address of the OHA has been changed. Additionally, the preamble to this rule corrects a preamble statement in the preamble of a previously published OHA final rule regarding the elimination of the position of Chief Administrative Law Judge in OHA. That position has not been eliminated.

DATES: *Effective Date:* February 25, 2009.

FOR FURTHER INFORMATION CONTACT: David T. Anderson, Director, Office of Hearings and Appeals, Department of Housing and Urban Development, 451 7th Street, SW., Room B–133, Washington, DC 20410–0001; telephone number 202–254–0000 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

As the result of section 847 of the 2000 National Defense Authorization Act of Fiscal Year 2006 (Pub. L. 109–163, approved January 6, 2006), HUD terminated its Board of Contract Appeals (BCA). At the same time, HUD established the Office of Hearings and Appeals (OHA) to perform the nonprocurement contract dispute functions previously performed by the HUD BCA. OHA was established within the Office of the Secretary and, under the director of OHA, consists of two divisions: The Office of Administrative Law Judges and the Office of Appeals. Since establishing OHA, the office has been physically relocated, has a new mailing address, and has undergone some staff changes.

II. This Final Rule

This final rule updates HUD's regulations in 24 CFR parts 17, 20, 30, 103, 180, 570, 954, and 3500 to reflect the office address change and staff title changes regarding HUD's OHA. These HUD regulations contain outdated references to the title of ''Chief Docket Clerk'' and refer to the former address of the OHA. This final rule updates the HUD regulations to reflect these changes.

III. HUD Chief Administrative Law Judge—Correction to Preamble Statement in HUD's March 13, 2008 Final Rule

On March 13, 2008 (73 FR 13722), HUD published a final rule revising its regulations to reflect the organization of OHA. The preamble to that final rule contained two incorrect references regarding the position of HUD's Chief Administrative Law Judge (Chief ALJ). Specifically, the preamble provided that the position of the Chief ALJ ''has been eliminated'' and that the title and position of the Chief ALJ ''are now obsolete since the establishment of OHA.'' The March 13, 2008 final rule was technical in nature, reflecting the establishment of the OHA and the new supervisory role of the Director of OHA over the entire office. HUD did not intend, however, for the preamble language to convey the impression that the Director of OHA had assumed duties or responsibilities reserved for the Chief ALJ. Although the regulatory amendments made by the March 13, 2008 final rule (and which became effective on April 14, 2008) are correct, HUD wishes to rectify the statements contained in the preamble of that rule, so as to avoid any confusion regarding the organization of the OHA and the position of the Chief ALJ. Through publication of this final rule, HUD clarifies that the position of the Chief ALJ continues to be a part of the staffing plan of the OHA.

IV. Justification for Final Rulemaking

Generally, HUD publishes a rule for public comment before publishing a rule for effect, in accordance with HUD's regulations on rulemaking at 24 CFR part 10. Part 10, however, allows in § 10.1 for omission of notice and public comment in cases of statements of policy, interpretive rules, rules governing the Department's organization or internal practices, or if a statute expressly provides for omission of notice and comment. In this case, HUD has determined that prior public comment is unnecessary because this rule is exclusively concerned with the internal organization of OHA. Specifically, the regulatory amendments made by the final rule are technical and nonsubstantive in nature, since they are limited to updating the terminology used in HUD's regulations governing administrative hearings and to correcting an outdated address.

V. Findings and Certifications

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, nor does it establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications, if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

List of Subjects

24 CFR Part 17

Administrative practice and procedure, Claims, Government employees, Income taxes, Wages.

24 CFR Part 20

Administrative practice and procedure, Government contracts, Organization and functions (Government agencies).

24 CFR Part 30

Administrative practice and procedure, Grant programs—housing and community development, Loan programs—housing and community development, Mortgages, Penalties.

24 CFR Part 103

Administrative practice and procedure, Aged, Fair housing, Individuals with disabilities, Intergovernmental relations, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 180

Administrative practice and procedure, Aged, Civil rights, Fair housing, Individuals with disabilities, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure, American Samoa, Community development block grants, Grant programs—education, Grant programs—housing and community development, Guam, Indians, Loan programs—housing and community development, Low and moderate income housing, Northern Mariana Islands, Pacific Islands Trust Territory, Puerto Rico, Reporting and recordkeeping requirements, Student aid, Virgin Islands.

24 CFR Part 954

Administrative practice and procedure, Grant programs—housing and community development, Grant programs—Indians, Indians, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 3500

Consumer protection, Housing, Mortgages, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons stated in the preamble, HUD amends Title 24 of the Code of Federal Regulations to read as follows:

PART 17—ADMINISTRATIVE CLAIMS

■ 1. The authority citation for 24 CFR part 17 continues to read as follows:

Authority: 5 U.S.C. 5514; 28 U.S.C. 2672; 31 U.S.C. 3711, 3716–3718, 3721; 42 U.S.C. 3535(d).

■ 2. In § 17.140, revise the first sentence to read as follows:

§ 17.140 Miscellaneous provisions; correspondence with the Department.

The employee shall file an original and one copy of a request for a hearing with the Clerk, Office of Hearings and Appeals, U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room B–133, Washington, DC 20410, on official work days between the hours of 8:45 a.m. and 5:15 p.m. * * *

* * * * *

■ 3. Revise § 17.161(a) to read as follows:

§ 17.161 Correspondence with the Department.

(a) All correspondence from the debtor to the Office of Appeals concerning the right to review as described in § 17.152 shall be addressed to the Office of Appeals, U.S. Department of Housing and Urban Development, SW., Room B–133, Washington, DC 20410.

* * * * *

PART 20—OFFICE OF HEARINGS AND APPEALS

■ 4. The authority citation for 24 CFR part 20 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

■ 5. In § 20.3, revise paragraph (a) and redesignate the current paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and add a new paragraph (b) to read as follows:

§ 20.3 Location, organization, and officer qualifications.

(a) *Mailing address.* The Office of Hearings and Appeals is located at the U.S. Department of Housing and Urban Development, 451 7th Street, SW., Room B–133, Washington, DC 20410.

(b) *Location.* For deliveries, the Office of Hearings and Appeals is physically located at 409 Third Street, SW., Suite 201, Washington, DC 20024. The telephone number of the Office of Hearings and Appeals is 202–254–0000. Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 800–877–8339. The facsimile number is 202–619–7304.

* * * * *

PART 30—CIVIL MONEY PENALTIES: CERTAIN PROHIBITED CONDUCT

■ 6. The authority citation for 24 CFR part 30 continues to read as follows:

Authority: 12 U.S.C. 1701q–1, 1703, 1723i, 1735f–14, and 1735f–15; 15 U.S.C. 1717a; 28 U.S.C. 2461 note; 42 U.S.C. 1437z–1 and 3535(d).

■ 7. Revise the first sentence of § 30.90(b) to read as follows:

§ 30.90 Response to the complaint.

* * * * *

(b) *Filing with the administrative law judges.* HUD shall file the complaint and response with the Docket Clerk, Office of Administrative Law Judges, in accordance with § 26.37 of this title. * * *

* * * * *

PART 103—FAIR HOUSING—COMPLAINT PROCESSING

■ 8. The authority citation for 24 CFR part 103 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3619.

■ 9. Revise § 103.405 (b)(1) to read as follows:

§ 103.405 Issuance of charge.

* * * * *

(b) * * *

(1) Obtain a time and place for hearing from the Docket Clerk for the Office of Administrative Law Judges;

* * * * *

■ 10. Revise the second sentence of § 103.410(b) to read as follows:

§ 103.410 Election of civil action or provision of administrative proceeding.

* * * * *

(b) * * * The notice of election must be filed with the Docket Clerk in the Office of Administrative Law Judges and served on the General Counsel, the Assistant Secretary, the respondent, and the aggrieved persons on whose behalf the complaint was filed. * * *

* * * * *

PART 180—CONSOLIDATED HUD HEARING PROCEDURES FOR CIVIL RIGHTS MATTERS

■ 11. The authority citation for 24 CFR part 180 continues to read as follows:

Authority: 29 U.S.C. 794; 42 U.S.C. 2000d–1 3535(d), 3601–3619; 5301–5320, and 6103.

■ 12. Revise § 180.100(c) by removing the definition of *''Chief Docket Clerk''* and adding, in alphabetical sequence, the definition of *''Docket Clerk''* to read as follows:

§ 180.100 Definitions.

* * * * *

(c) * * *

Docket Clerk is the docket clerk for HUD's Office of Hearings and Appeals, 451 7th Street, SW., Room B–133, Washington, DC 20410. The telephone number is 202–254–0000 and the facsimile number is 202–619–7304.

* * * * *

■ 13. Revise § 180.105(e) to read as follows:

§ 180.105 Scope of rules.

* * * * *

(e) All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in any proceeding may be inspected in the Docket Clerk's office during regular business hours.

■ 14. Revise the first sentence of § 180.400(b)(1) to read as follows:

§ 180.400 Service and filing.

* * * * *

(b) *Filing*—(1) Method. All documents shall be filed with the Docket Clerk. * * *

* * * * *

■ 15. In § 180.405, revise paragraph (c) and the last sentence of paragraph (d) to read as follows:

§ 180.405 Time computations.

* * * * *

(c) *Entry of orders.* In computing any time period involving the date of the ALJ's issuance of an order or decision, the date of issuance is the date of service by the Docket Clerk.

(d) * * * Documents are not filed until received by the Docket Clerk.

* * * * *

■ 16. In § 180.410, revise paragraph (a) and paragraph (b)(2) to read as follows:

§ 180.410 Charges under the Fair Housing Act.

(a) *Filing and service.* Within 3 days after the issuance of a charge, the General Counsel shall file the charge with the Docket Clerk and serve copies (with the additional information required under paragraph (b) of this section) on all respondents and aggrieved persons.

(b) * * *

(2) Such election must be made not later than 20 days after receipt of service of the charge by serving written notice of such on the Docket Clerk, each respondent, each aggrieved person on whose behalf the charge was issued, the Assistant Secretary, and the General Counsel.

* * * * *

■ 17. Revise § 180.415(a) to read as follows:

§ 180.415 Notice of proposed adverse action regarding federal financial assistance in non-Fair Housing Act matters.

(a) *Filing and service.* Within 10 days after a recipient/applicant has requested a hearing, as provided for in 24 CFR parts 1, 6, 8, or 146, the General Counsel shall file a notice of proposed adverse action with the Docket Clerk and serve copies (with the additional information required under paragraph (b) of this section) on all respondents and complainants.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

■ 18. The authority citation for 24 CFR part 570 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 5301–5320.

■ 19. Revise § 570.496(d)(1)(iii) to read as follows:

§ 570.496 Remedies for noncompliance; opportunity for hearing.

* * * * *

(d) * * *

(1) * * *

(iii) That the respondent has 14 days from receipt of the notice within which to provide a written request for a hearing to the Docket Clerk, Office of Administrative Law Judges, and the address and telephone number of the Docket Clerk;

* * * * *

PART 954—INDIAN HOME PROGRAM

■ 20. The authority citation for 24 CFR part 954 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

■ 21. In § 954.602, revise paragraph (b)(1)(iii) and the first sentence of paragraph (b)(2) to read as follows:

§ 954.602 Notice and opportunity for hearing; sanctions.

* * * * *

(b) * * *

(1) * * *

(iii) That the respondent has 14 days from receipt of the notice within which to provide a written request for a hearing to the Docket Clerk, Office of Administrative Law Judges, and the telephone number of the Docket Clerk;

* * * * *

(2) *Initiation of hearing.* The respondent shall be allowed 14 days from receipt of the notice within which to notify the Docket Clerk, Office of Administrative Law Judges, of its request for a hearing. * * *

* * * * *

PART 3500—REAL ESTATE SETTLEMENT PROCEDURES ACT

■ 22. The authority citation for 24 CFR part 3500 continues to read as follows:

Authority: 12 U.S.C. 2601 *et seq.*; 42 U.S.C. 3535(d).

■ 23. In § 3500.17, revise the second sentence of paragraph (n)(3) introductory text, paragraph (n)(3)(vi), the first sentence of paragraph (n)(4)(i), and paragraph (n)(6)(ii) to read as follows:

§ 3500.17 Escrow accounts

* * * * *

(n) * * *

(3) * * * A copy of the Notice of Intent must be filed with the Docket Clerk, Office of Administrative Law Judges, at the address provided in the Notice of Intent.* * *

* * * * *

(vi) The name, address, and telephone number of the representative of the Department, and the address of the Docket Clerk, Office of Administrative Law Judges, should the servicer decide to appeal the penalty.

(4) *Appeal procedures.* (i) *Answer.* To appeal the imposition of a penalty, a servicer shall, within 30 days after receiving service of the Notice of Intent, file a written Answer with the Docket Clerk, Office of Administrative Law Judges, Department of Housing and Urban Development, at the address provided in the Notice of Intent. * * *

* * * * *

(6) * * *

(ii) The petition must be filed within 30 days after the decision is filed with the Docket Clerk, Office of Administrative Law Judges.

* * * * *

Dated: January 15, 2009.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E9–1249 Filed 1–23–09; 8:45 am]

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Monday,
January 26, 2009

Part VI

Department of Housing and Urban Development

24 CFR Part 990

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 990

[Docket Number FR–5057–F–02]

RIN 2577–AC66

Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule makes final the conforming amendments to the regulations of the Public Housing Operating Fund Program to reflect recent statutory amendments allowing for: (1) The maximum term of an energy performance contract (EPC) between a public housing authority (PHA) and an entity other than HUD to be up to 20 years, and (2) the extension of an existing EPC, without reprocurement, to a period of no more than 20 years, to allow additional energy conservation improvements. The increase in the maximum EPC term, which was limited to 12 years, is provided by statutory amendments and will enable longer payback periods for energy conservation measures. This final rule adopts an October 16, 2008 interim rule without change.

DATES: *Effective Date:* February 25, 2009.

FOR FURTHER INFORMATION CONTACT: David J. Reeves, Deputy Assistant Secretary, Departmental Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 2000, Washington, DC 20410–5000; telephone number 202–475–8906 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Section 9(e) of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes an Operating Fund for the purpose of making assistance available to PHAs to operate and manage public housing. HUD's regulations implementing section 9(e) of the 1937 Act are located at 24 CFR part 990 (entitled ''The Public Housing Operating Fund Program''). The part 990 regulations contain the policies and procedures governing the Operating Fund allocation formula used by HUD to distribute operating subsidies to PHAs.

On September 19, 2005, at 70 FR 54984, HUD published a final rule amending the regulations at 24 CFR part 990 to provide a new formula for distributing operating subsidies to PHAs and to establish requirements that PHAs convert to asset management. The September 19, 2005, final rule provides PHAs with incentives for energy conservation and utility rate reduction. The energy conservation methods may include, but are not limited to, physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under a performance contract; or a shared savings agreement with a private energy company. The final rule also provided, in § 990.185(a), that the term of the contract under which these energy conservation measures are taken cannot exceed 12 years.

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (Pub. L. 109–58, 119 Stat. 594) (Energy Policy Act). Subtitle D of the Energy Policy Act amended section 9 of the 1937 Act to promote the use in public housing of innovative approaches to achieve programmatic efficiency and reduce utility costs. Specifically, section 151 of the Energy Policy Act amended section 9(e)(2)(C) of the 1937 Act, which governs the treatment of waste and utility savings under the Operating Fund allocation formula. The amendment made by section 151 of the Energy Policy Act provides that qualifying contracts for energy conservation improvements may have terms of not more than 20 years. (See 119 Stat. 647–648.) The Energy Policy Act also amended the Operating Fund treatment of savings resulting from such contracts. It allows for longer payback periods for retrofits, including windows, heating system replacements, wall insulation, site-based generation, advanced energy saving technologies, including renewable energy generation, and other such retrofits.

The Consolidated Appropriations Act, 2008 (Pub. L. 110–161, 121 Stat. 1844, approved December 26, 2007), amended section 9(e)(2)(C) of the 1937 Act (42 U.S.C. 1437g(e)(2)(C)), by adding the following clause:

> (iv) EXISTING CONTRACTS.—The term of a contract described in clause (i) that, as of the date of enactment of this clause, is in repayment and has a term of not more than 12 years, may be extended to a term of not more than 20 years to permit additional energy conservation improvements without requiring the reprocurement of energy performance, contractors.

(See administrative provision, section 229, of title II of Division K, at 121 Stat. 2438.)

II. The October 16, 2008, Interim Rule

On October 16, 2008 (73 FR 6135), HUD published an interim rule that amended the regulations at 24 CFR 990.185. The interim rule provided that, consistent with the amendment to the 1937 Act by section 151 of the Energy Policy Act, the term of an EPC between a PHA and an entity other than HUD may be up to 20 years. Consistent with the amendment made to section 9(e)(C)(2) by the Consolidated Appropriations Act, 2008, the interim rule also permitted the extension of executed EPCs to a term of not more than 20 years without requiring a new competitive procurement process. The provision for entering into EPCs with terms greater than 12 years and for extending the terms of executed EPCs commenced to apply on the effective date of the interim rule, which was November 17, 2008. The interim rule clarified that, consistent with the statute, to qualify for the incentives under § 990.185, the financing of energy conservation measures by a party other than HUD must be undertaken pursuant to a contract. The interim rule also clarified that the term ''energy performance contract'' encompasses all contracts that qualify under § 990.185, regardless of the energy conservation measure involved or the entity that is the other party to the contract with the PHA.

III. This Final Rule

The October 16, 2008 interim rule provided a 60-day public comment period. HUD received one public comment by the close of the public comment period on December 15, 2008.

The commenter supported the interim rule but expressed concern that its effectiveness could be limited due to two considerations. According to the commenter, HUD underestimates total utility costs, resulting in insufficient funding for PHAs to use to pay back EPCs, even with extended payback periods. The commenter argued that HUD should change its method for allocating utility subsidies to PHAs in order to avoid underestimating actual utility costs. In addition, the commenter expressed concern that EPC companies may overestimate the prospective savings from energy conservation measures. The commenter advocated oversight of EPC companies to prevent PHAs from paying too much in

exchange for measures that result in insufficient savings.

HUD appreciates the commenter's concerns and will take them under consideration as it develops additional guidance on the use and analysis of EPCs. HUD notes, however, that practices required under its asset management initiative result in increased accuracy in estimating utility costs, and HUD already reviews PHAs' proposed EPCs, including assumptions made about prospective utility cost savings. HUD encourages PHAs to negotiate savings guarantee provisions in their EPCs to reduce the risk to the PHA that savings from energy conservation measures will be insufficient to cover the PHA's obligations under the EPC. HUD refers PHAs to its publication, ''Energy Performance Contracting for Public and Indian Housing: A Guide for Participants'' (the ''Green Book''), which provides extensive guidance and technical assistance on planning and negotiating successful and cost-effective EPCs. HUD anticipates that it will be issuing a revision to the Green Book to incorporate leading industry trends and best practices. If HUD determines that further regulatory action is warranted to address the issues raised by the commenter, it will undertake separate rulemaking.

This rule therefore makes final the October 16, 2008, interim rule without change.

IV. Findings and Certifications

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule, consistent with recent statutory amendments, provides PHAs with the flexibility to enter into energy performance contracts with terms of not more than 20 years. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program number is 14.850.

List of Subjects in 24 CFR Part 990

Accounting, Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD makes final the October 16, 2008, interim rule (73 FR 6135) without change.

Dated: January 14, 2009.

Paula O. Blunt,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. E9–1252 Filed 1–23–09; 8:45 am]

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Federal Register

Monday,
January 26, 2009

Part VII

Department of Education

Compliance Agreement; OMB Final Decisions; Notice

DEPARTMENT OF EDUCATION

Compliance Agreement

AGENCY: Department of Education.

ACTION: Notice of written findings and compliance agreement with the Nebraska Department of Education.

SUMMARY: This notice is being published in the **Federal Register** consistent with section 457(b)(2) of the General Education Provisions Act (GEPA). Section 457 of GEPA authorizes the U.S. Department of Education (the Department) to enter into a compliance agreement with a recipient that is failing to comply substantially with Federal program requirements. In order to enter into a compliance agreement, the Department must determine, in written findings, that the recipient cannot comply with the applicable program requirements until a future date.

On October 8, 2008, the Department entered into a compliance agreement with the Nebraska Department of Education (NDE). Section 457(b)(2) of GEPA requires the Department to publish written findings leading to a compliance agreement, with a copy of the compliance agreement, in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Collette Roney, U.S. Department of Education, Office of Elementary and Secondary Education, 400 Maryland Avenue, SW., room 3W210, Washington, DC 20202–6132. Telephone: (202) 401–5245.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an accessible format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Title I of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Under Title I, each State is required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Title I also requires each State to implement a student assessment system to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12.

In addition to a general assessment, Title I requires States to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

Prior to the 2008–2009 school year, Nebraska employed a system of local assessments. Under this system, each local educational agency (LEA) in the State developed and administered its own standards and assessment system. In August 2007, NDE submitted evidence of its standards and assessment system to the Department. The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) submitted that evidence to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that NDE's standards and assessment system did not meet a number of the Title I requirements. Subsequently, the Nebraska legislature passed Legislative Bill (LB) 1157, which requires the State to implement a statewide standards and assessment system in place of the former system of local assessments.

Section 454 of GEPA, 20 U.S.C. 1234c, sets out the remedies available to the Department when it determines that a recipient ''is failing to comply substantially with any requirement of law'' applicable to Federal program funds the Department administers. Specifically, the Department is authorized to—

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law.

20 U.S.C. 1234c(a).

In a letter dated October 11, 2007, to Douglas Christenson, Nebraska's then-Commissioner of Education, the Assistant Secretary notified NDE that, in order to remain eligible to receive Title I funds, it would have to enter into a compliance agreement with the Department. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f(a). In order to enter into a compliance agreement with a recipient, the Department must determine, in written findings, that the recipient cannot comply until a future date with the applicable program requirements.

In accordance with the requirements of section 457(b) of GEPA, 20 U.S.C 1234f(b), on July 10, 2008, Department officials conducted a public hearing in Nebraska to assess whether a compliance agreement with NDE might be appropriate. Robert Evnen of Nebraska's State Board of Education testified at this hearing. The Department considered the testimony provided at the July 2008 public hearing and all other relevant information and materials and concluded that NDE would not be able to correct its non-compliance with Title I standards and assessment requirements immediately, particularly in light of LB 1157, Nebraska's recently passed State law, which requires the State to implement a statewide standards and assessment system in place of the former system of local assessments.

On December 19, 2008, the Assistant Secretary issued written findings, holding that compliance by NDE with the Title I standards and assessment requirements is genuinely not feasible until a future date. Under Title I, NDE was required to implement its final

assessment system no later than the 2005–2006 school year. The evidence that NDE submitted in August 2007 indicated that, well after the statutory deadline had passed, its locally developed standards and assessment system still did not fully meet Title I requirements. In addition, due to the enormity and complexity of the work needed to bring NDE's standards and assessment system into full compliance, NDE cannot immediately comply with all of the Title I requirements.

The Assistant Secretary also determined that a compliance agreement represents a viable means of bringing about compliance because of the steps NDE had already taken to comply and the plan it had developed for further action. The compliance agreement sets out the action plan that NDE must implement to come into compliance with Title I requirements. This plan, coupled with specific reporting requirements, will allow the Assistant Secretary to monitor closely NDE's progress in meeting the terms of the compliance agreement.

Nebraska's Deputy Commissioner of Education, Marge Harouff, signed the compliance agreement on October 2, 2008, and the Assistant Secretary signed the compliance agreement on October 8, 2008.

As required by section 457(b)(2) of GEPA, 20 U.S.C. 1234f(b)(2), the text of the Assistant Secretary's written findings is set forth as Appendix A and the compliance agreement is set forth as Appendix B of this notice.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF, you must have the Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

(Authority: 20 U.S.C. 1234c, 1234f)

Dated: January 16, 2009.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

Appendix A

Written Findings of the Assistant Secretary for Elementary and Secondary Education Regarding the Compliance Agreement Between the U.S. Department of Education and the Nebraska Department of Education

I. Introduction

The Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) of the U.S. Department of Education (Department) has determined, pursuant to 20 U.S.C. 1234c and 1234f, that the Nebraska Department of Education (NDE) has failed to comply substantially with certain requirements of Title I, Part A of the Elementary and Secondary Education Act of 1965 (Title I), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.*, and that it is genuinely not feasible for NDE to achieve full compliance immediately. Specifically, the Assistant Secretary has determined that NDE did not meet, within the statutory timeframe, a number of the Title I requirements for Nebraska's general and alternate assessments under section 1111(b)(3) of Title I.

For the following reasons, the Assistant Secretary has concluded that it would be appropriate to enter into a compliance agreement with NDE. During the effective period of the compliance agreement, which ends October 8, 2011, NDE will be eligible to receive Title I funds as long as it complies with the terms and conditions of the agreement as well as the provisions of Title I and other applicable Federal statutory and regulatory requirements.

II. Relevant Statutory and Regulatory Provisions

A. Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001

Title I provides financial assistance, through State educational agencies, to local educational agencies to provide services in high-poverty schools to students who are failing or at risk of failing to meet the State's student academic achievement standards. Under Title I, each State, including the District of Columbia and Puerto Rico, was required to adopt academic content and student academic achievement standards in at least mathematics, reading or language arts, and science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Academic achievement standards must be aligned with the State's academic content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each student's academic achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic content standards. By the 2005–2006 school year, States were required to administer mathematics and reading or language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State was required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;
- Be designed to provide coherent information about student attainment of State academic content standards across grades and subjects;
- Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited English proficient (LEP) students;
- Be aligned with the State's academic content and student academic achievement standards;
- Express student results in terms of the State's student academic achievement standards;
- Be valid, reliable, and of adequate technical quality for the purposes for which they are used and be consistent with nationally recognized professional and technical standards;
- Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
- Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
- Enable results to be disaggregated by gender, each major racial and ethnic group, migrant status, students with disabilities, English proficiency status, and economically disadvantaged students;
- Provide individual student reports; and
- Enable itemized score analyses.

20 U.S.C. 6311(b)(3); 34 CFR 200.2

In addition to a general assessment, States were required to develop and administer at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. 34 CFR 200.6(a)(2). An alternate assessment may be based on grade-level academic achievement standards, alternate academic achievement standards, or modified academic achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

B. The General Education Provisions Act

The General Education Provisions Act (GEPA) provides a number of options when

the Assistant Secretary determines a recipient of Department funds is ''failing to comply substantially with any requirement of law applicable to such funds.'' 20 U.S.C. 1234c. In such a case, the Assistant Secretary is authorized to:

(1) Withhold funds;

(2) Compel compliance through a cease and desist order;

(3) Enter into a compliance agreement with the recipient; or

(4) Take any other action authorized by law.

20 U.S.C. 1234c(a)

Under section 457 of GEPA, the Assistant Secretary may enter into a compliance agreement with a recipient that is failing to comply substantially with specific program requirements. 20 U.S.C. 1234f. The purpose of a compliance agreement is ''to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.'' 20 U.S.C. 1234f(a). Before entering into a compliance agreement with a recipient, the Assistant Secretary must hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. At that hearing, the recipient has the burden of persuading the Assistant Secretary that full compliance with applicable requirements of law is not feasible until a future date. 20 U.S.C. 1234f(b)(1). If, on the basis of all the evidence presented, the Assistant Secretary determines that full compliance is genuinely not feasible until a future date, the Assistant Secretary must make written findings to that effect and must publish those findings, together with the substance of any compliance agreement, in the **Federal Register**. 20 U.S.C. 1234f(b)(2).

A compliance agreement must contain the terms and conditions with which the recipient must comply during the period that agreement is in effect. 20 U.S.C. 1234f(c)(2). If the recipient fails to comply with any of the terms and conditions of the compliance agreement, the Assistant Secretary may consider the agreement to be no longer in effect, and may take any of the compliance actions set forth above. 20 U.S.C. 1234f(d).

III. Analysis

In deciding whether a compliance agreement between the Assistant Secretary and NDE is appropriate, the Assistant Secretary must determine whether compliance by NDE with the Title I standards and assessment requirements is genuinely not feasible until a future date. 20 U.S.C. 1234f(b)(2).

A. NDE Has Failed To Comply Substantially With Title I Standards and Assessment Requirements

Prior to the 2008–2009 school year, Nebraska employed a system of local assessments. Under this system, each local educational agency (LEA) in the state developed and administered its own standards and assessment system. In August 2007, NDE submitted evidence of its standards and assessment system, which the Assistant Secretary submitted to a panel of experts for peer review. Following that review, the Assistant Secretary concluded that NDE's standards and assessment system did not meet a number of the Title I requirements for standards and assessments.

In April 2008, the Nebraska legislature passed Legislative Bill 1157, which requires the state to implement a statewide standards and assessment system in place of the former system of local assessments. In light of this new state law, the Assistant Secretary has determined that, to demonstrate that its statewide standards and assessment system complies with Title I requirements, NDE must submit evidence to satisfy each component of the Department's December 2007 *Standards and Assessment Peer Review Guidance: Information and Examples for Meeting Requirements of the No Child Left Behind Act of 2001* (available at: *http://www.ed.gov/policy/elsec/guid/saaprguidance.doc*). In particular, NDE must submit evidence pertaining to each of the following required components of standards and assessment systems:

1. Academic content standards;
2. Academic achievement standards;
3. Full assessment system;
4. Technical quality;
5. Alignment;
6. Inclusion; and
7. Reporting.

B. NDE Cannot Immediately Correct Its Noncompliance With the Title I Standards and Assessment Requirements

Under Title I, NDE was required to implement its final standards and assessment system no later than the 2005–2006 school year. 20 U.S.C. 6311(b)(3). The evidence that NDE submitted in August 2007 indicated that, well after the statutory deadline had passed, its standards and assessment system still did not fully meet Title I requirements. Moreover, the state law that was passed in 2008 effectively requires Nebraska to begin anew in developing and implementing a statewide system of standards and assessments years after it was required to have compliant standards and assessments in place. Due to the enormity and complexity of the work that is needed to bring NDE's standards and assessment system into full compliance, NDE cannot immediately comply with all of the Title I requirements. As a result, the Assistant Secretary finds that it is genuinely not feasible for NDE to come into compliance with the applicable requirements of law until a future date.

C. NDE Can Meet the Terms and Conditions of a Compliance Agreement

At the public hearing, which was held on July 10, 2008, Robert Evnen of Nebraska's State Board of Education testified that it was not feasible for NDE to come into compliance with the Title I standards and assessment requirements until a future date. NDE has developed a comprehensive action plan, incorporated into the compliance agreement, which sets out a very specific schedule that NDE has agreed to meet for attaining compliance with the Title I standards and assessment requirements. As a result, NDE is committed to meeting a stringent, but reasonable, schedule for coming into compliance with the applicable requirements. The action plan also sets out documentation and reporting requirements with which NDE must comply. These provisions will allow the Assistant Secretary to ascertain promptly whether NDE is meeting each of its commitments under the compliance agreement.

IV. Conclusion

For the foregoing reasons, the Assistant Secretary finds the following: (1) That full compliance by NDE with the standards and assessment requirements of Title I is genuinely not feasible until a future date; and (2) that NDE can meet the terms and conditions of the attached compliance agreement. Therefore, the Assistant Secretary has determined that it is appropriate to enter into a compliance agreement with NDE.

Dated: December 19, 2008.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

Appendix B

Compliance Agreement Under Title I of the Elementary and Secondary Education Act Between the United States Department of Education and the Nebraska Department of Education

Title I of the Elementary and Secondary Education Act (ESEA) of 1965 (Title I), as amended by the No Child Left Behind Act (NCLB) of 2001, requires each State receiving Title I funds to satisfy certain requirements.

Each State was required to adopt academic content and achievement standards in at least mathematics, reading/language arts, and, beginning in the 2005–2006 school year, science. These standards must include the same knowledge and levels of achievement expected of all public school students in the State. Content standards must specify what all students are expected to know and be able to do; contain coherent and rigorous content; and encourage the teaching of advanced skills. Achievement standards must be aligned with the State's content standards and must describe at least three levels of proficiency to determine how well students in each grade are mastering the content standards. A State must provide descriptions of the competencies associated with each achievement level and must determine the assessment scores (''cut scores'') that differentiate among the achievement levels.

Each State was also required to implement a student assessment system used to evaluate whether students are mastering the subject material reflected in the State's academic standards. By the 2005–2006 school year, States were required to administer mathematics and reading/language arts assessments yearly during grades 3–8 and once during grades 10–12. Further, beginning with the 2007–2008 school year, each State is required to administer a science assessment in at least one grade in each of the following grade spans: 3–5, 6–9, and 10–12. A State's assessment system must:

- Be the same assessment system used to measure the achievement of all public school students in the State;

• Be designed to provide coherent information about student attainment of State standards across grades and subjects;
• Provide for the inclusion of all students in the grades assessed, including students with disabilities and limited English proficient (LEP) students;
• Be aligned with the State's content and achievement standards;
• Express student results in terms of the State's student achievement standards;
• Be valid, reliable, and of adequate technical quality for the purpose for which they are used and be consistent with nationally recognized professional and technical standards;
• Involve multiple measures of student academic achievement, including measures that assess higher order thinking skills and understanding of challenging content;
• Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal family beliefs and attitudes;
• Enable results to be disaggregated by gender, each major racial and ethnic group, migrant status, English proficiency status, students with disabilities, and economically disadvantaged students;
• Provide individual student reports; and
• Enable itemized score analyses.

In addition to a general assessment, States were required to develop at least one alternate assessment for students with disabilities who cannot participate in the general assessment, with or without accommodations. An alternate assessment may be based on grade-level achievement standards, alternate achievement standards, or modified achievement standards. Like the general assessment, any alternate assessment must satisfy the requirements for high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards.

The Nebraska Department of Education (NDE) was unable to timely meet certain of the requirements for its standards and assessment system. In order to be eligible to continue to receive Title I funds while working to comply with the statutory and regulatory requirements from this point forward, Nebraska's Commissioner of Education indicated NDE's interest in entering into a compliance agreement with the United States Department of Education (Department). On July 10, 2008, the Department conducted a public hearing regarding (1) whether NDE's full compliance with Title I is not feasible until a future date, and (2) whether NDE is able to come into compliance with the Title I standards and assessment requirements within three years.

Pursuant to this Compliance Agreement under 20 U.S.C. section 1234f, NDE must be in full compliance with the statutory and regulatory requirements, as they may exist from this point forward, no later than three years from the date of the Assistant Secretary's written findings, a copy of which is attached to, and incorporated by reference into, this Agreement. In order to achieve compliance with the standards and assessment requirements, NDE must submit evidence to satisfy each component of the Department's December 2007 *Standards and Assessment Peer Review Guidance: Information and Examples for Meeting Requirements of the No Child Left Behind Act of 2001* (available at: *http://www.ed.gov/policy/elsec/guid/saaprguidance.doc*). This includes documentation for each of the seven elements identified in that non-regulatory guidance:

1. Academic content standards;
2. Academic achievement standards;
3. Full assessment system;
4. Technical quality;
5. Alignment;
6. Inclusion; and
7. Reporting.

During the duration of this Compliance Agreement, NDE is eligible to receive Title I, Part A funds if it complies with the terms and conditions of this Agreement, and all other provisions of Title I, Part A and other applicable Federal statutory and regulatory requirements that are not specifically addressed by this Agreement. The attached action steps are a detailed plan and specific timeline for how NDE intends to come into compliance with the Title I standards and assessment requirements as they currently exist and how NDE intends to demonstrate that it has come into compliance with those requirements. Except as specified herein, these action steps are incorporated into this Agreement as though fully restated herein. All action steps may be amended by joint agreement of the parties, provided full compliance is still feasible by the expiration of the Agreement. Action steps that relate to NDE's science assessment that have due dates beyond the expiration of this agreement, and only these particular action steps, are not incorporated herein; failure to complete these particular action steps prior to the expiration of the agreement shall not be relied upon as a basis for finding that NDE has failed to comply with the terms of the compliance agreement.

By agreeing to the action steps that are incorporated into this Agreement, the Department expresses no opinion on the legal sufficiency of the standards and assessment system that will result from the completion of those action steps. NDE agrees that the Department's approval of its standards and assessment system will be handled through the Department's peer review process and that NDE's successful completion of the action steps incorporated herein does not bind the Department to approve NDE's standards and assessment system.

In addition to all terms and conditions set forth above, NDE agrees that its continued eligibility to receive Title I, Part A funds is predicated upon its compliance with all statutory and regulatory requirements of that program that are not specifically addressed by this Agreement, including any amendments to the No Child Left Behind Act of 2001 enacted after the effective date of this Agreement. This agreement is predicated upon NDE's compliance from this point forward with Federal and State laws as they now exist or as they may be amended in the future.

If NDE fails to comply with any of the terms and conditions of this Agreement, including the action steps attached hereto that are incorporated herein as set forth above, the Department may consider the Agreement no longer in effect and may take any action authorized by law, including the withholding of funds or the issuance of a cease and desist order. 20 U.S.C. 1234f(d).

It is so agreed.

For the Nebraska Department of Education.

Dated: October 2, 2008.

Marge Harouff,
Deputy Commissioner.

For the United States Department of Education.

Dated: October 8, 2008.

Kerri L. Briggs,
Assistant Secretary, Office of Elementary and Secondary Education.

Date this Compliance Agreement becomes effective: Oct 8, 2008.

Expiration Date of this Agreement: Oct 8, 2011.

BILLING CODE 4000–01–P

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
READING					
Develop and Adopt Content Standards	1.4	Development process involved stakeholders if locally developed	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Jan. 2009
	1.1	Content Standards, alternate standards, adopted in grades 3 – 8 and one grade in high school based on revised State Standards in Reading	Formal approval by the State Board of Education; description of development process	NDE, Statewide Assessment Team, Curriculum, Instruction and Innovation Team, Special Education	Initial Content Standards - January 2009; alternate content standards - Dec. 2009
	1.3	All standards are challenging, coherent and rigorous	Description of development process and external review	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Jan. 2009
	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications; Test Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2009; Final - January 2010
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2009; Final - January 2010
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications and Blue Prints	NDE, Statewide Assessment Team	Preliminary Table of Test Specifications - January 2009; Final - January 2010
	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2009 - NE educators alignment; Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Test Development			*Develop Test Items*		Initial Test items by January 2009
			Preparation of Assessment Materials		Prior to field test in Spring 2009
			Review Of Items for Validity and Bias		Initial Alignment Studies. January 2009 - NE educators alignment; Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual
			Reading Assessments – Field Test		Spring 2009
	3.3		Matrix Design Developed and Reported in Technical manual	Not Applicable	
	4.6	Accommodations for SP ED and ELL	Guidance for districts, studies on accommodations	NDE; Special Education; Federal Programs; Statewide Assessment teams	Summer 2009 - Update Board Policy; Summer 2009 - Update Guidance for districts; Fall 2010 - Analysis of tracking students
		Reading Assessments – Initial Year Administration			Spring 2010
	2.5	Content and achievement standards are aligned	Description of the development policy, alignment studies	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Summer 2010
	2.6	Diverse stakeholders were involved in development of achievement standards and modified achievement standards	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team, Curriculum, Instruction and Innovation Team	Jan. 2009

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	2.3	Academic achievement standards, modified achievement standards, and alternate achievement standards are used appropriately for students with disabilities	Description of process; guidance for districts for IEP's , etc.	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team, Special Education	Fall 2010 (Guidance to include all subject areas)
	2.1	Academic achievement standards, modified achievement standards, alternate achievement standards -- new State Standards in Reading	Formal approval by the Commissioner; description of development process	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team, Special Education	Jan. 2009
	2.4	Applied to all public school students	State Board Policy on Accountability and Inclusion	State Board of Education, NDE	Summer 2009 - Update Board Policy; Summer 2009 - Update Guidance for districts
	3.4	Coherent assessment system	Technical manual; alignment studies	NDE, Statewide Assessment Team	Dec. 2010
	3.5	Alignment of assessments with content and achievement standards	Technical manual; alignment studies	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Initial Alignment Studies: January 2009 - NE educators alignment;Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual
	3.6	Multiple measures and challenging content (higher order thinking skills)	Description of the development process in Technical Manual; Table of Test Specifications	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Initial Alignment Studies. January 2009 - NE educators alignment, Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	3.7	Alternate assessments – Revise alternate assessments to new standards - Reading	Documentation of the development process in Technical Manual; list/description of stakeholders; sample score reports	NDE, Statewide Assessment Team, Special Education	Field test in Spring 2009
	4.5	Criteria for administration, scoring, analysis and reporting	Management plan for contractor; guidance for districts	NDE, Statewide Assessment Team, Data and Federal Programs Team	Initial Management Plan - January 2009; implemented for field testing of each subject
Production of Technical Manual	4.1	Validity	External validity studies reported in technical manual	NDE, Statewide Assessment Team	Dec. 2010
	4.2	Reliability	Technical manual, external studies	NDE, Statewide Assessment Team	Dec. 2010
	4.3	Fair and accessible	Technical manual, documentation of development process; appropriate studies	NDE, Statewide Assessment Team	Dec. 2010
	4.4	Consistent forms	Equating studies	NDE, Statewide Assessment Team	December 2010 - incorporate alignment into Technical Manual
Reporting	7.1	State's reporting system facilitates appropriate, credible and defensible interpretation and use of its assessment data.	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - Fall 2010
	7 2	Participation and performance are reported, FERPA is followed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - Fall 2010
	7.3	Individual student reports provide a comparison of student performance to district; interpretive guidance; translated as needed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - Fall 2010

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	7.4	Student confidentiality is protected	State Board policies on data use	NDE, Data and Federal Programs Team, Statewide Assessment Team	Current Policy Updated Summer 2009
	7.5	Itemized score analysis for parents, teachers and principals	Develop and Provide Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Spring/Summer 2010
Alignment Study	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Dec. 2010
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Dec. 2010
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2009 - NE educators alignment, Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual
	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2009 - NE educators alignment, Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual

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Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	5.5	Sufficiency	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2009 - NE educators alignment; Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual
	5.6	Scores are at the domain or sub-domain levels	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies. January 2009 - NE educators alignment; Spring 2009 - field test alignment; Fall 2010 - External studies with operational results; December 2010 - incorporate alignment into Technical Manual
	5.7	Continuous refinement of assessments	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Ongoing

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
MATHEMATICS					
Develop and Adopt Content Standards	1.4	Development process involved stakeholders if locally developed	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Sept. 2009
	1.1	Content Standards, alternate standards, adopted in grades 3 – 8 and one grade in high school based on revised State Standards in Mathematics	Formal approval by the State Board of Education; description of development process	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Initial Content Standards - January 2010; alternate content standards - Dec. 2010
	1.3	All standards are challenging, coherent and rigorous	Description of development process and external review	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Jan. 2010
	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications, Test Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2010; Final - January 2011
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2010; Final - January 2011
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications and Blue Prints	NDE, Statewide Assessment Team	Preliminary Table of Test Specifications - January 2010, Final - January 2011

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Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
			Develop Test Items		Initial test items - January 2010
			Preparation of Assessment Materials		Prior to field test in Spring 2010
			Review Of Items for Validity and Bias		Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
			Math Assessments – Field Test		Spring 2010
	3.3		Matrix Design Developed and Reported in Technical manual	Not Applicable	
	4.6	Accommodations for SP ED and ELL	Guidance for districts, studies on accommodations	NDE; Special Education; Federal Programs; Statewide Assessment teams	Summer 2010 - Update Board Policy; Summer 2010 - Update Guidance for districts, Fall 2011 - Analysis of tracking students
		Math Assessments – Initial Year Administration			Spring 2011
Test	2.5	Content and achievement standards are aligned	Description of the development policy, alignment studies	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Summer 2011

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Development	2.6	Diverse stakeholders were involved in development	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Jan. 2010
	2.3	Academic achievement standards, modified achievement standards, and alternate achievement standards are used appropriately for students with disabilities	Description of process; guidance for districts for IEP's , etc.	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team, Special Education	Fall 2010 (Guidance to include all subject areas)
	2.1	Academic achievement standards, modified achievement standards, alternate achievement standards – new State Standards in Math	Formal approval by the Commissioner, description of development process	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Jan. 2010
	2.4	Applied to all public school students	State Board Policy on Accountability and Inclusion	State Board of Education, NDE	Summer 2009 - Update Board Policy; Summer 2009 - Update Guidance for districts
	3.4	Coherent assessment system	Technical manual; alignment studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	3.5	Alignment of assessments with content and achievement standards	Technical manual, alignment studies	NDE, Statewide Assessment Team, Curriculum, Instruction and Innovation Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	3.6	Multiple measures and challenging content (higher order thinking skills)	Description of the development process in Technical Manual; Table of Test Specifications	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
	3.7	Alternate assessments – Revise alternate assessments to new standards - Math	Documentation of the development process in Technical Manual; list/description of stakeholders; sample score reports	NDE, Statewide Assessment Team, Special Education	Field test in Spring 2009
	4.5	Criteria for administration, scoring, analysis and reporting	Management plan for contractor; guidance for districts	NDE, Statewide Assessment Team, Data and Federal Programs Team	Initial Management Plan January 2010; implemented for field testing of each subject
Production of Technical Manual	4.1	Validity	External validity studies reported in technical manual	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	4.2	Reliability	Technical manual, external studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	4.3	Fair and accessible	Technical manual, documentation of development process; appropriate studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	4.4	Consistent forms	Equating studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	7.1	State's reporting system facilitates appropriate, credible and defensible interpretation and use of its assessment data.	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - August 2011
	7.2	Participation and performance are reported; FERPA is followed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - August 2011

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Reporting	7.3	Individual student reports provide a comparison of student performance to district; interpretive guidance; translated as needed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Initial Report - August 2011
	7.4	Student confidentiality is protected	State Board policies on data use	NDE, Data and Federal Programs Team, Statewide Assessment Team	Current Policy Updated Summer 2009
	7.5	Itemized score analysis for parents, teachers and principals	Develop and Provide Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	Spring/Summer 2011
	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	*Technical Manual for Math - Dec. 2011
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: Jan. 2010- NE educators alignment, Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual

*Outside the scope of the compliance agreement

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Alignment Study	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
	5.5	Sufficiency	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
	5.6	Scores are at the domain or sub-domain levels	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: Jan. 2010- NE educators alignment; Spring 2010 - Field test alignment; Fall 2011 - External studies with operational results; *December 2011 - Incorporate alignment into Technical Manual
	5.7	Continuous refinement of assessments	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Ongoing

*Outside the scope of the compliance agreement

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Science					
Develop and Adopt Content Standards	1.4	Development process involved stakeholders if locally developed	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Jan. 2011
	1.1	Content Standards, alternate standards, adopted in grades 3 – 8 and one grade in high school based on revised State Standards in Science	Formal approval by the State Board of Education, description of development process	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Initial Content Standards and alternate - January 2011
	1.3	All standards are challenging, coherent and rigorous	Description of development process and external review	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team; Special Education	Jan. 2011
	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications; Test Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2011; *Final - Sept. 2012
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Blue Prints	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Preliminary Table of Test Specifications - January 2011; *Final - Sept. 2012
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications and Blue Prints	NDE, Statewide Assessment Team	Preliminary Table of Test Specifications - January 2011; *Final - Sept 2012
	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
Test Development			*Develop Test Items*		Initial Test Items January 2011
			Preparation of Assessment Materials		Prior to field test in Spring 2011
			Review Of Items for Validity and Bias		Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual
			Science Assessments – Field Test		Spring 2011
	3.3		Matrix Design Developed and Reported in Technical manual	Not Applicable	
	4.6	Accommodations for SP ED and ELL	Guidance for districts, studies on accommodations	NDE; Special Education; Federal Programs; Statewide Assessment teams	Summer 2011 - Update Board Policy; Summer 2011 - Update Guidance for districts; Fall 2012 - Analysis of tracking students
		Science Assessments – Initial Year Administration			*Spring 2012
	2.5	Content and achievement standards are aligned	Description of the development policy; alignment studies	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	*Summer 2012
	2.6	Diverse stakeholders were involved in development	Description of development process; list/description of stakeholders involved	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Jan. 2011

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Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	2.3	Academic achievement standards, modified achievement standards, and alternate achievement standards are used appropriately for students with disabilities	Description of process; guidance for districts for IEP's , etc.	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team, Special Education	Fall 2010 (Guidance to include all subject areas)
	2.1	Academic achievement standards, modified achievement standards, alternate achievement standards – new State Standards in Science	Formal approval by the Commissioner; description of development process	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team, Special Education	Jan. 2011
	2.4	Applied to all public school students	State Board Policy on Accountability and Inclusion	State Board of Education, NDE	Summer 2009 - Update Board Policy; Summer 2009 - Update Guidance for districts
	3.4	Coherent assessment system	Technical manual; alignment studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	3.5	Alignment of assessments with content and achievement standards	Technical manual; alignment studies	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual
	3.6	Multiple measures and challenging content (higher order thinking skills)	Description of the development process in Technical Manual; Table of Test Specifications	NDE, Statewide Assessment Team; Curriculum, Instruction and Innovation Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual

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Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	3.7	Alternate assessments – Revise alternate assessments to new standards - Science	Documentation of the development process in Technical Manual; list/description of stakeholders; sample score reports	NDE, Statewide Assessment Team, Special Education	Field test in Spring 2011
	4.5	Criteria for administration, scoring, analysis and reporting	Management plan for contractor; guidance for districts	NDE, Statewide Assessment Team, Data and Federal Programs Team	Initial Management Plan to be finalized by January 2011; implemented for field testing in each subject
Production of Technical Manual	4.1	Validity	External validity studies reported in technical manual	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.2	Reliability	Technical manual, external studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.3	Fair and accessible	Technical manual, documentation of development process; appropriate studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.4	Consistent forms	Equating studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
Reporting	7.1	State's reporting system facilitates appropriate, credible and defensible interpretation and use of its assessment data.	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012
	7.2	Participation and performance are reported; FERPA is followed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012
	7.3	Individual student reports provide a comparison of student performance to district; interpretive guidance; translated as needed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012

*Outside the scope of the compliance agreement

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	3.7	Alternate assessments – Revise alternate assessments to new standards - Science	Documentation of the development process in Technical Manual; list/description of stakeholders; sample score reports	NDE, Statewide Assessment Team, Special Education	Field test in Spring 2011
	4.5	Criteria for administration, scoring, analysis and reporting	Management plan for contractor; guidance for districts	NDE, Statewide Assessment Team, Data and Federal Programs Team	Initial Management Plan to be finalized by January 2011; implemented for field testing in each subject
Production of Technical Manual	4.1	Validity	External validity studies reported in technical manual	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.2	Reliability	Technical manual, external studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.3	Fair and accessible	Technical manual, documentation of development process; appropriate studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	4.4	Consistent forms	Equating studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
Reporting	7 1	State's reporting system facilitates appropriate, credible and defensible interpretation and use of its assessment data.	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012
	7.2	Participation and performance are reported; FERPA is followed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012
	7.3	Individual student reports provide a comparison of student performance to district; interpretive guidance; translated as needed	Develop Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Initial Report - Fall 2012

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	7.4	Student confidentiality is protected	State Board policies on data use	NDE, Data and Federal Programs Team, Statewide Assessment Team	Current Policy Updated Summer 2009
	7.5	Itemized score analysis for parents, teachers and principals	Develop and Provide Reports	NDE, Data and Federal Programs Team, Statewide Assessment Team	*Spring/Summer 2012
Alignment Study	5.1	Assessments aligned to content and achievement standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	5.2	Assessments reflect the full range of content standards; depth of the standards; cognitively challenging, etc.	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	*Technical Manual Dec. 2012
	5.3	Assessments and standards aligned in terms of content and process	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual
	5.4	Assessments reflect the degree and patterns of emphasis of standards	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual

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Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	5.5	Sufficiency	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual
	5 6	Scores are at the domain or sub-domain levels	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Initial Alignment Studies: January 2011 - NE educators alignment; Spring 2011 - Field test alignment; Fall 2012 - External studies with operational results; *December 2012 - Incorporate alignment into Technical Manual
	5.7	Continuous refinement of assessments	Table of Test Specifications; Alignment studies	NDE, Statewide Assessment Team	Ongoing
Inclusion	6.1	All students are included in the assessments	Participation Rates reports after the initial implementation of tests in each subject; revised state accountability policy	NDE; Special Education; Federal Programs; Statewide Assessment teams	Policy Revised Spring 2009; Reports after initial year
	6.2	Students with disabilities are included	Guidelines to Districts for inclusion of students with disabilities and accommodations guidelines	NDE; Special Education; Federal Programs; Statewide Assessment teams	Fall 2010 (Guidance to include all subject areas)
	6 3	English Language Learners are included	Guidelines to Districts for inclusion of students with disabilities and accommodations guidelines	NDE; Special Education; Federal Programs; Statewide Assessment teams	Fall 2010 (Guidance to include all subject areas)

*Outside the scope of the compliance agreement

Nebraska Compliance Plan

Milestone	Critical Element		Activity and Documentation	Responsible	Date Due
	6.4	Migrant and highly mobile students are included	Guidelines to Districts for inclusion of students who are English Language Learners and accommodations guidelines	NDE; Special Education; Federal Programs; Statewide Assessment teams	Fall 2010 (Guidance to include all subject areas)

*Outside the scope of the compliance agreement

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Federal Register

Monday,
January 26, 2009

Part VIII

The President

Executive Order 13489—Presidential Records

Executive Order 13490—Ethics Commitments by Executive Branch Personnel

Memorandum of January 21, 2009—Senior White House Staff Pay Freeze

Federal Register
Vol. 74, No. 15
Monday, January 26, 2009

Presidential Documents

Title 3—

The President

Executive Order 13489 of January 21, 2009

Presidential Records

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish policies and procedures governing the assertion of executive privilege by incumbent and former Presidents in connection with the release of Presidential records by the National Archives and Records Administration (NARA) pursuant to the Presidential Records Act of 1978, it is hereby ordered as follows:

Section 1. *Definitions.* For purposes of this order:

(a) ''Archivist'' refers to the Archivist of the United States or his designee.

(b) ''NARA'' refers to the National Archives and Records Administration.

(c) ''Presidential Records Act'' refers to the Presidential Records Act, 44 U.S.C. 2201–2207.

(d) ''NARA regulations'' refers to the NARA regulations implementing the Presidential Records Act, 36 C.F.R. Part 1270.

(e) ''Presidential records'' refers to those documentary materials maintained by NARA pursuant to the Presidential Records Act, including Vice Presidential records.

(f) ''Former President'' refers to the former President during whose term or terms of office particular Presidential records were created.

(g) A ''substantial question of executive privilege'' exists if NARA's disclosure of Presidential records might impair national security (including the conduct of foreign relations), law enforcement, or the deliberative processes of the executive branch.

(h) A ''final court order'' is a court order from which no appeal may be taken.

Sec. 2. *Notice of Intent to Disclose Presidential Records.* (a) When the Archivist provides notice to the incumbent and former Presidents of his intent to disclose Presidential records pursuant to section 1270.46 of the NARA regulations, the Archivist, using any guidelines provided by the incumbent and former Presidents, shall identify any specific materials, the disclosure of which he believes may raise a substantial question of executive privilege. However, nothing in this order is intended to affect the right of the incumbent or former Presidents to invoke executive privilege with respect to materials not identified by the Archivist. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

(b) Upon the passage of 30 days after receipt by the incumbent and former Presidents of a notice of intent to disclose Presidential records, the Archivist may disclose the records covered by the notice, unless during that time period the Archivist has received a claim of executive privilege by the incumbent or former President or the Archivist has been instructed by the incumbent President or his designee to extend the time period for a time certain and with reason for the extension of time provided in the notice. If a shorter period of time is required under the circumstances

set forth in section 1270.44 of the NARA regulations, the Archivist shall so indicate in the notice.

Sec. 3. *Claim of Executive Privilege by Incumbent President.* (a) Upon receipt of a notice of intent to disclose Presidential records, the Attorney General (directly or through the Assistant Attorney General for the Office of Legal Counsel) and the Counsel to the President shall review as they deem appropriate the records covered by the notice and consult with each other, the Archivist, and such other executive agencies as they deem appropriate concerning whether invocation of executive privilege is justified.

(b) The Attorney General and the Counsel to the President, in the exercise of their discretion and after appropriate review and consultation under subsection (a) of this section, may jointly determine that invocation of executive privilege is not justified. The Archivist shall be notified promptly of any such determination.

(c) If either the Attorney General or the Counsel to the President believes that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President and the Attorney General.

(d) If the President decides to invoke executive privilege, the Counsel to the President shall notify the former President, the Archivist, and the Attorney General in writing of the claim of privilege and the specific Presidential records to which it relates. After receiving such notice, the Archivist shall not disclose the privileged records unless directed to do so by an incumbent President or by a final court order.

Sec. 4. *Claim of Executive Privilege by Former President.* (a) Upon receipt of a claim of executive privilege by a living former President, the Archivist shall consult with the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel), the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the Presidential records notwithstanding the claim of privilege. Any determination under section 3 of this order that executive privilege shall not be invoked by the incumbent President shall not prejudice the Archivist's determination with respect to the former President's claim of privilege.

(b) In making the determination referred to in subsection (a) of this section, the Archivist shall abide by any instructions given him by the incumbent President or his designee unless otherwise directed by a final court order. The Archivist shall notify the incumbent and former Presidents of his determination at least 30 days prior to disclosure of the Presidential records, unless a shorter time period is required in the circumstances set forth in section 1270.44 of the NARA regulations. Copies of the notice for the incumbent President shall be delivered to the President (through the Counsel to the President) and the Attorney General (through the Assistant Attorney General for the Office of Legal Counsel). The copy of the notice for the former President shall be delivered to the former President or his designated representative.

Sec. 5. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 6. *Revocation.* Executive Order 13233 of November 1, 2001, is revoked.

THE WHITE HOUSE,
January 21, 2009.

[FR Doc. E9–1712
Filed 1–23–09; 8:45 am]
Billing code 3195–W9–P

Presidential Documents

Executive Order 13490 of January 21, 2009

Ethics Commitments by Executive Branch Personnel

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and sections 3301 and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2009, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee:

''As a condition, and in consideration, of my employment in the United States Government in a position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:

''1. *Lobbyist Gift Ban*. I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.

''2. *Revolving Door Ban—All Appointees Entering Government*. I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

''3. *Revolving Door Ban—Lobbyists Entering Government*. If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

(a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;

(b) participate in the specific issue area in which that particular matter falls; or

(c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

''4. *Revolving Door Ban—Appointees Leaving Government*. If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions for a period of 2 years following the end of my appointment.

''5. *Revolving Door Ban—Appointees Leaving Government to Lobby*. In addition to abiding by the limitations of paragraph 4, I also agree, upon leaving Government service, not to lobby any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

''6. *Employment Qualification Commitment*. I agree that any hiring or other employment decisions I make will be based on the candidate's qualifications, competence, and experience.

''7. *Assent to Enforcement*. I acknowledge that the Executive Order entitled 'Ethics Commitments by Executive Branch Personnel,' issued by the President on January 21, 2009, which I have read before signing this document, defines certain of the terms applicable to the foregoing obligations and sets forth

the methods for enforcing them. I expressly accept the provisions of that Executive Order as a part of this agreement and as binding on me. I understand that the terms of this pledge are in addition to any statutory or other legal restrictions applicable to me by virtue of Federal Government service.''

Sec. 2. *Definitions.* As used herein and in the pledge set forth in section 1 of this order:

(a) ''Executive agency'' shall include each ''executive agency'' as defined by section 105 of title 5, United States Code, and shall include the Executive Office of the President; provided, however, that for purposes of this order ''executive agency'' shall include the United States Postal Service and Postal Regulatory Commission, but shall exclude the Government Accountability Office.

(b) ''Appointee'' shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

(c) ''Gift''

(1) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;

(2) shall include gifts that are solicited or accepted indirectly as defined at section 2635.203(f) of title 5, Code of Federal Regulations; and

(3) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) & (3) and (j)-(l) of title 5, Code of Federal Regulations.

(d) ''Covered executive branch official'' and ''lobbyist'' shall have the definitions set forth in section 1602 of title 2, United States Code.

(e) ''Registered lobbyist or lobbying organization'' shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, ''registered lobbyist'' shall include each of the lobbyists identified therein.

(f) ''Lobby'' and ''lobbied'' shall mean to act or have acted as a registered lobbyist.

(g) ''Particular matter'' shall have the same meaning as set forth in section 207 of title 18, United States Code, and section 2635.402(b)(3) of title 5, Code of Federal Regulations.

(h) ''Particular matter involving specific parties'' shall have the same meaning as set forth in section 2641.201(h) of title 5, Code of Federal Regulations, except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.

(i) ''Former employer'' is any person for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner, except that ''former employer'' does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession.

(j) ''Former client'' is any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients

of the appointee's former employer to whom the appointee did not personally provide services.

(k) ''Directly and substantially related to my former employer or former clients'' shall mean matters in which the appointee's former employer or a former client is a party or represents a party.

(l) ''Participate'' means to participate personally and substantially.

(m) ''Post-employment restrictions'' shall include the provisions and exceptions in section 207(c) of title 18, United States Code, and the implementing regulations.

(n) ''Government official'' means any employee of the executive branch.

(o) ''Administration'' means all terms of office of the incumbent President serving at the time of the appointment of an appointee covered by this order.

(p) ''Pledge'' means the ethics pledge set forth in section 1 of this order.

(q) All references to provisions of law and regulations shall refer to such provisions as in effect on January 20, 2009.

Sec. 3. *Waiver.* (a) The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver. A waiver shall take effect when the certification is signed by the Director of the Office of Management and Budget or his or her designee.

(b) The public interest shall include, but not be limited to, exigent circumstances relating to national security or to the economy. *De minimis* contact with an executive agency shall be cause for a waiver of the restrictions contained in paragraph 3 of the pledge.

Sec. 4. *Administration.* (a) The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish such rules or procedures (conforming as nearly as practicable to the agency's general ethics rules and procedures, including those relating to designated agency ethics officers) as are necessary or appropriate to ensure that every appointee in the agency signs the pledge upon assuming the appointed office or otherwise becoming an appointee; to ensure that compliance with paragraph 3 of the pledge is addressed in a written ethics agreement with each appointee to whom it applies, which agreement shall also be approved by the Counsel to the President or his or her designee prior to the appointee commencing work; to ensure that spousal employment issues and other conflicts not expressly addressed by the pledge are addressed in ethics agreements with appointees or, where no such agreements are required, through ethics counseling; and generally to ensure compliance with this order within the agency.

(b) With respect to the Executive Office of the President, the duties set forth in section 4(a) shall be the responsibility of the Counsel to the President or his or her designee.

(c) The Director of the Office of Government Ethics shall:

(1) ensure that the pledge and a copy of this order are made available for use by agencies in fulfilling their duties under section 4(a) above;

(2) in consultation with the Attorney General or the Counsel to the President or their designees, when appropriate, assist designated agency ethics officers in providing advice to current or former appointees regarding the application of the pledge; and

(3) in consultation with the Attorney General and the Counsel to the President or their designees, adopt such rules or procedures as are necessary or appropriate:

(i) to carry out the foregoing responsibilities;

(ii) to apply the lobbyist gift ban set forth in paragraph 1 of the pledge to all executive branch employees;

(iii) to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban;

(iv) to make clear that no person shall have violated the lobbyist gift ban if the person properly disposes of a gift as provided by section 2635.205 of title 5, Code of Federal Regulations;

(v) to ensure that existing rules and procedures for Government employees engaged in negotiations for future employment with private businesses that are affected by their official actions do not affect the integrity of the Government's programs and operations;

(vi) to ensure, in consultation with the Director of the Office of Personnel Management, that the requirement set forth in paragraph 6 of the pledge is honored by every employee of the executive branch;

(4) in consultation with the Director of the Office of Management and Budget, report to the President on whether full compliance is being achieved with existing laws and regulations governing executive branch procurement lobbying disclosure and on steps the executive branch can take to expand to the fullest extent practicable disclosure of such executive branch procurement lobbying and of lobbying for presidential pardons, and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation; and

(5) provide an annual public report on the administration of the pledge and this order.

(d) The Director of the Office of Government Ethics shall, in consultation with the Attorney General, the Counsel to the President, and the Director of the Office of Personnel Management, or their designees, report to the President on steps the executive branch can take to expand to the fullest extent practicable the revolving door ban set forth in paragraph 5 of the pledge to all executive branch employees who are involved in the procurement process such that they may not for 2 years after leaving Government service lobby any Government official regarding a Government contract that was under their official responsibility in the last 2 years of their Government service; and to include in the report both immediate action the executive branch can take and, if necessary, recommendations for legislation.

(e) All pledges signed by appointees, and all waiver certifications with respect thereto, shall be filed with the head of the appointee's agency for permanent retention in the appointee's official personnel folder or equivalent folder.

Sec. 5. *Enforcement.* (a) The contractual, fiduciary, and ethical commitments in the pledge provided for herein are solely enforceable by the United States pursuant to this section by any legally available means, including debarment proceedings within any affected executive agency or judicial civil proceedings for declaratory, injunctive, or monetary relief.

(b) Any former appointee who is determined, after notice and hearing, by the duly designated authority within any agency, to have violated his or her pledge may be barred from lobbying any officer or employee of that agency for up to 5 years in addition to the time period covered by the pledge. The head of every executive agency shall, in consultation with the Director of the Office of Government Ethics, establish procedures to implement this subsection, which procedures shall include (but not be limited to) providing for factfinding and investigation of possible violations of this order and for referrals to the Attorney General for his or her consideration pursuant to subsection (c).

(c) The Attorney General or his or her designee is authorized:

(1) upon receiving information regarding the possible breach of any commitment in a signed pledge, to request any appropriate Federal investigative authority to conduct such investigations as may be appropriate; and

(2) upon determining that there is a reasonable basis to believe that a breach of a commitment has occurred or will occur or continue, if not enjoined, to commence a civil action against the former employee in any United States District Court with jurisdiction to consider the matter.

(d) In any such civil action, the Attorney General or his or her designee is authorized to request any and all relief authorized by law, including but not limited to:

(1) such temporary restraining orders and preliminary and permanent injunctions as may be appropriate to restrain future, recurring, or continuing conduct by the former employee in breach of the commitments in the pledge he or she signed; and

(2) establishment of a constructive trust for the benefit of the United States, requiring an accounting and payment to the United States Treasury of all money and other things of value received by, or payable to, the former employee arising out of any breach or attempted breach of the pledge signed by the former employee.

Sec. 6. *General Provisions.* (a) No prior Executive Orders are repealed by this order. To the extent that this order is inconsistent with any provision of any prior Executive Order, this order shall control.

(b) If any provision of this order or the application of such provision is held to be invalid, the remainder of this order and other dissimilar applications of such provision shall not be affected.

(c) Nothing in this order shall be construed to impair or otherwise affect:

(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) The definitions set forth in this order are solely applicable to the terms of this order, and are not otherwise intended to impair or affect existing law.

THE WHITE HOUSE,
January 21, 2009.

[FR Doc. E9–1719
Filed 1–23–09; 8:45 am]
Billing code 3195–W9–P

Presidential Documents

Memorandum of January 21, 2009

Pay Freeze

Memorandum for the Assistant to the President and Chief of Staff

The United States is in a period of severe economic stress. Too many Americans have lost their jobs, their homes, their health insurance, or a substantial part of their retirement savings, and many more feel uncertain about the future.

In these circumstances, Government must act forcefully and creatively to stimulate our economic recovery, investing in infrastructure, innovative energy technologies, and education. It must act quickly to provide assistance to average Americans.

Many have accepted the call to serve in Government and to assist me in restoring a sound economy and in improving the lives of average Americans. In this challenging economic period, it is only appropriate that senior officials on the White House staff forgo pay increases until further notice.

Accordingly, as a signal of our shared commitment to restoring the country's economic vitality and because of the serious economic conditions we are facing, I intend to freeze the salaries of senior members of the White House staff, to the extent permitted by law. I direct you to report back to me within 30 days with recommendations for actions to implement this freeze.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This memorandum shall be published in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9–1724
Filed 1–23–09; 8:45 am]
Billing code 3195–W9–P

Federal Register

Monday,
January 26, 2009

Part IX

The President

Memorandum of January 21, 2009—Freedom of Information Act

Memorandum of January 21, 2009—Transparency and Open Government

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Presidential Documents

Title 3—

The President

Memorandum of January 21, 2009

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, ''sunlight is said to be the best of disinfectants.'' In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9–1773
Filed 1–23–09; 11:15 am]
Billing code 3110–01–P

Federal Register
Vol. 74, No. 15
Monday, January 26, 2009

Presidential Documents

Memorandum of January 21, 2009

Transparency and Open Government

Memorandum for the Heads of Executive Departments and Agencies

My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.

Government should be participatory. Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

I direct the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget (OMB) and the Administrator of General Services, to coordinate the development by appropriate executive departments and agencies, within 120 days, of recommendations for an Open Government Directive, to be issued by the Director of OMB, that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum. The independent agencies should comply with the Open Government Directive.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

This memorandum shall be published in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9–1777
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S.J. Res. 3/P.L. 111–1

Ensuring that the compensation and other emoluments attached to the office of Secretary of the Interior are those which were in effect on January 1, 2005. (Jan. 16, 2009; 123 Stat. 3)

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